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GROUNDS FOR COMPENSATION IN ADMINISTRATIVE PROCEDURE FOR THE DAMAGES CAUSED IN CRIMINAL PROCEEDINGS – SOME RELEVANT ASPECTS OBSERVED IN LATVIA'S LAWS AND CASE LAW

Keywords: damages caused in criminal proceedings, compensation for damages in administrative procedure

Summary

The article is dedicated to the topic of compensation in administrative procedure for such damages that have been inflicted by unlawful or unjustified infringements on a person's legal interests in the framework of criminal proceedings in Latvia. Acknowledging that this topic comprises numerous relevant and problematic aspects, this article focuses on those infringements in the case of which compensation for damages is due and on the preconditions for claiming it. The article presents the authors' opinion on whether the regulation on this matter in Latvia is sufficiently clear, what the relevant issues are in the practice of applying law, and the proposals for improving the regulation and practice.

1. Damages caused in criminal proceedings and compensation for them – is this matter relevant and why?

Criminal proceedings as one of the manifestations of the State's actions are characterised by a high degree of interference into persons' lives. The existence of criminal proceedings *per se* allows implementation of numerous procedural measures of the kinds that are not envisaged in any other procedural law. Sufficiently striking examples serve as an illustration to this, e.g., detention or prohibition to manage one's property, lasting for years, applied to persons, with respect to whom only presumption is made that they might have committed criminal offences or

even to persons who have not offended but to whom some adverse consequences could be applied. The existence of various procedural statuses can be restrictive for a person, as well as conductive of certain procedural activities relating to the person, their home, etc. We assume, no one will deny – criminal proceedings as a legally regulated process are nothing pleasant. At the same time, the State needs them, they have existed and will exist always, as long as crime exists. However, the need for them does not justify unlawful and unjustified infringements on persons in the course of criminal proceedings. Damages that have been inflicted upon persons in such a way must be compensated for. Several regulatory enactments set out this provision, *inter alia*, on the level of international and EU law. Thus, for example, para. 5 of Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[1] provides: "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation"; Art. 13 sets down: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"; whereas Art. 41 prescribes: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." Para. 3 of Art. 40 of the Charter of Fundamental Rights of the European Union[2], in turn, provides: "Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.", and Art. 47 provides for "Right to an effective remedy and to a fair trial". Digests of the case law and guidelines on the case law regarding the application of the rights, included in conventions, of the European Court of Human Rights and the Court of Justice of the European Union are available, providing sufficient illustrative information on the way these matters are treated on the EU and international level.[3]

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[1] European Convention on Human Rights. Signed in Rome on 04.11.1950. [in the wording of 15.10.2021.].

[2] Charter of Fundamental Rights of the European Union. Available: http://data.europa.eu/eli/treaty/char_2012/oj [in the wording of 15.10.2021.].

[3] See, for example: Guide on Article 5 of the European Convention on Human Rights. Council of Europe/European Court of Human Rights, 2021. Available: https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf [viewed 15.10.2021.]; Guide on Article 13 of the European Convention on Human Rights. Council of Europe/European Court of Human Rights, 2021. Available: https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf [viewed 15.10.2021.]; Guide to good practice in respect of domestic remedies (adopted by the Committee of Ministers on 18 September 2013). Available: https://www.echr.coe.int/Documents/Pub_coe_domestics_remedies_ENG.pdf [viewed 15.10.2021.]; see also information on the homepage of FRA, e.g.: https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial?page=1#TabCaseLaw [viewed 15.10.2021.].

The aim of this article is to dwell on the situation in Latvia. The third sentence of Art. 92 of the Latvian Constitution, the *Satversme*[4] provides: "Everyone, where his or her rights are violated without basis, has a right to commensurate compensation". Whereas the Constitutional Court has recognised in its rulings that "commensurate compensation has several functions – first of all, indemnity, reconciliation, as well as the function of general and special prevention. The purpose of these functions is to achieve effective restitution of justice and protection of fundamental rights because only such compensation is compatible with the third sentence of Art. 92 of the *Satversme*, which simultaneously is also an effective legal remedy"[5]. Compensation for an infringement may be of different kinds – both material and non-material. As recognised by the Constitutional Court of the Republic of Latvia: "The term "commensurate compensation", included in the third sentence of Art. 92 of the *Satversme*, may not be interpreted to mean that this is only disbursement in cash. The said term includes any fair satisfaction, which is proportionate to the infringement on a person's rights in the particular legal situation. Thus, taking into account, for example, the type and nature of the infringement upon rights, the legal interest endangered, the legal subject affected or the severity of damages inflicted, "commensurate compensation" may have also a non-material form."[6] The issue regarding compensation may be decided on already during the proceedings, where the infringement occurred, as well as in other proceedings.

Response to failure to abide by a reasonable term of legal proceedings can be mentioned as a vivid example of an infringement in criminal proceedings which is compensated for in a non-material form already during the proceedings where this infringement occurred. Pursuant to Section 14 of the Criminal Procedure Law[7] (hereafter – CPL), each person has the right to the completion of criminal proceedings within a reasonable term, and the failure to respect this right may be the grounds for terminating criminal proceedings. Section 58 (5) of the Criminal Law[8] defines the substantive law grounds for terminating legal proceedings. However, these are not the only possible criminal law consequences and are even not the most extensively applicable. In practice, the most frequently encountered ones are defined in Section 49[1] of the Criminal Law, which defines the rights of

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[4] The Constitution of the Republic of Latvia (*Satversme*). Available: https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia [viewed 06.10.2021.].

