

Assessment of Recidivism Risk in Different Stages of Proceedings

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In this chapter it is examined how the prosecutors and judges assess the recidivism risk in specific situations in which they make decisions that will influence the life of people who have committed criminal offences.

1. Database

The main part of the analysis is formed by document analysis; the assessment of recidivism risk is most thoroughly examined in case of premature releases where, in addition to random selection of procedural documents, the rulings made with respect to people who have committed manslaughter and rulings repeatedly made with respect to the same imprisoned person has been more thoroughly analysed.

Besides the court rulings, the database also included the data on the poll (See Annex 4) and the interviews. All in all, 396 procedural documents were analysed that are divided in three types of rulings.

Rulings on termination of criminal proceedings made pursuant to § 202 (1) of the CCP. The analysis sample of rulings on termination included 68 rulings from which more than half were made by the Harju County Court judges (42), followed by the Pärnu County Court decisions (12) and about one tenth of decisions were made by the Tartu (8) and Viru (6) County Courts. By type of criminal offence the sample contained an equal number of crimes of violence and criminal offences against property (26 of both offences). There were 14 cases of aggravated breach of public order and 2 other criminal offences.

Rulings on premature release of prisoners (§ 76 of PC). The analysis included 227 rulings; the dominating majority concerned the prematurely released people placed under the supervision of a probation supervisor; two separate subsamples were formed: the rulings on release in case of manslaughters (71) and repeated release (30). The overall sample of premature release cases included 125 rulings on premature release made in 2008 regardless of the type of decision in these matters (to release or not). From the rulings included in the sample 49 were made in the Viru County Court, equally the same number in the Harju County Court and 27 rulings in the Tartu County Court. Pärnu County Court does not hear the cases of release on parole, as no prisons are located in the jurisdiction of that county court. The highest number of people included in the sample belonged to prisoners who had committed criminal offences against property (99), 43 prisoners had committed offences against the person, 19 had committed drug-related crimes, 10 had committed offences against public order, also 10 had committed traffic offences and 24 prisoners had committed other criminal offences. In case of more than half of the cases (64), a person applying for release had been imposed prison sentence for one criminal offence.

Arrest warrants (§ 130 of CCP). The analysis of arrest warrants used 101 arrest warrants which were mostly prepared in the 1st quarter of 2009. The sample included 47 rulings of the Harju County Court, 21 rulings of the Viru County Court, 17 rulings of the Tartu County Court and 16 rulings of the Pärnu County Court. The sample contained 26 suspects of crimes of violence, 11 suspects of drug-related crimes, 36 suspects of larcenies, 24 suspects of robberies and other criminal offences against property and 4 suspects of driving in a state of intoxication.

The research work plan foresaw an analysis of court judgements, however, this did not prove to be expedient because the county court is not required to present any arguments how the solution was

reached.¹ The rulings on premature release were analyzed instead of court judgements in case of which, as it became evident later as a result of poll results and interviews; the importance of assessing the recidivism risk was considerably bigger according to the opinion of bodies conducting proceedings. Still, the circumstances related to the making of decision on punishment by the court have not been entirely left out from the analysis; the information received from the poll and interviews has been used instead.

The purpose of using the rulings on termination of proceedings is to show how the recidivism risk is assessed in case of people who have committed less aggravated violations and who in most cases have not been punished pursuant to the criminal procedure before. Both the Prosecutor's Office and the court find that these people need not be isolated from the society by means of imprisonment and it is possible to influence them also without implementing other types of criminal punishment and without conducting criminal proceedings in the court. Consequently, this should be a group with the lowest risk level in criminal proceedings. Neither is it possible upon assessing the recidivism risk in case of these judgements in most cases to rely on people's prior violations as the indicators of recidivism risk.

In case of arrest warrants and rulings on premature release the issues concerning the society's feeling of safety are dealt with and these are mostly connected to people who have committed more aggravated criminal offences. In principle, in case of arrest it is decided whether it is safe to allow a person who is being suspected of criminal offence to continue his/her life at large during the proceedings, or the person should be isolated. In case of premature release the question is vice versa: whether a person is ready to live at large without becoming a danger for other members of the society.

2. When to assess the recidivism risk

Both prosecutors and judges are facing in course of proceedings at least once, often also repeatedly, a situation in which the recidivism risk of person who has committed a criminal offence could be assessed. Sometimes it is a question what is the best way to influence a criminal offender to make the person to give up the commission of criminal offences, some other time, however, how to guarantee in the best way the safety and wellbeing of other members of the society. In the poll, the respondents were offered options about possible decision-making places where the assessment of recidivism risk could be important in the opinion of the authors of this analysis. The respondents had to mark up to two decision-making places in the list where in their opinion the assessment of recidivism risk is most important.

It came out that the assessment of recidivism risk is thought to be most important upon the release of an imprisoned person from serving the sentence before the end of the term of punishment.

The priority of recidivism risk assessment upon deciding the premature release was also mentioned during interviews; for example, one judge found that recidivism risk is the main thing that should be considered upon releasing a person. Upon imposing punishment and terminating the proceedings with opportunity, the body conducting proceedings has first of all to take into consideration the guilt of a person who committed the act; however, upon arrest, in addition to the risk of committing new criminal offence the risk of evading proceedings.

Premature release has caught great public attention. Often the media points out the risk of committing new criminal offences in connection with premature release, for example, in case of people who have been punished for manslaughter or sex offences. A situation when a person who has been released before the final term of punishment has committed a new criminal offence often causes the decision-makers the public attention and interest in the release decision motives.

¹ A judge has to present the substantiated judgement only if a party to the court proceeding notifies of the wish to file an appeal against the judgement with the circuit court.

The assessment of arrested person's recidivism risk was considered most important by 26 respondents; however, it has to be considered that in case of arrests the law itself obligates to consider the risk of committing new criminal offences.

Slightly more than every fourth respondent marked as the important assessment place of recidivism risk the release of a person on parole (17 respondents) and the determination of the type of principal punishment (16 respondents). In case of both decisions the need to assess recidivism risk can be derived from the isolating function of prison sentence. As people with high recidivism risk endanger the protected legal rights, the implementation of prison sentence for the purpose of isolation is more justifiable in their case and it has to be more thoroughly considered as well. In case of determining the type of principal punishment, the prosecutors found in one interview that the prediction of recidivism risk is especially important upon requesting punishment for a person with already established recidivism. In case of alternative punishments, an option should be chosen which could change the established behavioural pattern as much as possible.

The opinions of prosecutors and judges concerning the most important assessment situations were quite similar. As the only difference, the prosecutors regarded the assessment of recidivism risk upon terminating proceedings by the principle of opportunity considerably more important in comparison to judges. Evidently, on one hand the reason to this is the fact that prosecutors terminate proceedings due to reasons of expediency much more frequently than the judges. On the other hand, the termination of proceedings by prosecutors is also regulated by the Chief Public Prosecutor's guidelines in which, among other things, it has been specified that in general the proceedings cannot be terminated against people who have repeatedly committed acts of the similar type. The analysis of terminated proceedings conducted by the Ministry of Justice also refers to the importance of recidivism risk assessment (Salla 2009). When from the prosecutors every third regarded the consideration of recidivism risk upon the termination of proceedings to be most important, then among the judges only every tenth did.

Below you will find a more detailed analysis of the assessment of recidivism risk upon arresting, terminating proceedings due to reasons of expediency, imposition of punishment and premature release.

3. Assessment of risk upon arrest

The obligation of recidivism risk assessment has been given the clearest wording in the established legal order in case of arrest decisions. Pursuant to § 130 (2) of the CCP, the precondition of arrest is the fact that a person may abscond from the criminal proceeding or continue to commit criminal offences. The court has to evaluate the prosecutor's request for arresting a person namely based on these facts.

Continued commission of criminal offences may mean in the same criminal case the destruction or falsification of evidence but also the commission of completely new criminal offences which may be both of the same and different type as the committed offences. Pursuant to an electronic comment to CCP², the risk that criminal offences are continued to commit is higher in case of suspects who have already been punished earlier; a suspect's previous life, a suspect's social environment, attitudes and proneness to commit new criminal offence are also assessed; the risk is regarded to be especially high in case of so-called addiction-related crimes, the examples of which are given the sex offences, drug-related offences, larcenies and computer-related crime.

The predominant majority of people responding to the poll found that the risk of committing new criminal offences in connection with arrests is optimally assessed.³

Four respondents thought that the overestimation of risk often occurs which means that liberty is taken away from people in case of whom the danger that new criminal offences will be committed is

² An aid prepared by the Public Prosecutor's Office for prosecutors for the interpretation of the code and the guidance of procedural practice.

³ All respondents had participated in deciding on the arrest also themselves as prosecutors or judges.

low. Five respondents thought that the recidivism risk is not sufficiently assessed – on one hand this may mean that the court fails to pay attention to facts referring to recidivism risk and will not agree to arresting such a person on whom the arrest could be imposed in the opinion of respondents; on the other hand, this opinion may mean that the prosecutors do not request the arrest of people with high recidivism risk at all.

Prosecutors estimated the consideration of recidivism risk to be more optimal than the judges; all respondents who thought that the overestimation of recidivism risk occurs were judges, the underestimation of recidivism risk was mentioned by three prosecutors and two judges.

By districts the representatives of the Southern District were more critical concerning the assessment of recidivism risk. Two from the five respondents who mentioned underestimation and three from the four respondents who mentioned overestimation were employed in the Southern District.

Further, it was studied which specific indicators refer in the opinion of bodies conducting proceedings in case of arrest to the risk of committing new criminal offences. It was thought that the most important fact to be considered was the person's prior criminal record, addiction and facts of the committed criminal offence.

More than half of the respondents thought that the suspect's assessment of his/her conduct and the fact whether the suspect had a job was "rather important" or "very important". Evidently, the recidivism risk is thought to be higher in case of these people who do not confess to the act committed by them or do not show any remorse in connection with what they have committed. At the same time, the confession of one's act and compensation of damages caused may indicate both a lower risk of committing new criminal offences and absconding from proceedings.

It was mentioned during interviews that, if a person has a permanent job the loss of which would substantially influence how the person's family will cope, the expediency of arrest is more thoroughly considered.

Fictitious jobs were mentioned as a problem where a suspect claims to be employed but where he/she has no official income. In this case, according to the bodies conducting proceedings, it is difficult to assess whether the suspect is indeed employed there, or the suspect hopes to show himself/herself in a better light through the existing job.

It was not considered especially important how the person shows himself/herself before the court when the arrest is being decided and what are the person's relationships with the people close to him/her. It was also found during interviews that a person's conduct before the court and what is being disclosed in the courtroom may often be deceptive.

In case of arrests in most cases the parties who are wanted to be arrested have pregnant women somewhere, I don't know whether these are some kind of rented women who can be impregnated or this is only verbal, in any case half of them have pregnant women. Then another thing, in the court, indeed in course of regular proceedings they all show their children and everything - everything - everything – everything: "You cannot put me in prison because I have a child and then I have a bank loan and I have this and that." Then I sometimes ask: "You had these already when you committed [the offence], for example, your child is five years old, and you have committed a criminal offence for five times!" They point it out in the court that these are their leverage./.../ But in reality he, he's like using them; in reality maybe he does not even see these children. (Extract from an interview, a judge)

From people brought to the arrest hearing, information on prior criminal record was available on 86 people, 19% (16) of them had not been punished so far, 13 people had been punished once, 22 people had been punished twice or thrice, 34 people had been punished over 4 times. From the rulings included in the sample the court had decided to arrest a person in case of 80% and not to arrest in case of 20% of rulings.

The volume of indicating and substantiating the circumstance referring to the recidivism risk was very different. On the average, only a few circumstances in every fourth arrest warrant were mentioned. However, there were more such warrants than the average in the Viru County Court, the proportion of substantiated warrants was the smallest in the Harju County Court.

The judges pointed out as factors referring to the recidivism risk the most the data on the person's prior criminal record – the more the person has been punished earlier, the higher the probability that the person will be arrested. The fact whether a person has a permanent residence and income are also considered important. Without residence and legal income the probability of arrest is higher. The factors concerning the ways of life and the fact that an arrested person is being suspected of having committed also other criminal offences were mentioned somewhat less frequently. In case of some decisions the fact that a person had been prosecuted in several criminal offences with similar facts, which referred to the serial nature of offences, served as a basis. In case of arrest, the least attention was paid to the person's own evaluation of his/her conduct.

Below you will find examples on taking into consideration several factors upon making the arrest decisions.

Earlier criminal record/absence of punishments

The court decided to release a person who was being suspected of an attempt to steal goods worth EEK 18.70. Upon making the decision, the court relied on the fact that the person had been repeatedly punished earlier and the prior prison sentence had not led the person to the law abiding road either. The fact that the person had been apprehended only 18 days after release from imprisonment was also considered to be significant (Harju County Court Ruling in Matter No. 1-09-795)

The court found that the commission of aggravated act of violence for the purpose of proprietary gain (the victim was assaulted, kicked with feet after which a hole was caused in the victim's lung) has been proved but there are no grounds for arrest. Among other things, the court assumed such an opinion due to the lack of prior criminal record. (Harju County Court Ruling in Matter No. 1-09-6573)

Existence or absence of residence or job

Viru County Court decided to arrest a man suspected of manslaughter. Several factors served as a basis for that, including prior criminal record and the fact that a new aggravated criminal offence was committed less than 1 month before; at the same time, both the prosecutor and judge pointed out the absence of residence and work-related and personal connections. (Viru County Court Ruling in Matter No. 1-09-2036)

Northern District Prosecutor's Office conducted proceedings in criminal matter in which a Latvian citizen was suspected of two different criminal episodes in course of which the person while being in Tallinn at first consumed alcoholic beverages in a dressing cabin at a store without having paid for these, and after that attempted to leave the restaurant where he had dined with an acquaintance without paying the bill. Nevertheless, the court decided not to arrest the person, relying among other things on the fact that the person had a permanent residence in the Republic of Latvia. (Harju County Court Ruling in Matter No. 1-09-5891).

Other circumstances

The person had been interrogated all in all in eight criminal episodes which all concerned either the theft of automated gas station ATM or tampering with an ATM and stealing the money from there. The court decided to satisfy the request, relying among other things on the regular nature of larcenies (the prosecutor had pointed out in addition to the facts relating to the criminal offence the fact that the person had also obtained instruments necessary to conduct corresponding criminal offences). (Harju County Court Ruling in Matter No. 1-09-973).

On several occasions, the suspects pointed it out when the proceedings were conducted that they were ill. Concerning the matter in question the court expressly found in course of arrest that the suspect's health status is not a factor preventing the arrest, insofar as the person will have access to medical help also during the time he spends in a custodial institution. (Pärnu County Court Ruling in Matter No. 1-09-779).

4. Risk assessment upon termination due to lack of public interest in proceedings

By means of rulings on termination of criminal proceedings the consideration of recidivism risk of less dangerous criminal offenders can be studied. The Code of Criminal Procedure provides a possibility to terminate proceedings in a situation where there is no public interest in conducting criminal proceedings and the guilt of the person who committed the criminal offence is not big. The proceedings can be terminated only in case of criminal offences in the second degree, i.e. less serious criminal offences, and in a situation where a criminal offender is willing to assume certain obligations (compensate damages and procedural expenses, do community service or pay sums of money into public revenues).

The Code of Criminal Procedure does not require the consideration of recidivism risk; however, the body conducting proceedings has to indirectly take into consideration the factors influencing the recidivism risk both in case of person's guilt and considering the general and special preventive circumstances. For example, the special preventive circumstances are against the termination of proceedings, if a person who committed the act had been previously punished and if there is reason to believe that the termination of proceedings may encourage the person to commit new criminal offences (Kergandberg and Sillaots, 2006, pp. 323–324).

The termination of proceedings is also regulated by the Chief Public Prosecutor's guidelines which refer to special preventive considerations. According to the guidelines, public interest in proceedings exists, if a person has been previously punished for similar offence, or the person has proved by his/her other conduct that in order to guarantee law-obedience it is required to continue the proceedings. (Chief Public Prosecutor's, 2009).⁴ Thus, the assessment of recidivism risk is in principle required with respect to people who have a higher recidivism risk.