[5] Judgment of the Constitutional Court of the Republic of Latvia of 6 June 2012 in Case No. 2011–21–01. Available in Latvian: https://likumi.lv/ta/id/248796-par-valsts-parvaldes-iestazu-nodarito-zaudejumu-atlidzinasanas-likuma-8panta-otras-dalas-atbilstibu-latvijas-republikas-satversmes-92panta-tresajam-teikumam https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia [viewed 06.10.2021.], para. 11.1.

[6] Judgment of the Constitutional Court of the Republic of Latvia of 6 June 2012 in Case No. 2011–21–01. Available in Latvian: https://likumi.lv/ta/id/248796-par-valsts-parvaldes-iestazu-nodarito-zaudejumu-atlidzinasanas-likuma-8panta-otras-dalas-atbilstibu-latvijas-republikas-satversmes-92panta-tresajam-teikumam [viewed 15.10.2021.], par.a 11.1.

[7] Criminal Procedure Law. Available: https://likumi.lv/ta/en/en/id/107820 [viewed 15.10.2021.].

[8] Criminal Law. Available: https://likumi.lv/ta/en/en/id/88966 [viewed 15.10.2021.].

a court, upon establishing that the right to termination of criminal proceedings within a reasonable term had not been respected, to determine both more lenient type of punishment and sanction. Compensation for infringement of the right to have criminal proceedings terminated within a reasonable term by determining a lesser type of punishment is quite extensively applied in practice in Latvia.[9]

Although the issues related to compensation for the damages inflicted during criminal proceedings in the framework of the same criminal proceedings are sufficiently interesting, this time we are going to focus on another matter – compensation for the damages in administrative procedure, which, in Latvia, has been established by a special law "Compensation for the Damages Caused in Criminal Proceedings and Record-Keeping of Administrative Offences"[10] (hereafter – the Compensation Law). This law was adopted on 30 November 2017, entered into force on 1 March 2018. Until now, the parliament has not amended it; however, the Constitutional Court has recognised one of its provisions as being incompatible with the *Satversme*[11].

The statistics relating to the application of this law proves that the application of this law is a relevant issue in practice. Unfortunately, aggregated statistics is not publicly available, therefore, in the course of preparing this article, we turned to competent authorities[12] and the data provided by them will be used as an illustration of the situation.

Pursuant to the data provided by the Prosecutor's General Office, which, on the basis of Section 17 of the Compensation Law, is the authority, if the decision, which is the grounds for compensating for damages, has been adopted in pre-trial criminal proceedings[13]:

- In 2018, 39 applications regarding compensation for damages have been r eviewed, of these 29 were dismissed, 8 were partially satisfied, and 2 were satisfied in full.

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[9] See, for example: Tiesu prakse par tiesībām uz kriminālprocesa pabeigšanu saprātīgā termiņā un soda noteikšanā, ja nav ievērotas tiesības uz kriminālprocesa pabeigšanu saprātīgā termiņā [Case law with respect to the right to have criminal proceedings terminated within a reasonable term and the setting of punishment if the right to having criminal proceedings completed with a reasonable term has not been respected]. Available: https://at.gov.lv/files/uploads/files/6_Judikatura/Tiesu_prakses_apkopojumi/sapratigi%20termini.doc [viewed 15.10.2021.].

[10] Kriminālprocesā un administratīvo pārkāpumu lietvedībā nodarītā kaitējuma atlīdzināšanas likums [Compensation for the Damages Caused in Criminal Proceedings and Record-Keeping of Administrative Offences]. Available in Latvian: https://likumi.lv/ta/id/295926-kriminalprocesa-un-administrativo-parkapumu-lietvediba-nodarita-kaitejuma-atlidzinasanas-likums [viewed 15.10.2021.].

[11] Judgment of the Constitutional Court of the Republic of Latvia of 5 March 2021 in Case No. 2020–30–01. Available in Latvian: https://likumi.lv/ta/id/321524-par-kriminalprocesa-un-administrativo-parkapumu-lietvediba-nodarita-kaitejuma-atlidzinasanas-likuma-parejas-noteikumu-2-punkta-... [viewed 15.10.2021.].

[12] The authors express their sincere gratitude to the Prosecutor's General Office, the Ministry of Justice, the Court Administration, the Administrative Regional Court and Regional Courts.

[13] Statistical indicators on the applications examined by the Prosecutor's General Office and decisions on disbursed compensations for damages caused in criminal proceedings. Information prepared by the Prosecutor's General Office, October 2021, unpublished material.

- In 2019, 33 applications regarding compensation for damages have been reviewed, of these 19 were dismissed, 12 were partially satisfied, and 2 were satisfied in full.
- In 2020, 31 applications regarding compensation for damages have been reviewed, of these 23 were dismissed, 7 were partially satisfied, and 1 was satisfied in full.
- In the first six months of 2021, 19 applications regarding compensation for damages have been reviewed, of these 12 were dismissed, 7 were partially satisfied, and none was satisfied in full.

The rate of appealed decisions made by the Prosecutor's General Office is rather low. Pursuant to the data provided by the Prosecutor General's Office,

In 2018, 9 decisions were appealed against, of these, in the courts, 3 remained valid, 3 repealed in full, and 3 were partially repealed.

- In 2019, only 5 decisions were appealed against, of these 3 remained valid, 1 was repealed in full, and one case is still being reviewed.
- In 2020, only 7 decisions were appealed against, of these 3 remained valid, 3 were repealed partially, none has been was repealed in full, and three cases are still being reviewed.
- In 202, only 3 decisions have been appealed against, they all are still being reviewed.