Only these rulings have been included in this analysis in case of which the proceedings have been terminated by the court. However, also in this case the termination has been requested by a prosecutor who has to take into consideration the principles indicated in the Chief Public Prosecutor's guidelines. On the other hand, it has to be considered that with respect to proceedings terminated by the court the termination is possible also in case of somewhat more serious criminal offences – unlike the criminal matters which can be terminated by the prosecutor's ruling, the court may approve the termination in case of criminal offences in the second degree for which the minimum term of imprisonment has been provided.⁵

4.1 Specification of circumstances referring to recidivism risk in the rulings

Out of 68 analyzed rulings on termination, in case of more than half (36) the termination of proceeding was not substantiated evaluating it from the aspect of recidivism risk. In 28 rulings, at least one factor referring to recidivism risk was mentioned but it was not evaluated on the basis of a person (e.g. why the absence of job namely in case of this particular person is an important circumstance upon terminating the proceedings). The reasoning had been specified somewhat better in case of four rulings, whereas three of them had been made by the Tartu County Court judges (different judge in case of each ruling).

In case of nearly half of the rulings included in the sample, the court did not point out any circumstances referring to the recidivism risk; in these cases it was just limited to mentioning the preconditions provided for in the law ("The person's guilt is not big and there is no public interest in proceedings").

Out of these rulings in which the circumstances referring to the recidivism risk were mentioned (35), information on prior criminal record of the accused at trial was indicated the most, this was

⁴ However, the guidelines prescribe the situations in which it is possible not to apply the specified requirements.

⁵ In case of termination pursuant to § 202 (1) of CCP, the only condition is the fact that the criminal offence committed would be a criminal offence in the second degree.

mentioned in case of 77% (27) rulings, i.e. all in all, 41 rulings did not contain any information on prior criminal record. The evaluation of the accused at trial concerning his/her own conduct was indicated in 15 rulings on termination, references to life style and habits in 3 rulings, addiction problems and personal relationships in 1 ruling and other circumstances in 15 rulings.

Reference to **prior criminal record** mostly meant the position of the court that proceedings can be terminated, as the person does not have any punishments in force. In a few rulings the bodies conducting proceedings found that although the person had been previously punished for an offence of the same type, this does not prevent the termination of proceedings.

The accused in the criminal matter of larceny had been punished five times, including four times with actual imprisonment. The court took into consideration the fact that proprietary damage was not big and the act had been committed three years ago - thus, the guilt is small and there is no public interest in proceedings. (Pärnu County Court Ruling in Matter No. 1-09-1692)

With the ruling in criminal matter 1-07-11869 the court terminated criminal proceedings against a person who had committed a larceny, who had been previously punished eleven times, including for recent criminal offences against property. The court mentioned that the victim has recovered the stolen object and there are grounds for termination of proceedings due to lack of public interest in proceedings. (Harju County Court Ruling in Matter)

The second, most frequently mentioned factor referring to the recidivism risk was **the criminal offender's evaluation of his/her own conduct**. When noting this factor in the judgement, the person's remorse was often just generally mentioned. At the same time, it has been indicated in the judgements when offenders have apologized to victims or reconciled with victims that also reflect a person's attitude towards his/her earlier conduct.

A father accused of criminal offence used a bank card in fast loan fraud. The court repeats in its position the understanding of Prosecutor's Office according to which sincere remorse is evident in this matter as a possible mitigating circumstance. (Pärnu County Court Ruling in Matter No. 1-09-15774)

The accused attacked together with another person a victim in a bus stop who was beaten with hands in the facial area and the beating was continued after the victim fell on the ground. The judge points it out in the ruling that unlike the other person who took part in the commission of criminal offence, the accused apologized in public to the victim and confessed his guilt. (Tartu County Court Ruling in Matter No. 1-09-4241)

Other factors were pointed out considerably less frequently than the criminal record and evaluation of conduct. Among these, one of the most common factors was the existence of a job or income. In a few cases, very specific circumstances related to the criminal offence were also pointed out, for example, criminal offender's advanced age, preventive influence of court session and existence of dependent children. Life style and habits were pointed out on three occasions:

The accused beat his partner in course of a domestic row. After the termination of criminal proceedings for the first time pursuant to § 202 (7) of CCP, the proceedings were resumed because the person could not pay the monetary payment imposed on him as an obligation. The court estimated the person's endeavours in finding a job and pointed it out that the person has not committed any new criminal offences during a long period of time. (Harju County Court Ruling in Matter No. 1-08-14267)

The person's criminal offence was assaulting his partner in a state of intoxication and later intimidating his partner and children by hitting the door with an axe behind which the latter were hiding. Upon terminating the proceedings, the judge considered as one of the many factors the fact that the accused at trial had changed his way of life – giving up the use of alcohol, taking care of home, creation and retention of normal family relationships. (Tartu County Court Ruling in Matter No. 1-08-6079)

There were no considerable differences in the analyzed rulings on termination **by types of criminal offences**; both in case of criminal offences against property and crimes of violence, there were more those rulings which substantiation did not concern the recidivism risk. In case of three rulings out of four, which were more thoroughly substantiated, the rulings dealt with crimes of violence, however, one ruling dealt with the use of narcotic substance by an imprisoned person.

It is difficult to generalize by courts – there were rulings in all courts in which the substantiation was more thorough and which gave a clue what the judge considered when thinking about the termination of proceedings.

All in all, it can be said that judges do not pay special attention to the substantiation of the ruling on termination. In most cases the judges just mention the conditions prescribed by law for the termination of proceedings. It cannot be excluded that also the judges who have not substantiated the rulings still consider the termination of proceedings thoroughly but simply do not write down the reasoning in the ruling.

5. Assessment of risk upon imposition of punishment

The wording of the USSR Criminal Code which was effective until 1992 used the terms “recurrence” and “recidivism” quite broadly, among other things the Code included provisions on especially dangerous recidivists. In the commentaries of Ilmar Rebane (1980) the recidivism of criminal offence was called the commission of a new criminal offence after conviction, i.e. recidivism meant repeated crime. At the same time, the reporting of prior criminal offences in the meaning of repeated crime was limited in terms of time – either by the expiry or deletion of criminal record.

The penal policy of the Republic of Estonia has avoided the term “recidivism” in the laws so far – mainly due to the introduction of penal policy based on the Western principle of guilt.

Although the term “recidivism” is not used in the laws, recidivist conduct is still relevant in terms of penal law, manifesting itself in the legal assessment of select types of criminal offences in the special part of the Penal Code. Repeated commission of an act of the same type is subject to stricter punishment in case of manslaughter, larceny, robbery, illegal entry, accepting a bribe and many other necessary elements of criminal offences.

Outside these specific provisions, the basis for punishment pursuant to established legal dogmatism and practice is the guilt of a person upon committing a specific criminal offence. Upon imposing punishment, the personality of the criminal offender is important only to the extent it is connected to the act. Judicial practice has specified this position by finding that prior offence can be taken into consideration upon imposing the punishment only when this is related to the new act and shows the offender’s disregarding attitude towards prior punishment.⁶

Upon assessing the criminal offender’s recidivism risk, the previously committed offence is an important indicator, which shows that criminal conduct need not be of accidental nature. At the same time, there are also other factors referring to the risk of committing new criminal offences that the court will consider when imposing the punishment.

In this part of the analysis the assessment of recidivism risk upon imposition of punishment has been evaluated on the basis of the poll and interviews. First, it was studied in the poll how the respondents perceive the assessment of recidivism risk when prosecutors request the punishment.

The predominant majority of respondents (50 respondents out of 59) found that the prosecutors pay sufficient attention to recidivism risk upon requesting the punishment and not enough attention in the opinion of nine respondents.⁷ The prosecutors themselves were less critical about their work; among judges more than one third thought that the consideration of recidivism risk was not sufficient, however, among judges only every tenth respondent.

The following circumstances were indicated as reasons why the prosecutors do not take the risk into considerations:

- The law does not directly require this; recidivism risk is not a basis for punishment, the act and person’s guilt have to be assessed;

⁶ Supreme Court Decision 3-1-1-79-03, clause 14.

⁷ In your opinion, do the prosecutors in general take into consideration the criminal offender’s recidivism risk upon requesting punishment? Yes, they pay sufficient attention to this. No, it is not assessed with sufficient thoroughness. Cannot tell.

- In settlement proceedings it is attempted to come to a settlement at any cost (it was also found that this may, among other things, also cause unfit punishment; for example, community service is imposed on a person who cannot comply with the conditions);

I have worked in different courts, if we talk here about the assessment of recidivism risk by prosecutors now, then I have seen settlements in which the settlements are made for the sake of settlements. The recidivism risk does not have any bearing on the subject at all; the main thing is that there will be a settlement. Insofar as we all have full liberty - both the judges and prosecutors and our own judgements – we are not supervised so very much, so we have very wide hands, very wide hands. (Extract from an interview, prosecutor.)

The similar question was asked about judges.⁸ The question was focused on selecting the type of punishment, as presumably the recidivism risk affects the type of punishment more than the term of punishment – it is more likely that the accused with higher recidivism risk will be imposed actual prison sentence than the accused with lower risk.

Nine people could not give any assessment; however, the answers of remaining people were divided into two groups: 29 respondents from 51 found that the assessment of recidivism risk in the court is optimal; however, 22 respondents found that the underestimation of recidivism risk often occurs. No respondents thought that upon selecting the type of punishment, the court is overestimating the recidivism risk of the accused. Although there were somewhat more people among the prosecutors who found that the court underestimates the recidivism risk, the differences were not worth mentioning and it can be said rather that the assessments of judges and prosecutors in this question are similar.

The following reasons why judges may underestimate the recidivism risk were offered among other things:

- Judges rely too much on the remorse of the accused and other allegations presented in course of judicial proceedings;
- It is practically difficult to assess the recidivism risk - there are too many factors influencing it, judges do not always have complete information at their disposal on all important factors and sometimes some positive signs may prove to be misleading.

The considerations of prosecutors and judges upon requesting/imposing actual prison sentence for the accused was also studied somewhat closer. The objective was to find out which factors influence prosecutors and judges most of all to impose actual prison sentence.

The respondents found that **prior criminal record** influenced the imposition of actual prison sentence the most; it was of minor importance only in the opinion of one respondent. Such an assessment could mean that it is least likely that actual prison sentence will be imposed on a person who has not been punished so far and it is most likely in case of a person who has already been punished several times.

In this sense also this prior punishment, it depends. If there are two [punishments], then it does not disturb you so much. And when you look at the statement of charges and see that 11 times punished – this immediately causes such a reaction that: “Well, now! We are not going to stroke you here either.” Let’s see and consider, but this, yes, quite a tough indicator, let’s put it this way. (Extract from interview, judge)

The 2007 Judicial Practice Survey (Klopets and Reinthal, 2009) did not confirm this trend – prison sentence was equally imposed on previously punished people and people who had not been previously punished, exception being the offences against property in case of which actual imprisonment was imposed much more frequently on previously punished people.

⁸ In your opinion, to which extent does the court take into consideration the recidivism risk when choosing the type of punishment for an accused at trial in Estonian legal practice today? Recidivism risk is often overestimated; Recidivism risk is often underestimated; The assessment of recidivism risk is optimal; Cannot tell.

Upon imposing actual prison sentence, the accused's **assessment of his/her own conduct**, his/her **alcohol or drug addiction** and whether he/she has a job at present was also considered important. Just like in case of arrests, it is more carefully considered also upon imposition of actual imprisonment, if a person has a permanent job. Evaluations from interviews about considering these factors:

If he comes, really says to you in court session that "bloody Estonian Republic, I didn't want this republic and now I have to starve here and the state is guilty of everything and all others around are guilty", then it is really very likely that he will go and nick something from Prisma tomorrow. (Extract from interview, judge)

In most cases they say with tears in their eyes that: "I will never do anything, I apologize." Has been punished for ten times, still he promises in the court. ... He simply knows that he has to look humble in the court and say that I am guilty of everything and will not do it ever again. (Extract from interview, prosecutor)

And when he gets already salary from his job, then the risk that he will go to steal food is again smaller. But another important thing is this that he is occupied during certain time of the day... But sometimes when you phone some company after that character reference, it is said that the person who has signed it is not on the board at all. ... And then you think whether to start a storm in a teacup or not. In general, you do the defence counsel so and will not start because you don't bother to deal with it, you simply don't have time for that. (Extract from interview, judge)

Job is important, it enables to spend time meaningfully, to be connected to something in addition to providing a source of subsistence. But I also think that, if this recidivism or risk is in fact heightened, the job will not hinder the commission of criminal offences either. (Extract from interview, judge)

All in all, from the factors referring to the recidivism risk upon the imposition of punishment this is assessed the most whether the person has committed any criminal offences earlier. Evidently, the predominant consideration of this factor indicates that in case of most common necessary elements of criminal offences the recurrence has to be assessed in any case because this will determine whether the punishment will be lighter or stricter. Remorse considered as mitigating circumstance is also deemed important, if there is reason to believe that it is sincere.

Overestimation of recidivism risk would mean that the imposed punishment would not correspond to the person's guilt and would probably bring along a stricter penal practice also (e.g. actual prison sentence for a person who could be influenced with less stricter measures). However, underestimation of risk can mean two things – on one hand that the bodies conducting proceedings cannot adequately assess the risk (because many factors have to be taken into consideration regarding which the amount and reliability of obtained information is with different levels), on the other hand as a consequence this that the accused is imposed rather a lighter punishment than a serious one.

6. Assessment of risk upon premature release

The release on parole is regulated in Estonia in several legal acts, including the Penal Code, the Imprisonment Act and the Code of Criminal Procedure. The possibility to apply for release depends on a criminal offence – it is possible for a person who has been convicted of criminal offence in the second degree or a criminal offence in the first degree through negligence to be released after six months have passed from the commencement of imprisonment. In case of criminal offences in the first degree the possibility arises when two-thirds of the term of the imposed punishment has been served.

Pursuant to § 76 (1) of the Imprisonment Act, the prison shall forward to the court, after the prisoner has served the within-named term of punishment, the following documents: the personal file of the prisoner, the character reference prepared by the prison in which the possibility that the prisoner will commit a new criminal offence is assessed, the probation supervisor's opinion and, upon the

application of electronic monitoring, the consent of the person to the application of electronic monitoring if the person has applied for such monitoring.

Pursuant to the Minister of Justice Regulation (Prisoner's ...), the collection of information required for the character reference prepared by the prison will be organized by the prisoner's contact person, who, if necessary, will make inquiries to the inspection board. The latter consists of at least the prison social worker, psychologist, security specialist and health care professional. After a character reference is prepared, the contact person shall send it to the prison director or a person appointed by the director, who will contact the probation supervisor in order to get an opinion on the release. After getting the probation supervisor's opinion, the prison director or a person appointed by the director shall send the documents referred to in § 76 of the Imprisonment Act to the court of the location of the prison. Prisoner's own opinion/consent is required only upon the application of electronic monitoring.

As the workload of the courts upon settling the requests for premature release is very big, the terms after expiry of which a new request can be submitted, if a request is not satisfied, were extended with the Imprisonment Act which entered into force in 2009. Upon the application of electronic monitoring, a new possibility for release shall open only after the so-called usual term for premature release has come and at least six months after a decision to refuse the release has been made. If premature release with the application of electronic monitoring is not applied for (so-called usual premature release), the applicant may file a new request after six months after the entry into force of a ruling on refusal to release unless the court has prescribed a different term in the ruling (it can be both shorter and longer).

In case of a release judgement, a probationary period shall be determined for a released person during which time he/she is also subjected to supervision of conduct. Probationary period shall last for one year at least.

The biggest danger in case of premature release is the fact that the released person will commit a new criminal offence. However, just like it was indicated in case of the rulings included in this sample, the probation supervision linked with such a release will provide a possibility to maintain contact with people and contribute to resocialization. The latter is especially important when a person has been isolated for a long time.

Pursuant to § 76 (3) of the Penal Code, upon deciding the premature release of imprisoned person, the court shall take into consideration, among other things, the personality of the offender to be released, under which the risk of committing new criminal offences can be understood. Such provision is contrary to the dogmatics recognized in understanding the punishment according to which the personality of offender is not taken into consideration upon the imposition of punishment. The list included in § 76 (3) contains beside the personality of criminal offender as a wider term, also "his or her previous personal history and conduct during the service of the sentence, his or her living conditions and the consequences which release on parole may bring about for the convicted offender". These circumstances are taken into consideration upon the assessment of recidivism risk upon predicting the probability of further unlawful conduct.

6.1 Quality of risk assessment

Nearly half of the people who responded to the poll (60) had not participated in the premature release sessions in the capacity of a prosecutor or judge, thus the poll enable to assess in this respect the viewpoints of bodies conducting proceedings who have come into direct contact with the subject as well as the bodies conducting proceedings as bystanders.