The "smallest" compensation that was grated had been an apology, whereas material compensations during this period had varied in the range from EUR 28 to EUR 21212.20. The total amounts to be disbursed as compensation (on the basis of decisions adopted both by the Prosecutor's General Office and courts) had been

- In 2018 – EUR 52207.19
- In 2019 – EUR 8282.86
- In 2020 – EUR 1911.10
- In 2021 – EUR 10037.15

Pursuant to information provided by the Ministry of Justice, which, pursuant to Section 17 of the Compensation Law, is the authority in case where the judgement or decision, which is the grounds for the right to compensation for damages, has been adopted by a court[14],

- In 2018, 36 applications were reviewed, part recognised as such to which the Compensation Law was not applicable, none of the applications had been satisfied in full, 24 were partially satisfied, one was dismissed.
- In 2019, 42 applications were reviewed, part recognised as such to which the Compensation Law was not applicable, 2 applications were satisfied in full, 24 were partially satisfied, one was dismissed.

[14] Statistical indicators on the applications examined by the Ministry of Justice and decisions on disbursed compensations for damages caused in criminal proceedings. Information prepared by the Ministry of Justice, October 2021, unpublished material.

- In 2020, 27 applications were reviewed, part recognised as such to which the Compensation Law was not applicable, none of the applications had been satisfied in full, 16 were partially satisfied, one was dismissed.
- In the first sixth months of 2021, 13 applications were reviewed, part recognised as such to which the Compensation Law was not applicable, none of the applications had been satisfied in full, 5 were partially satisfied, none were dismissed.

The Ministry of Justice does not collect statistics about the outcomes in cases where its decisions have been appealed against in courts; however, it records the number of decisions that have been appealed against. Also, in this case it can be recognised that the share of decisions that have been appealed against is not large, 9 in 2018, 11 in 2019, 2 in 2020, and 1 in 2021.

We can see that the total number of decisions by the Prosecutor General's Office and the Ministry of Justice that have been appealed against in courts is not high, hence, such cases do not cause excessive workload for administrative courts.

The case law of the Administrative Regional Court as the appellate instance[15] shows that the number of appealed rulings by the first instance court is not high either. In 2019 this number was 12, in 2020 – 28, and 8 in the first six months of 2021. Examination of complaints reveals that, in the majority of cases, the Regional Court has upheld the ruling made by the first instance court. Thus, out of 28 complaints reviewed in 2020, in 18 cases an analogous judgement was passed, in 6 cases the judgement by the first instance court was amended, and in 4 cases an opposite judgement was delivered. In 2021, 5 cases have been reviewed, in 4 cases a judgement analogous to the one by the first instance court was adopted, in one case it was amended. The amounts of compensation granted by the judgements of the Regional Court in 2019–2021 had been in the range from 110 to 44280 EUR.

Insight into the total amounts of compensation to be disbursed is granted by the statistics provided by the Ministry of Justice, pursuant to which, in 2018, it amounted to 192 185.35 EUR; in 2019 – 97 393.97 EUR; in 2020 – 97 646.88 EUR, and in the first six months of 2021 – 40292.46 EUR, whereas the smallest amount had been EUR 27.84, but the largest – 50 000 EUR. In both cases, the decision was made by a court.

As shown above, neither the number of reviewed applications nor the compensations granted are comparatively high. Examination of statistics on acquittals and other cases, where criminal proceedings had been terminated on exonerating grounds, reveals that persons exercise their right to receive some kind of compensation in a very low number of cases (thus, for example, pursuant to the information provided by the Prosecution Office, in 2018, 91 persons were

[15] Statistical indicators on the complaints examined by the Administrative Regional Court and the rulings on disbursed compensations for damages caused in criminal proceedings. Information prepared by the Administrative Regional Court, October 2021, unpublished material.

fully acquitted, but in 2019 – 74 persons[16]. Moreover, the range of cases where it is possible is not limited by only the ones mentioned. This raises the question – why it is so, can it be explained by not knowing one's rights, lack of understanding, unwillingness to exercise them or some kind of deficiencies, *inter alia*, in the normative regulation. Admitting that all these aspects are worth researching, this time we shall focus on the analysis of some aspects in the normative regulation.

2. Compensation for the damages inflicted during criminal proceedings in Latvia – a general overview of the legal regulation

As noted above, on the constitutional level, the obligation to compensate for damages, primarily, has been defined in the third sentence of Art. 92 of the *Satversme*, whereas the Compensation Law deals specifically with compensation in administrative procedure for the damages inflicted in criminal proceeding. The Constitutional Court has recognised that "By adopting the Compensation Law, the legislator has created regulation, in which the right, included in the third sentence of Art. 92 of the *Satversme*, to receive compensation for material and non-material damages inflicted upon a person in criminal proceedings or in record-keeping of administrative offences due to unlawful or unjustifiable actions by an institution, a prosecutor's office or a court."[17]. It is essential that "Since 1 March 2018, an application by a person regarding compensation of the damages, caused to them in relation to an infringement of their fundamental rights in criminal proceedings or in record-keeping of administrative offences is not subject to review by a court of general jurisdiction. A private person may demand the State's liability for unjustifiable and unlawful actions of its institutions during criminal proceedings or in record-keeping of administrative offences in accordance with the provisions of the Administrative Procedure Law."[18]

The following are the most important provisions of the Compensation Law with respect to the issues directly examined in this article:

> Section 4. Legal grounds for compensation for the damages inflicted during criminal proceedings

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[16] Latvijas Republikas Prokuratūras darba rezultāti 2019. gadā [Results of the work of the Prosecutor's Office of the Republic of Latvia in 2019]. Available in Latvian: http://www.prokuratura.gov.lv/media/Statistika_2019.pdf [viewed 15.10.2021].

[17] Decision by the Constitutional Court of the Republic of Latvia on Terminating Legal Proceedings in Case No. 2019-21-01. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/10/2019-21-01_Lemums-par-tiesved%C4%ABbas-izbeig%C5%A1anu.pdf#search= [viewed 15.10.2021.].

[18] Decision by the assignments sitting of the Senate of the Republic of Latvia on 29 July 2020 in Case No. C(-), SKC-988/2020 (ECLI:LV:AT:2020:0729.SKC098820.8.L).

(1) A natural person shall have the right to compensation for damages if one of the following conditions occurs:

1) an acquitting court judgement has entered into force, by which a person has been recognised as being innocent of or acquitted of all charges brought against him or her;

2) criminal proceedings have been fully terminated due to exonerating circumstances;

3) a court's judgement has entered into force, by which a person has been acquitted of charges of one of the criminal offences, for which the person has been made criminally liable, if during the course of the particular criminal proceedings a procedural coercive measure, involving deprivation of liberty, had been applied to the person and the law does not provide for a punishment of deprivation of liberty for the criminal offence, for the commitment of which a person has been sentenced;

4) criminal proceedings have been terminated in a part thereof due to exonerating circumstances if during the course of the particular criminal proceedings a procedural coercive measure involving deprivation of liberty was applied to this person and criminal proceedings are continued in the part thereof concerning a criminal offence, for the commitment of which the law does not provide a punishment of deprivation of liberty;

5) the duration of the procedural coercive measure involving deprivation of liberty, applied in the respective criminal proceedings, has exceeded the duration of the punishment of deprivation of liberty applied by the final judgement;

6) by the decision of an authorised official in criminal proceedings, a violation has been established in the course of procedural activities, as the result of which property has been destroyed or excessively damaged.

(2) A legal person of private law (hereafter — a legal person) acquires the right to compensation for damages if a decision on terminating proceedings in full or in part thereof regarding the application of coercive measures to this person enters into force, without establishing the grounds, defined in the Criminal Law, for applying the coercive measure to the respective person.

We see that the range of cases included in this provision is strictly limited and by far does not cover all situations, where damage could be unlawfully inflicted in criminal proceedings. Prior to the third reading of this draft law, this problem was validly foregrounded also by the Ombudsman and Judges of the Supreme Court. The Ombudsman noted in his letter[19] that various interests may be infringed upon in criminal proceedings, not only the ones mentioned in the draft law. The Ombudsman, referring to case law, underscored, that claims, for example, regarding damages caused by imposing arrest, are not accepted by courts for reviewing in civil procedure, as well as other cases. The Ombudsman proposed expanding the scope of the draft law, applying it to any situation, where a person's interests had been unlawfully or unjustifiably infringed upon. The Department

[19] Letter of the Ombudsman of the Republic of Latvia of 20.02.2017 to the Legal Committee of the *Saeima* No. 1-8/8 "On the Draft Law "Compensation for Damages Caused in Criminal Proceedings and Record-Keeping of Administrative Offences" (No. 578/Lp12)". Available: http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/2CA0246F5CF5FD94C22580CD004E350D?OpenDocument [viewed 15.10.2021.].

of Administrative Cases of the Supreme Court, likewise, emphasised the need for clarity and foregrounded the problem that it was not clear what should be done in cases not covered by the law[20]. The Department of Administrative Cases proposed applying to these the civil procedural review.[21] The Department of Civil Cases of the Supreme Court drew attention to the need to establish united procedure applicable to those claims that were not covered by the law, applying to it administrative procedure to ensure a uniform approach[22]. The matter was examined also at the sitting of Chairpersons of the Supreme Court's Departments, recommending to the legislator to choose this model to provide in this law that all cases (referred to directly and not referred to) should be resolved in the procedure set out in this law. Denial of the possibility for persons to receive compensation for damages is seen as being contrary to the *Satversme*, whereas failure to include precise references would increase legal uncertainty, the application of different procedures, in turn, would be incompatible with the principle of legal equality[23].

The outcome of discussions was an addition to the draft law, as the result of which we now see Section 2 (2) of the Compensation Law: "The provisions of this Law shall be applicable also to cases not referred to directly in this Law, if in criminal proceedings or record-keeping of administrative offences a private person has been inflicted damages due to unlawful actions by an institution, a prosecutor's office or a court", which is recognised and applied in practice, admitting that, thus, Section 4 and Section 5 of the Law cover only the most typical and most important but not all possible legal grounds (cases) for compensation for the damages inflicted in the course of criminal proceedings or record-keeping of administrative offences, and that compensation may be granted also in situations that are not directly referred to in the said legal provisions.[24]

The Compensation Law provides for compensation for damages caused by unlawful or unjustified actions.

Section 6. Unlawful and unjustified actions

(1) In the meaning of this Law, actions by an institution, a prosecutor's office or a court shall be unlawful if legal norms have been violated by such an action and later one of

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[20] Letter of the Department of Administrative Cases of the Supreme Court of 02.2017 No. 10-1/1-375nos On Draft Law No. 578/Lp12. Available: http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/B8402781228A2281C22580C90029C78E?OpenDocument [viewed 15.10.2021.].