First, researchers wanted to know how the bodies conducting proceedings evaluate the quality of risk assessment. Eleven respondents could not or did not want to give an evaluation to which extent does the court take into consideration a prisoner's recidivism upon premature release. The opinions

of remaining 49 respondents were almost divided in two – 25 respondents found that the recidivism risk is often underestimated; however, 22 thought that the assessment of recidivism risk is optimal. Two respondents thought that the court often overestimates the recidivism risk. Thus, similarly with the imposition of punishment it is seen in case of premature release that the possibility to underestimate recidivism risk is considerably higher than the possibility of overestimating it.

In case of this question the opinions differed considerably according to the respondents' personal experience. The majority (15 out of 19) of these respondents who in their practice had not participated in making a decision on premature release found that the recidivism risk is often underestimated. Only every third from these prosecutors and judges who had participated in making a decision thought that the recidivism risk is underestimated (10 out of 30). But there were more those who thought that the assessment is optimal (18). Two respondents who had themselves participated as judges in premature release thought that overestimation of recidivism risk often occurs; whereas they both thought that the reason to overestimation is overstatement of the committed criminal offence.

Researchers wanted to know separately which factor may influence the underestimation of recidivism risk in the opinion of bodies conducting proceedings. During interviews it was frequently said that the contact of prosecutors and judges with prisoners is very brief, probably due to a large number of cases to be heard, wherefore it is difficult for them to assess whether a person is ready to return to freedom as a law-abiding person. As the contact of body conducting proceedings with a prisoner is short, this is why the opinion given by the prison and probation supervisor is preferably trusted.

In a web-based poll it was further studied what are the specific circumstances which in the opinion of bodies conducting proceedings lead to the underestimation of recidivism risk.

Most respondents thought that the underestimation of recidivism risk is influenced by two connected factors – prisoner's conduct in prison and the opinion of prison on the prisoner.

Based on the interviews it can be said that **conduct in prison** was assessed at least from two points of view.

- On one hand it was found that bad conduct in prison restricts person's possibilities for premature release: *If somebody has disciplinary punishments, if these have been imposed and there has already been an offence against the person, then it will be out of the question that he will walk. (Extract from interview, judge)*
- However, on the other hand it was pointed out that good conduct in prison need not mean that the person will be able to cope the same way also at large: *But even if he has no disciplinary punishments, this does not mean it either that he is ready at once to go under probation supervision. In the meantime this clean conduct in the prison, impeccable conduct, in the meantime it may seem that he is simply used to this regime and is simply a smart convict who knows that: "I have to sit very quietly in order to be prematurely released". (Extract from interview, judge)*

At the same time, a person's activities in prison are not expressed only in terms of violations of discipline; for example, a prisoner can learn, participate in social programmes or work in the prison. The poll also studied how the bodies conducting proceedings understand the influence of these activities on a decision of premature release. It became evident that upon premature release the existence of afore-mentioned violations of discipline were still considered the most important thing, which was considered very important by more than half of the respondents. Participation in social programmes, working and obtaining education followed more or less on the same level.

In case of violations of discipline the respondents draw the attention to the fact that these violations are very different as to their nature and therefore should also be regarded differently. Not any disturbance is an indicator of high recidivism risk either.

You see his violations of discipline and what they have been, has he insulted somebody or has he really had some prohibited items there, some heating spiral for boiling water. I don't think that this possession of heating spiral shows that he will definitely come out and commit a new criminal offence. (Extract from interview, judge)

If you look and see that he's got 12 violations of discipline and it is really something like this that in a pioneer camp his sheet was not straight or such things ... Some person is simply so energetic and emotional that he is like that. He is not capable of totally obeying this strict regime there. (Extract from interview, judge)

Judges and prosecutors regarded obtaining education and working important both in the context of meaningful pastime and the context of future possibilities (education) and compensation of damages. Learning was partly valued even more than working, as learning requires deeper personal interest and it shows a person's will to continue a law-abiding lifestyle which was interrupted. However, participation in social programmes was also seen as a possibility "to score a point".

But the one who wants to score the points, he takes first – I go to programmes, don't throw the bread but instead of ... another person works hard, in his case all damages have been compensated, maybe I'll send my family some money ... Whether you have this social programme or not, but if you have paid up everything up to the very last cent what damages you have caused, paid all costs to the state, you save money for release, you have sent money for your child ... (Extract from interview, judge)

A judge and a prosecutor receive in principle all information on a prisoner's conduct from prison character references. In interviews, the thoroughness and richness of content of **prison character references** was highly valued, and their advantages in comparison with a probation supervisor's character reference were pointed out.

The prison knows this person. I have also always thought than when the prison is not supporting, then as a general rule I don't support either. If the can see it already ... This person's own talk, if you still can see that this is recidivism already and then he talks with you there, this no longer has any influence, you have already done everything yourself in order to be more strictly punished. (Extract from interview, prosecutor)

For me the prison character reference is more important [than the probation supervisor's opinion]. The probation supervisor checks his background, goes to the apartment, makes sure whether electronic equipment can be installed, are there any small children at home who could ... we are now talking about "the bracelet"... who could disturb or breaks this system there, or pets. Whether the apartment owner agrees to take him in, then he will examine the same sources that we have and form his/her opinion. If everything goes well, the probation supervisor has had the chance to talk to somebody also. (Extract from interview, judge)

At the same time, in the risk underestimation context excessive positiveness and favouritism of release was pointed out in interviews:

When they go from the prison here now, then how can you sign the release, if he has committed manslaughter three times, killed three people and he is brought to you after serving half of the time, super character reference, put you hands around him and give him a hug – dear man, how on earth did you end up in the prison. (Extract from interview, judge)

... some killer who has been sitting there for already ten, eleven years, committed the offence in a relatively young age and such a song of praise comes from the prison and exactly the same from probation supervision, then I am the last person who knows what kind of a person he is. But why then don't I trust these officials who tell me that he is a golden boy? But he will come out and kill somebody again after two weeks, although nobody could guess that this would happen. (Extract from interview, judge)

Because sometimes this talk in the character reference may be so brilliant ... He talks so convincingly and intelligently and is sensible in every way and then actually one sentence was enough ... where he got irritated for a moment and it could be seen how ...the whole bubble burst, behind it there was the same person who had committed this particular act. (Extract from interview, prosecutor)

*If it is still said that he is a tip-top A-student and he studies and dances and sings, plays the drums, acts and is very active and capable, then I have no reason to believe that he cannot cope at large.
(Extract from interview, judge)*

Bodies conducting proceedings value the opinion of prison because of its thoroughness, at the same time some prosecutors and judges are suspicious of prison character references. If a prisoner is released largely thanks to a positive character reference, the judge still bears responsibility for the release. Therefore, it is probably thought that relying excessively on the prison opinion leads to the underestimation of recidivism risk.

Eight bodies conducting proceedings mentioned as a factor leading to the underestimation of recidivism risk the consideration of these circumstances which refer to the prisoner's possibilities **to cope outside the prison**. Obviously this was meant that prisoners try to leave a positive impression about their possibilities to cope outside the prison.

If the person is a chronic thief and then ... „we are waiting for him at work“. Outside the decent people cannot find jobs and somebody is now waiting for such a systematic thief somewhere outside ... (Extract from interview, prosecutor)

Besides, there have been many cases in the judges' and prosecutors' practice when a person's possibilities of coping are in fact good, yet in spite of this he still commits new criminal offences.

Even today we are waiting for a boy ... serves a 5 years imprisonment, or he served, we released him nine months earlier. Character reference is good and family and everything, plus that he will cope and go to work. And he has ... been at large since July, it is August now, he has already committed two robberies, the court has already been approached with a request for arrest. So that, he didn't cope. (Extract from interview, judge)

The opinions of prosecutors and judges on factors influencing the recidivism risk were also studied with other questions; they were asked to evaluate what kind of importance would a respondent attribute to given factors upon premature release.

The respondents considered all factors important; however, bodies conducting proceedings would release with greater caution people who are addicted to drugs. Prisoner's relationships with close relatives were considered least important.

Comparing the opinions of these bodies conducting proceedings who had participated in the premature release sessions with the opinions of bodies conducting proceedings who had no personal experience it became evident that the first considered more important this whether a person has been imprisoned for an offence committed for the first time, and what was his conduct in the prison like.

The consideration of recidivism risk on the basis of rulings on premature release has been assessed below.

As the requests for premature release are adjudicated by judges in charge of execution of court judgments, there were relatively more judgements made by two judges among the judgements.

6.2 Analysis of rulings on premature release

First, it was studied to which extent the circumstances referring to the recidivism risk were set out in the rulings. For that purpose, possible circumstances were counted in the rulings.

There were six decisions among the rulings which did not set out any circumstance referring to the recidivism risk. In all six cases the person was refused to release – in four cases the person was not released because he himself did not want it; in one case the ruling would have entered into force after planned release of the person and in one case the release was only refused because the person did not have a permanent residence. In case of 80% of rulings, two to four circumstances referring to the recidivism risk were set out. Decisions including five and more circumstances were rather rare in

the sample. On the average, three circumstances referring to the recidivism risk were set out per one decision.

From the rulings in which the circumstances were mentioned (119), prior **criminal record** was mentioned the most (this was set out in 89 rulings); in case of people released for the first criminal offence this meant a bigger chance for release before the term, in case of repeatedly punished prisoners, however, this meant that they will remain in the prison to serve their sentence. **Conduct in prison** was considered nearly as important (78), less importance was attribute to **relationships with close relatives** and **assessment of one's own conduct**. The **least attention was paid to addiction problems**, probably because the addiction problem was set out primarily in case of these prisoners who were known to have alcohol or drug addiction, in case of other prisoners this was not considered worth mentioning. This is also confirmed by the afore-mentioned poll results according to which addiction is the main risk to which attention is paid upon premature release.

Very different factors were pointed out under **other circumstances** which could either increase or reduce a person's possibilities to be released from the prison. Two examples:

Among other things the judge considered as a circumstance supporting the release the fact that according to the prison chaplain, the prisoner is exceptionally musical and after taking up music (in the prison) considerable positive changes can be noticed in his conduct. (Harju County Court Ruling in Matter No. 1-08-6875)

The person had been punished in the prison pursuant to disciplinary procedure 17 times, including nine times when he was committed to a punishment cell for the violation of rules. On the other hand, the person had filed an application to get employed and had obtained education, among other things the speciality of a carpenter-mason, had participated in the project organized by an NPO and took up carpet-weaving. However, upon release, his prior criminal offence - rape of a minor - became the main obstacle, in case of which the court thought that premature release may invade the victim's sense of justice. (Viru County Court Ruling in Matter No. 1-08-13806)

All in all, by degree of thoroughness the rulings were divided in two groups of nearly equal size. In less substantiated rulings it was just limited to state the circumstances which were the preconditions for release; in most thorough rulings the risk both arising from the person and the environment were comprehensively analyzed, which contribute to or prevent the commission of new criminal offences.

Examples about rulings which were better substantiated:

The person had been repeatedly punished pursuant to criminal procedure, mainly for criminal offences committed in a state of intoxication. However, he was serving actual prison sentence for the first time, he followed the rules, in his own words is motivated to live in a law-abiding manner and go to see a doctor in order to get rid of his addiction problem. A job and a place of residence were also guaranteed him outside the prison. The court found that "his living conditions at large and preconditions for coping are good" (Tartu County Court Ruling in Matter No. 1-08-6306)

The person had been previously punished on three occasions, he was serving punishment for causing serious bodily injury. However, there were many factors supporting the release and managing the recidivism risk: permanent employment at large, motivation to change and a supporting social network. During imprisonment, there were no violations, he participated in social programmes. As alcohol use constituted an additional risk factor, the judge ordered "for the purpose of reducing the risks of committing a new criminal offence" an additional obligation not to use alcohol. (Tartu County Court Ruling in Matter No. 1-08-12368)

The person behaved properly in the prison, obeyed the rules; studied during imprisonment, also entered the university. After release, there will be a job, wife and two children waiting for him. He committed the criminal offences in a state of intoxication, has worked with the problem during imprisonment and declared a wish to participate in the AA support group outside the prison. Taking into consideration these factors it is found that in the court's opinion all this contributes to his law-abiding conduct in the future. (Viru County Court Ruling in Matter No. 1-08-12819)

6.3 Differences by type of judgement and length of imprisonment

Judges substantiate more these rulings in which they decide to release a prisoner. From the rulings in which 5 to 6 circumstances referring to recidivism risk were set out, in six of them it was decided to release the prisoner and in one ruling not to release. In rulings containing the decision of release, the judges pointed out on the average 3.4 circumstances referring to the recidivism risk and 2.3 circumstances in the remaining decisions.

It is difficult to point out a definite connection between the length of prison sentence imposed for criminal offences and indicated risk factors because the differences between four groups were not big in terms of the number of indicated circumstances. Still, it became evident that in case of the group containing the longest terms of imprisonment, the thoroughness of assessment was smaller than on the average.

6.4 Differences by type of criminal offences and the courts

The analysis made on the basis of types of criminal offences committed by prisoners showed that the type of criminal offence did not substantially influence the number of indicated risks. Risks were indicated the most in case of punishments imposed for driving a motor vehicle in a state of intoxication (§ 424 of PC). This can largely be explained by a fact that pursuant to the earlier wording of the Penal Code this act was punishable only as a repeated criminal offence and probably there were more alcoholic addicts among the people committing these criminal offence also that was also mentioned in the ruling with great probability. In comparison with other types of criminal offences less factors referring to recidivism risk were pointed out in case of offences against life.

From three county courts, the Tartu County Court rulings were substantiated the best in which on the average 3.2 factors referring to recidivism risk were pointed out; the least circumstances were pointed out in the Harju County Court decisions (2.2). The number of pointed out factors in the Viru County Court rulings was 3.0. This difference could have been affected to a certain extent also by this that the Tartu County Court rulings contained more rulings in which it was decided to release the person (See more specifically in the following subitem).

The richness of content of premature release rulings largely depends on a specific judge, as every judge has one's own custom how many and which factors the judge thinks important to point out. If no circumstances are pointed out in a ruling, it does not mean that the judge does not consider different factors when making the judgement – the judge simply need not write down the reasoning. At the same time, the substantiation of a ruling is probably not important if a prisoner himself/herself says that he/she does not want to be released. In general, the substantiation of a ruling may be considered important because of the following reasons:

- It supports uniform procedural practice in Estonia;
- If a prisoner is not released, the prisoner will get to know from the ruling what he/she has to change about himself/herself so that his/her possibilities for release would be better the next time;
- If a person is prematurely released from imprisonment, it is important to pay attention to this how the decision can be justified for the public so that people's sense of security is not reduced. If a judge does not substantiate the motives for premature release of a person who has been punished, for example, for murder or rape, the judge's choice in the public eye is probable less legitimate than in case of a substantiated ruling.

6.5 Repeated rulings on premature release

In order to assess to which extent does a specific court and judge influence the thoroughness of a ruling, the premature release rulings repeatedly made with respect to the same person were analyzed. Such rulings are made when a person is not released and the court will hear the release

once again later. Release may be heard both in the same court and in another one (if a person has been relocated in the meantime).

Four cases are described below in case of which the initial ruling was made in one court, and the subsequent one in another court.

Upon considering the release, the Harju County Court mainly relied on the person's repeated criminal record and unsuccessful outcome of prior probationary period. It was thought that these two circumstances refer to the dangerousness of the person and therefore the request for premature release was not satisfied.

First, the Tartu County Court evaluated the person's conduct during imprisonment - he had one disciplinary punishment in force, had studied in prison but not worked. At the same time, he had a supporting family outside the prison, a possibility and will to go to work, permanent residence, he also had remorse for his act. Because of these reasons the judge decided to satisfy the request for premature release (Harju and Tartu County Court rulings in matter No. 1-07-14014)

The person had been punished for several criminal offences including drug-related offences. Harju County Court judge substantiated the decision to refuse release on parole mainly with prior criminal record and disciplinary punishments imposed in the prison (incl. for using drugs). On the basis of these two circumstances the judge deduced that the person has not made necessary conclusions and thus would endanger the society's wellbeing upon release.