[21] Letter of the Department of Administrative Cases of the Supreme Court of 13.04.2017 No. 10-1/1-1691nos On Draft Law No. 578/Lp12. Available: http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/6EC3C6645E1411D8C2258106002478DF?OpenDocument [viewed 15.10.2021.].

[22] Letter of the Department of Civil Cases of the Supreme Court of 10-1/1-16 On Draft Law No. 578/Lp12 [viewed 15.10.2021.]. Available: http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/F7F3227BA0249047C22580F100321A32?OpenDocument [viewed 15.10.2021.].

[23] Letter of the Supreme Court of 26.04.2017 to the Legal Committee of the *Saeima* No. 10-1/1-756 On Draft Law No. 578/Lp12. Available: http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/233FD1AAF5012164C225810F0040BEAC?OpenDocument [viewed 15.10.2021.].

[24] See, for example, Decision by the Senate of the Supreme Court of 14 November 2018 in Case SKA-1081/2018 (ECLI:LV:AT:2018:1114.SKA108118.4.L), paras 12–13 quoted from Decision by the Senate of the Supreme Court of 18 October 2019 in Case SKA-1533/2019 (ECLI:LV:AT:2019:1018.A420255418.13.L).

the legal grounds for compensating for the damages, referred to in this Law, has set it. Unlawful actions shall be established by a ruling of an authorised person in criminal proceedings or by a court.

(2) In the meaning of this Law, actions by an institution, a prosecutor's office or a court shall be unjustified if, at the moment of making the decision, they had complied with legal norms, but later one of the legal grounds for compensation, referred to in this Law, has set it.

The respective norms allow concluding that in the cases referred to in Section 4 and Section 2 (2) of the Law the grounds for granting compensation are sometimes unlawful and unjustified actions, sometimes – only unlawful.

The legal regulation quoted above is quite laconic. However, the regulation *per se* and issues identified in practice allow advancing several important matters for examination.

3. What are the damages "inflicted in criminal proceedings"?

We see that for a person to have claim compensation on the basis of the Compensation Law, the damages need to have been inflicted in "criminal proceedings". *Prima facie* it seems simple, however, it seems to be far from it when delving deeper. Criminal proceedings are a totality of actions made for a definite purpose and which are regulated in CPL. However, their practical implementation is inconceivable also without such actions, the regulation/ appeal/ supervision of which is not subject to criminal procedural regulation. In such situations, it is important to define, what are and what no longer are criminal proceedings, thus, assessment of which actions is and of which is not subject to administrative courts. This matter has been foregrounded in the Supreme Court's case law.

Thus, for example, in its decision of 18 October 2019 in case SKA-1533/2019[25], the Court recognised that the claim for compensation for such damages or harm, which had been inflicted upon a private person by actions taken in criminal proceedings by the investigative institution, which had the nature of criminal proceedings, fell within the scope of the Compensation Law for Damages Caused in Criminal Proceedings and Record-Keeping of Administrative Offences. In the particular case, it was assessed whether the damage caused during the search could be recognised "as having happened in criminal proceedings".

Whereas in case SKA-430/2021, the Supreme Court did not recognise the failure to release immediately a person from the pre-trial prison as an action in criminal proceedings. It is noted in the ruling "[...] also the conducting of pre-trial criminal proceedings are actions by public administration because it is an action by the State power, which is neither the action of legislating, administration of justice or government. Exclusion of actions in criminal proceedings from review in

[25] Decision by the Senate of the Supreme Court of 18 October 2019 in Case SKA-1533/2019 (ECLI:LV:AT:2019:1018.A420255418.13.L).

administrative procedure does not follow from the fact that the concepts of actions by public administration and actions in criminal proceedings would be opposites but from the fact that actions in criminal proceedings are reviewed in accordance with another law – the Criminal Procedure Law [...]. Whether the respective action is an action of factual nature in criminal proceedings must be determined by reviewing its connection to the course of the particular criminal proceedings and the aim of this action [...]. The purpose of a pre-trial prison, pursuant to Section 4(1) of the law On Procedures for Holding under Arrest, is to implement the investigative judge's decision on the application, change or revoking of the arrest. Hence, the pre-trial prison does not make the decision on the application of a particular security measure and its term but ensures the performance of an administrative function. [...] In organising a person's release from the place of detention due to release from arrest, the institution does not have to make any considerations relating to criminal proceedings. The procedure of release is a matter of the institution's administrative actions. [...] As the Senate has noted, exclusion of actions in criminal proceedings from review in administrative procedure does not follow from the fact that the concepts of actions by public administration and actions in criminal proceedings would be opposites but from the fact that actions in criminal proceedings are reviewed in accordance with another law – the Criminal Procedure Law. Thus, it is also important that the Criminal Procedure Law does not set out the procedure for reviewing the actions of prison in releasing a person from prison due to revoking of the arrest. [26]

It is also important to keep in mind that, within criminal proceedings, damages can be inflicted upon any person, not only a person who has a certain criminal procedural status. In this respect, the Supreme Court's finding can be entirely upheld, i.e., "An investigative institution, by its actions in criminal proceedings, can inflict damages or harm upon a private person even if no status has been defined for the private person in criminal proceedings, i.e., they cannot be considered as being a person involved in criminal proceedings. The fact that the private person has no status whatsoever in the particular criminal proceedings *per se* does not change the nature of the institution's criminal procedural actions."[27]

4. Should all damages caused in criminal proceedings be compensated for?

Providing a brief answer to this question, it should be – no. Firstly, only unlawful and unjustified damages should be recognised (see explanation above).