Tartu County Court relies upon making a ruling which satisfies the request for release once again on many circumstances. The person confessed his drug addiction and looked for help, participated in the NPO work. Upon release, he has material and moral support from his mother, as well as a possibility to go to work. The judge separately points out the impression he had during the court session that the prisoner really wants to continue a law-abiding life. The judge is also convinced that probation supervision would contribute in a better way to living a law-abiding life than unconditional release after 3 months. (Harju and Tartu County Court rulings in matter No. 1-07-8261)

Harju County Court refused to release a prisoner who had been convicted of murder. The court relied in the reasoning mainly on repeated criminal record and the fact that the crimes have become more aggravated during the time and the person had failed to pass the probationary period before.

Also the Tartu County Court decided not to prematurely release the person, however, giving more factors as reasons. The court drew attention to the person's alcohol problem, lack of residence outside the prison, bad relationships with family members, lack of permanent profession but, on the other hand, also to good and constructive conduct in the prison. Similarly with the Harju County Court, attention was also paid to prior criminal offences. (Harju and Tartu County Court rulings in matter No. 1-08-544)

The person had been convicted for robbery and larceny. It was found in the Harju County Court ruling that the person had been previously repeatedly punished, however, he had made no conclusions from this. Prisoner's prior conduct and violations of law referred to his dangerousness, wherefore the court did not release the person prematurely.

In the Tartu County Court, much more circumstance were taken as a basis upon hearing the matter. It was pointed out that the person has been previously repeatedly punished but for the first time with prison sentence. The person had been in prison for more than five years already during which time he had engaged in self-analysis, participated in social programmes and studied. Upon release, the person had specific plans and help in the form of relatives and friends. Based on this the court decided to prematurely release the person. (Harju and Tartu County Court rulings in matter No. 1-08-2536)

Based on these cases an impression remains that judges describe the acts of the same person and the risk of new criminal offences with different degree of thoroughness. However, as already said, the recorded conclusions do not enable to give a full evaluation of risk assessment thoroughness.

Neither can it be concluded that the recidivism risk is considered in one court more thoroughly than in another, however, it can be said that there are judges who substantiate rulings more thoroughly than the others.

6.6 Premature release in case of manslaughter

Prison sentences imposed for murder (§ 100 of the Criminal Code and § 113 of the Penal Code) are mostly one of the longest punishments. As this is a criminal offence in the first degree, then pursuant to § 76 (2) of the Penal Code, the prisoners have a possibility of release on parole only after a prisoner has served two-thirds of the term of the punishment (in case of usual release on parole) or half of the punishment (upon application of electronic monitoring). Thus, the person with respect to whom the decision is made has usually been in prison for a long time.

Due to the degree of severity of these criminal offences premature release is also a socially sensitive topic. Too early release may invade the society's sense of justice. Also the media pays great attention to the cases when people released on parole commit new criminal offences during their probationary period. The purpose of analysis is to show whether the court considers the release of people who have committed manslaughter somehow differently than in case of other criminal offences.

In the premature release rulings of killers on the average nearly as many circumstances referring to recidivism risk per ruling (2.8) were pointed out than in case of the overall sample of premature release cases. No circumstance had been indicated in 1 ruling, 2 to 4 circumstances were mentioned in 8 rulings, up to 4 circumstances were mentioned in 59 rulings and 5 to 6 circumstances were mentioned in 9 rulings.

If we were to give a summarized evaluation of the thoroughness of overall sample rulings and manslaughter sample rulings, it can be still said that there were more rulings which were well substantiated and paid more attention to the recidivism risk in case of manslaughters. It can also be said that in case of crimes of violence the judges consider the risks related to release more thoroughly than in case of other types of criminal offences.

From circumstances referring to recidivism risk conduct during imprisonment was pointed out most frequently, followed by earlier criminal record. In overall sample the order was opposite. Also, unlike the overall sample, in case of killers the assessment of one's own conduct was more emphasized than relationships with family members and friends. Evidently this refers to the fact that killer's attitude towards serious criminal offence committed by him/her is more important than in case of other criminal offences which do not have so severe consequences.

Similarly with the overall sample also in case of manslaughters the Tartu County Court rulings were more thoroughly substantiated than the Harju and Viru County Court rulings. If 4.0 circumstances per ruling were pointed out in the Tartu County Court rulings, then 3.2 in the Viru County Court and 2.0 in the Harju County Court ruling were pointed out.

Examples from rulings:

The court points out as a positive circumstance the fact that the person has behaved decently during serving the sentence, has reevaluated his earlier life and is motivated to behave in a law-abiding manner; he has a partner and a child outside the prison to whom the prisoner wants to commit. At the same time, the person has been previously punished 5 times, he committed the last criminal offence (manslaughter) only 16 days after having been released from serving the previous sentence. Also a social apartment belonging to the Haanja Rural Municipality has been marked as his possible residence, the Rural Municipality does not agree with the person starting to live there. There is also no possibility to start work at once. Therefore, the court finds that in such a situation the risk that new criminal offences will be committed is very high. (Tartu County Court rulings in matter No. 1-08-11332)

Besides the lack of job and permanent residence after release, the court points out the following circumstances: the person abuses alcohol which leads to the loss of self-control, there is virtually

no supporting social network, therefore the risk that new criminal offence will be committed is high. In addition, the person has been previously punished pursuant to criminal procedure on three occasions and violated the rules of conduct which refers to the fact that he has not made necessary conclusions. (Viru County Court rulings in matter No. 1-08-8912)

The person's prior criminal record and the fact that he is in prison for the first time is pointed out in the reasons of the court. In prison the person has committed 15 violations of discipline, thus he is constantly breaking the rules. Other factors referring to the risk are not pointed out, the remaining part of the court's position is formal. (Harju County Court rulings in matter No. 1-08-5831)

Similarly with the overall sample the rulings in case of which a person was released were substantiated considerably more thoroughly than the rulings in which it was decided not to release a person (average number of circumstance respectively 3.1 and 2.6). One reason to that is definitely the heightened interest of the media and society in premature release of a person who has committed a serious offence against the person.

7. Sources used for the assessment of recidivism risk

One of the purposes of the analysis was to study which sources do the bodies conducting proceedings use upon the assessment of recidivism risk and what kind of obstacles do the bodies conducting proceedings come into contact with in order to get information which would enable to define the recidivism risk.

During all three focus group interviews, the punishment register was pointed out as the main universally used source. This once again refers to the fact that upon assessing the recidivism risk most important thing for the bodies conducting proceedings is information on criminal record. Prior criminal record was the most important criterion upon imposing the punishment, terminating the proceedings and arresting.

Besides the punishment register, also the examination of facts relating to the criminal offence, and in case of a previously punished person also the examination of decisions made with respect to the person was considered important.

And if you look at one decision ... look at another – exactly the same handwriting – and look at the third one, again the same handwriting, then you know that he's got ... this "established behavioural pattern". That he is using the same scheme, the same style, the same ... stylish person in short. (Extract from interview, judge)

Besides the extract from the punishment register, also the Tax and Customs Board data on a person's income declared the previous year was mentioned, which show whether a person has received any official income. This helps to assess better the person's possibilities to cope outside the prison without committing any new criminal offences. Information on a person's job and residence relates to this.

It was found during all interviews that the bodies conducting proceedings can choose between the biggest number of sources in case of premature releases. In addition to the material submitted by a prison, a probation supervisor also gives his/her opinion on premature release. Some people who were interviewed considered the latter from these two less important because prison officers have a closer and more thorough contact with a person serving the sentence.

During two interviews, two information channels not referred to in law were also mentioned – sometimes prison social workers or probation supervisors have contacted the court on their own initiative in order to give additional information, the prison chaplains have done the same thing before hearings of premature release.

... the prison social worker phones before the premature release approaches. We can call this influencing the court but ... the social worker has talked with him for hours and knows what kind of a person he is, and also knows this that the probation supervisor has not maybe written

*everything there what the situation is actually like. It is very pleasant to get this information.
(Extract from interview, judge)*

And sometimes, it is very good in my opinion, if a probation supervisor phones that: "Oh, I can see that you have a new case, he has, for example, committed during the probationary period but he is so good and does this and this and this..." Or some community service has been imposed on the person and then he phones and talks about the person. (Extract from interview, judge)

... the chaplain phones and asks that what's the situation, is it necessary for him also to attend the court session because for some reason a very close contact has formed in the prison, trust has formed and the person very much relies on this chaplain. (Extract from interview, judge)

Using people personally connected to criminal offenders as information source was mentioned during two interviews.