[26] Decision by the Senate of the Supreme Court of 30 April 2021 in Case SKA-430/2021. Available: https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:AT:2021:0430.A420286718.10.L [viewed 15.10.2021.], paras 6, 10, 12.

[27] Decision by the Senate of the Supreme Court of 18 October 2019 in Case SKA-1533/2019. Available: https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:AT:2019:1018.A420255418.13.L [viewed 15.10.2021.].

Secondly, to receive compensation, the infringement should be in causal relation to the unlawful or unjustified action. Thirdly, the unlawfulness of the action should be established in criminal procedure. This has been consistently recognised in case law, *inter alia*, in the Supreme Court's rulings. For example, by drawing the conclusion: "Hence, the legislator has granted to administrative courts, in connection with criminal procedural actions, the competence to decide on compensation for damages but has not granted the competence to review the criminal procedural actions themselves on their merits."[28] In general, not objecting to this position, nevertheless, it has to be recognised that, by applying it without any derogations, the possibilities for a real person to achieve a fair solution to a situation might be endangered. Also, in the ruling quoted above, the Court has not taken into account the applicant's arguments regarding the lack of clarity with respect to appealing against actions made in the pre-trial proceedings, it has only noted: "The applicant had to submit a complaint regarding alleged violations of the provisions of the Criminal Procedure Law committed by the official in charge of the proceedings (Section 231 (1), Section 232 (3), Section 412 (2)). The procedure for submitting a complaint is defined by Section 336 and Section 337 of the Criminal Procedure Law [...]" Admittedly, such action can be partially recognised as being formal because, indeed, there are grounds for considering CPL provisions as unclear and incomplete with respect to establishing unlawfulness of some pre-trial decisions or actions, in particular, if these have taken place during the final stage of the pre-trial proceedings[29]. The main problems are related to the requests and complaints submitted in accordance with Section 413 (6) of CPL, which the prosecutor forwards to the court as soon as the pre-trial proceedings have been completed and the case has been transferred to a court. It is not quite clear what happens to them because the provisions of Chapter 24 of CPL, referred to by the Supreme Court, does not provide that a court might review complaints regarding violations committed during the pre-trial proceedings.

The Supreme Court admits that the prior out-of-court procedure for assessing the unlawfulness of an infringement has not been complied with also in Case No. SKA-992/2021. At the same time, this ruling includes references that, substantially, do not qualify the respective situation as being criminal proceedings. Thus, the Court points out "it is essential that the verification of the correctness of the contested action should be subject to review by the competent authority and it would have the possibility to rectify errors made by the lower institution if such exist. In this matter, another institution, i.e., the prosecutor's office, may not

[28] Decision by the assignments sitting of the Senate of the Republic of Latvia on 29 June 2021 in Case No. SKA-831/2021. Available: https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:AT:2021:0629.A420231319.9.L [viewed 15.10.2021.] [2].

[29] Judgement by the Senate of the Republic of Latvia on 28 September 2020 in Case No. SKA-1286/2020. Available: https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:AT:2020:0928.A420142719.22.S [viewed 15.10.2021.] [5].

replace the Chief of the State Police."[30] Thus, the procedure for reviewing criminal procedural matters, defined in CPL, has been totally ignored because, pursuant to CPL provisions, complaints regarding an investigator's actions are not examined by their direct manager but by the supervising prosecutor, likewise, the supervising prosecutor has the right to give binding instructions to an investigator.

At the same time, it does not go unnoticed that the courts take a more lenient attitude towards the cases of administrative offences. A judgement by an administrative regional court is a vivid example of it: "Within the framework of administrative proceedings, the court, substantially, can review neither the institution's actions nor the decisions adopted in the case of administrative offence because, pursuant to para. 5 of Section 1 (3) of the Administrative Procedure Law, neither such actions nor decisions are subject to the judicial review in the framework of administrative proceedings. Hence, the control over violations made in the framework of reviewing cases of administrative offences has been transferred into the competence of a court of general jurisdiction. Only the matter of granting compensation when harm or damages have been inflicted upon a person in the framework of a case of an administrative offence has been transferred into the administrative court's competence. And yet, even if the review of the legality of record-keeping of an administrative violence *per se* is not subject to the administrative court, in the context of the matter of compensation, the administrative court must verify whether, in the particular case, a person is entitled to compensation for an institution's actions in a case of administrative offence. Moreover, in those cases when, in the framework of reviewing a case of an administrative offence, the procedural violations committed by an institution have not been examined, it can be done by the administrative court in the framework of the claim for compensation."[31]

In connection with the above-stated, it can be recognised that, in the current circumstances, unlawful and unjustified infringements made in criminal proceedings can be left without fair compensation. Why? First of all, the current wording of the Compensation Law causes certain bewilderment, if an answer needs to be found to the question of whether, in case a person is recognised as being guilty in criminal proceedings, they have any hope of achieving compensation for damages if they have been subjected to unlawful actions (for example, unlawful detention, search, etc.). Section 4 of the Compensation Law does not provide for it. It might seem that Section 2(2) of this Law might save the situation. However, we have not found confirmation of this being so in the case law. At least, in studying judgements by the first instance court that have entered into force and are included in the database of redacted court rulings, we could not identify a single case of the kind. Secondly, the strict requirement for establishing the unlawfulness of

[30] Decision by the Senate of the Republic of Latvia on 4 August 2021 in Case No. SKA-992/2021 ECLI:LV:AT:2021:0804.A420146821.10.L [7].

[31] Judgement by the Senate of the Republic of Latvia on 21 June 2021 in Case No. A42-01379- Available: https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:ADRJLTN:2021:0621.A420137021.2.S [viewed 15.10.2021.] [7].

the infringement in the criminal procedure may cause insurmountable obstacles in a situation where CPL sets out that certain actions or decisions are not subject to appeal or where the regulation on the mechanism of appeal is imperfect.

The next aspect of particular significance is the fact that the unlawfulness or unjustifiability of the infringement *per se* does not create the grounds for compensation for the damages. I.e., it is stipulated in several sections of the Compensation Law, including Section 7 and Section 11, that nonmaterial damage is such that has caused adverse consequences. Hence, it can be concluded that for a person to acquire the right to compensation for non-material damages, it must be established that the unlawful or unjustified action had caused some kind of negative consequences (caused an infringement), and causal relation must be identified. This finding is consistently confirmed by the Supreme Court's case law: "[...] it has to be established that not only a procedural decision had been revoked in the framework of criminal proceedings but also that the adoption of the decision had caused an infringement on a person's rights. The content of the decision referred to by the applicants does not provide the grounds to consider that the adoption of it *per se* had caused damages for the applicant"[32]; "it must be established whether, in the particular case, unlawful or unjustified actions by an institution, a prosecutor's office or a court in criminal proceedings can be identified and whether, in causal relation to these actions, adverse non-material consequences have been caused for the applicant[33]"; "At the same time, for the purpose of initiating a criminal case, establishing whether a person has committed a criminal offence *per se* cannot be regarded as an unjustified infringement upon rights and the necessity to participate in these proceedings, as well as to appeal against the decisions adopted therein cannot be regarded as adverse consequences in the context of the Compensation Law, unless malice or obvious negligence can be identified in the initiation of proceedings"[34].

A clear illustration of the negative answer to the question, where compensation is granted for any damages caused in criminal proceedings, is the highest threshold of compensation defined in the Compensation Law. The most vivid example – para. 2 and para. 3 of Section 13(3) of the Compensation Law, pursuant to which damages are only partially compensated for if they exceed 145 000 EUR. This issue, as the matter of the amount of compensation in general, is essential; however, it will not be examined here, leaving it for a separate study.

Interesting discussions in the case law have pertained to the compensation for damages when third persons have incurred some costs. The Supreme Court

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[32] Decision by the Senate of the Republic of Latvia on 4 August 2021 in Case No. SKA-992/2021 ECLI:LV:AT:2021:0804.A420146821.10.L [8].

[33] Decision by the Senate of the Republic of Latvia on 15 July 2021 in Case No. AA43-0048-21/12 ECLI:LV:ADAT:2021:0715.A420319418.10.S [11].

[34] Danovskis E. Nemantiskā kaitējuma jēdziens administratīvajās tiesībās [The Concept of Non-pecuniary Damage in Administrative Law]. Jurista vārds, 2018. gada 20. marts, Nr.12 (1018) See also Decision by the Senate of the Republic of Latvia on 15 July 2021 in Case No. AA43-0048-21/12 ECLI:LV:ADAT:2021:0715.A420319418.10.S [13].

has provided a reasoned solution that can be upheld, by noting "The Senate does not agree that in all cases, where the invoice has been paid by another person, the right to receive compensation should be recognised. However, if it follows from the agreement between the person to whom legal assistance was provided and the person who paid for the legal assistance that the paid amount is a loan that would have to be repaid, with high probability, in foreseeable future, then the damages should be considered as such that have been incurred by the person to whom the legal assistance was provided. In this respect, the Senate draws attention to the finding mentioned in the judgement, to which the regional court has referred to: decrease of assets that are part of property is to be considered financial deprivation in the meaning of Section 1770 of the Civil Law. The existing property is diminished not only by decreased value of the property but also when property is encumbered by debt. [...] In view of the above, for a person, who has received assistance, to be entitled to recover costs in circumstances where someone else has paid the invoice for the legal assistance, it is not enough to conclude that someone has paid the invoice issued by the attorney but is essential to establish that the person who claims compensation has incurred costs because they repaid the money or became indebted."[35]

In concluding this insight into some interesting issues relating to compensation for damages caused in criminal proceedings, one more interesting aspect needs to be mentioned. An infringement on a person's rights that has occurred in criminal proceedings may be of criminal nature, i.e., it could be qualified as exceeding the authority of a public official, negligence or abuse of office, etc. A question arises – whether the fact that the unlawful infringement is assessed as being criminal "changes the game"? No clear answer can be found to this at this point. We have not succeeded in finding an example from the case law of compensating for criminally inflicted damages in criminal proceedings. However, the Supreme Court has expressed its opinion on a similar situation, i.e., assessing the possibility of applying the law "On Compensation for Damages Caused by Institutions of Public Administration"[36] in such situations. It has recognised: "If non-material harm or damages have been caused to a person by a public official's failure to act, which has been recognised as being a criminal offence, i.e., the actual actions already have transformed into a criminal offence and it has been recognised by a judgement in a criminal case that has entered into force, then, primarily, the person who has committed the criminal offence is responsible for the harm and damages caused, and this person is liable in the procedure set out in the Criminal Procedure Law and the Civil Procedure Law. Subsidiary liability may set in for a public person as

[35] Decision by the Senate of the Republic of Latvia on 18 June 2021 in Case No. SKA-471/2021. Available: https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:AT:2021:0618.A420160919.12.S [7] [viewed 15.10.2021.].