Sometimes it's like this that family members come here. We wait until he comes up, then his mother or father starts to talk there that it's like this that everyone agrees to take him back with them. Then you talk with them off-the-record, ask where do they live and what conditions you live in and how long have you lived together before. You do this what is actually not allowed but quite frankly is not quite prohibited either. You don't drag this probation supervisor here, because he/she also has a lot work to do ... Sometimes you can talk with them and this is important information. If something has changed considerably for the better in that family and they have not communicated with that guy in the prison and then still started to communicate in the prison and agree to take him in and the person also starts to have a hope that I have a place to go to. These things are very important, in term of the source. (Extract from interview, judge)

Extraordinary reports were separately pointed out as a very good information material which probation supervisors prepare on minors. According to the opinion of bodies conducting proceedings, information received from these reports is thorough and versatile in terms of used sources. Unlike, for example, the materials gathered by a defence counsel, their great advantage is also neutrality upon gathering and presenting information. During one interview, these reports were considered the best sources on the accused at trial which, if wider used, would have a very good effect on the quality of procedural decisions.

... they are doing a rather good job. ... first, they phone, go and see people, take the time and examine, this is altogether a different proceeding. /.../ But this is of course the best material that is available at all, from probation supervisors. (Extract from interview, judge)

During one interview a possibility to contact local government was also mentioned as a source that can provide information on a person's social background, and on a few occasions also the material received from experts' reports.

8. Obstacles upon assessment of recidivism risk

People participating in the interviews pointed out the shortage of time as the main obstacle upon assessment of recidivism risk – in order to get thorough information on a person it is necessary to communicate with different authorities which is given up because of shortage of time. Insufficient information on a person, however, leads to decisions with lower quality.

Usually, there are very many cases in the Prosecutor's Office, thus you don't have time to dig into the case to phone and find out about it. This is especially good, if they do it themselves, the probation supervisors, if they see that there is reason to, then they phone, ... they should do it more often, if they find a reason. (Extract from interview, prosecutor)

However, one judge found that although there is little time, he is not conscious of information shortage; although the circumstances could be definitely found out more thoroughly, making a final decision based on these is always largely a discretionary decision. It is difficult to say when materials for giving a right evaluation have been sufficiently gathered.

According to the opinion of bodies conducting proceedings, more extensive use of probation supervisors' reports would help to alleviate the need to turn to different sources. At the same time,

no possibility for that was seen, as it was found that probation supervisors are overloaded with work as it is.

Besides saving the time of prosecutors and judges, the independence of information source was considered as the advantage of probation supervisors' reports. Unlike a defence counsel who could also gather such information, a probation supervisor, as an official, has no interest in varnishing the truth, thus the information is more versatile and reliable.

Several people who were interviewed found that primarily defence counsels should alleviate information shortage concerning the factors reducing recidivism risk. However, shortcomings in the defence counsels' work were pointed out; for example, it was found that in districts where there are many appointed defence counsels the situation upon assessment of recidivism is worse. In the participant' opinion the reason to this is the fact that the appointed defence counsels are paid remuneration based on the cases, not the hours of labour. In case of a low remuneration, a lawyer is not motivated and also it is not possible for the lawyer to find out about the factors reducing recidivism risk and collect evidence on them.

In adversarial proceedings the collection and presentation of data characterizing a person has remained in the background. Mostly it is limited to an extract from the punishment register. Also the probation supervisors' pre-trial report forms (of course, it these have been asked for and these reports have to be requested seldom) nowadays contain somehow too little information. And so it happens that the court has to decide on recidivism risk based on very insufficient data. Assessment only on the basis of an extract from the punishment is a slippery road." (Extract from interview, judge)

And if defence counsels have been appointed here then ... probably it is not possible for them either because they have to be randomly in different courts, investigations ... (Extract from interview, judge)

In addition to the lack of time and information also the lack of knowledge required for the assessment of recidivism risk was pointed out in the web-based poll; two respondents thought it necessary to organize training and schooling. It was found that the insufficiency of information also manifests itself in inconsistent practice.

It very much depends on the personality of this official or prosecutor or judge as well. ... we approach these matters very differently. Some are like this that "Unquestionably into the prison and let him sit there and he will not get out." ... sometimes it comes up, however, that well, you release so many and this one only so many. How can it be then that this percentage is so different? Still, it is. (Extract from interview, judge)

You do know in case of a judge, don't you, that some is exceptionally lenient, some is exceptionally strict, some is ... exceptionally just. (Extract from interview, prosecutor)

As we have so wide hands then ... and no penal policy, there is no such coordination. .. I'll give you one example: when I was working in X⁹ court system, then ... when I went in general proceedings... then 99% the judge imposed this punishment that I asked for in the court. If I now work in the Y court system then I am telling you that this percentage is zero – zero! Never, not in one general proceeding up to this day has any judge yet imposed this punishment that the prosecutor has asked for. Now there's a question that how this penal policy could be shaped at all? Who is this shaper in a situation where we all are ... hands are so free, aren't they – a judge has to decide for himself/herself, and that's right too. But ... when I'm reading the court judgement in which I have tried to substantiate the recidivism risk or whatever, that why do I want such a punishment. ... A situation is formed that a person commits one act in East-Viru and then commits here a similar act – the punishment is completely different. Is it right or wrong, I cannot say. Estonia is so small that maybe this is the way it has to be, I cannot say. (Extract from interview, prosecutor)

Lack of time was separately mentioned also in case of premature releases in case of which a big number of imprisoned people per judge in charge of execution of court judgments was complained about. Therefore, it is often impossible for judges in charge of execution of court judgments to delve

⁹ Records enabling the identification of respondent have been removed from the quote.

into the case, not to mention requesting or obtaining additional information. This, however, may cause mistakes upon risk assessment.

But yes, it's a shame that they come in so many numbers... two people work with this in our court, this has become such a conveyor that now it is very difficult for us to be responsible for that that the press writes something like you are an accomplice to a murder, you should almost hang yourself and shoot yourself. I'm definitely not going to do that! Whether it has to be such a conveyor this is a very big question. If a very bad character reference comes from the prison, then in my opinion it was right when the prison employees decided whom to propose and whom not to. They can see them, they know them. /.../

Yes, if there would be at least some kind of a committee decision, let's say in that bunch of probation supervisors, who knows this background and then they will decide – let's submit these-these-these but not submit these-these-these. Why do we have to see those who have, for example, beaten somebody up in the prison – he has a new criminal case in which proceedings are conducted, no, we have to hold a court session, we have to talk with him and discuss whether we will set you free or not. Good heavens! /.../

... the man is accused of murdering his former business partner, a woman ... He had other sections as well, these won, the section concerning the murder was cancelled. He is serving his sentence, is sent to the court for deciding the premature release, whereas his murder trial is still unfinished. Well, what are we talking about, right? In my opinion this should be quickly changed ... then there would be more time for those who really deserve that this matter is considered. (Extract from interview, judge)

If it is like this that we do it in large numbers then a judge could adjudicated it by way of general written procedure, let the prosecutor protest if he/she wants. Examines these cases, and it is good that I can't see the bloke because this is evidently not important if it has to work in five minutes. I don't see him, I only see this paper and decide on the basis of the paper and anyway the computer could soon do it. You enter the data, the computer analyzes it, and I believe that this should be possible. ... Yes, and if we don't want to hear out the person and if we process these matters pretty damn quick, then if we don't want the person, maybe soon the court is not needed either. It is also put in that the person has been punished for four times, this is the section, this is the subsection, how many victims? – four [years], if it is eight, then he gets more, the computer will calculate...(Extract from interview, judge)

As one solution to reduce the number of prisoners arriving for premature release, the bodies conducting proceedings proposed the making of pre-selection among people applying for premature release.

In case of release on parole the recidivism risk could be assessed already in prison and not to submit for release people who have been punished up to ten times by the court and people who have violated rules in the prison, for example, 20 times. (Extract from interview, judge)

It was pointed out in connection with the same problem that the matter of premature release is heard in case of prisoners who themselves even do not want to be released.

... In case of prematurely released prisoners – he will call you names in your face that why did you drag me here, I didn't express any wish. I say: "Look here, it doesn't depend on you, we simply have to." – "I don't want to talk to you anymore at all." – "Okay, if you don't, then you don't but do I understand you that you do not want to be prematurely released?" "That's right, I don't want to." – "Why don't you?" – "I have nowhere to go." – "Okay then, don't go!" (Extract from interview, judge)

References can be found here:

www.just.ee/recidivism