[36] Valsts pārvaldes iestāžu nodarīto zaudējumu atlīdzināšanas likums [Law "On Compensation for Damages Caused by Institutions of Public Administration"]. Consolidated text in Latvian. Available: https://likumi.lv/ta/id/110746-valsts-parvaldes-iestazu-nodarito-zaudejumu-atlidzinasanas-likums [viewed 15.10.2021.].

an employer, on the basis of Section 1782 of the Civil Law. Accordingly, the victim has the right to submit a claim subsidiarily against the official's employer in civil procedure."[37] Assuming that the Court might take a similar position with respect to the Compensation Law, we shall take the liberty to not subscribe to this approach. The Compensation Law, as to its purport, is needed to allow a person, to whom representatives of the State power have inflicted unlawfully or unjustifiably damages to receive, in a relatively simple procedure, compensation from the State. No objective reason can be found why the State would not have this duty if the representatives of the State power in their unlawfulness have already reached the level of criminality. Invoking the possibility of civil law liability in this situation would be contrary to the idea that the State's obligation to compensate for the damages is to be reviewed only in the administrative procedure. And, even more importantly, in our opinion, limiting the State's liability is not commensurate with, for example, the trend to apply more extensively the adverse criminal law consequences of criminal offences to legal persons of private law, on behalf of or in the interests of which or due to insufficient control/supervision by which the criminal offence had been committed. Likewise, it does not promote treatment of the State as a socially responsible formation, whose inalienable force is assuming legal liability for infringements related to the exercise of the State power.

And, finally, – when to seek justice in a court? In order to turn to a court, a person, first of all, has to turn to the competent authority, to the Ministry of Justice or the Prosecutor General's Office, respectively. Most often, failure to abide by this procedure is an obstacle to legal proceedings. However, in some cases, calling for special review, this might not be the case. The Supreme Court has recognised: "At the same time, it should be taken into account that abiding by the procedure for prior out-of-court examination of the case as a pre-condition for reviewing the application in court is not an end in itself. Therefore, in deciding on leaving an application unexamined if this precondition has not been met, the expedience and proportionality of such a decision should be considered in light of the functions performed by the out-of-court procedure. In exceptional cases, due to some special circumstances, an exception could be admissible with the purpose of respecting the principle of respecting a private person's rights, as well as ensuring the principle of procedural economy, it could be admissible to

[37] Para. 5, para. 6. of the decision by the Sitting of the President of the Supreme Court's Departments on 11 October 2018, also Decision by the Supreme Court of 6 December 2018 in Case No. 670006518 SKA-13102/2018. Available in Latvian: https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:AT:2018:1206.SKA130218.7.L [viewed 15.10.2021.]. See also Tiesu prakses apkopojumu "Tiesu prakse par administratīvajām tiesām pakļautajiem prasījumiem (2017.-2021.maijs)" [Case Law Digest "Case Law on Claims under the Jurisdiction of Administrative Courts], Rīga, 2021, p. 149. Available: https://at.gov.lv/files/uploads/files/6_Judikatura/Tiesu_prakses_apkopojumi/2021/Administrativajam%20tiesam%20paklautie%20jautajumi%202017-2021.pdf [viewed 15.10.2021.].

derogate from the mandatory requirement to abide by the regular procedure of having the case examined in prior out-of-court procedure."[38]

Conclusion

1. In the course of criminal proceedings, a person's different rights and lawful interests can and are significantly affected. It cannot be excluded that this is unlawful or unjustified, which causes a person's right to receive compensation for the unlawful infringement. There are different types of compensation. The State's obligation to compensate for damages caused by unlawful or unjustified actions in criminal proceedings is defined in detail by the Compensation Law for the Damages Caused in Criminal Proceedings and Record-Keeping of Administrative Offences (the Compensation Law).
2. Pursuant to the provisions of the Compensation Law, the damages caused by unlawful or unjustified criminal procedural actions may be compensated for.
3. Criminal procedural actions, whose unlawfulness or unjustifiability may cause grounds for compensating for damages must be differentiated from administrative actions (by public administration) that are not of criminal procedural nature.
4. Pursuant to the current case law, the unlawfulness of a criminal procedural action may be established in criminal procedure. Such a strict approach may cause obstacles to effective exercise of a person's rights, in view of the incomplete mechanism for appealing against officials' decisions and actions, included in the Criminal Law. This, in particular, applies to decisions, which, pursuant to the Criminal Procedure Law, are not subject to appeal at all, as well as to decisions made and actions taken in the final stage of the pre-trial proceedings. The solution to this deficiency should be linked either to improving the provisions of the Criminal Procedure Law, envisaging a clear possibility and a mechanism for appealing against all decisions and actions, or by expanding the possibilities for applying the Compensation Law also with respect to a situation, where its unlawfulness and unjustifiability has not been established in criminal procedure.
5. The "highest threshold" for compensation for damages, set in the Compensation Law, could be viewed as an unjustifiable infringement on a person's rights and an obstacle to fair compensation.
6. There are no grounds for not applying the provisions of the Compensation Law when the unlawful infringement is to be assessed as being criminal. Limiting the State's liability in such a case would not testify to the existence of the State as a socially responsible formation, which, *inter alia*, should assume also legal liability for the infringements inflicted by representatives of power.

[38] Decision by the Senate of the Supreme Court on 18 October 2019 in Case SKA-1533/2019 (ECLI:LV:AT:2019:1018.A420255418.13.L).

7. In order to turn to a court, a person, first of all, has to turn to the competent authority, to the Ministry of Justice or the Prosecutor General's Office, respectively. However, pursuant to the current case law of the Supreme Court, the failure to abide by this requirement not always is an obstacle to legal proceedings.

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