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## **Relevant Issues of the Commissioning and Carrying out of Forensic Psychiatric and Forensic Mental Health Assessment in the Criminal Procedure of Latvia**

**Abstract:** The high quality of pre-trial and judicial criminal procedure depends on the widespread use of data of technical, natural and other sciences for the purpose of solving crimes.

The goal of the research is the search for and determination of modern ways and means of optimizing the activity of persons directing the process, judges, prosecutors and investigators, in solving the tasks of the commissioning and carrying out forensic psychiatric and forensic mental health assessment in the course of the investigation of crimes.

Based on the results of this research, conclusions are drawn, and suggestions are made to improve the Criminal Procedure Law (Latvia), related to the commissioning and carrying out of forensic psychiatric and forensic mental health assessment.

**Keywords:** criminal procedure, Criminal Procedure Law, expert, forensic psychiatric assessment, forensic mental health assessment

### **Introduction**

The goal of writing the article is the search for and determination of modern ways and means of optimizing the activity of persons directing the process, judges, prosecutors, and investigators, in solving the tasks of the commissioning and carrying out of forensic psychiatric and forensic mental health assessment in the course of the investigation of crimes.

The objectives of the research are: determination of the nature, objectives, signs and principles of assessment in criminal procedure law; consideration of the pro-

cedural position of an expert in the formation of an opinion; improvement of the procedural form of the commissioning and carrying out of forensic psychiatric and forensic mental health assessment.

Methods of research: comparative and legal, logical and legal, statistical, analytical.

Human rights and freedoms are protected by various legal means. The criminal law should be considered one of the legal ways to protect constitutional human rights and freedoms, which is the firmest state response to the facts of the commission of a crime and is carried out using measures of criminal law, both compulsory and encouraging (stimulating) in nature.

A systematic study of criminal law provisions concerning the protection of the individual, his/her rights and freedoms allows us to express our own opinion on the controversial issues of qualification, give a critical assessment of a number of these norms, and, consequently, make suggestions for improving these standards and the practice of their use.

## **1. Characterization of Forensic Psychiatric and Forensic Mental Health Assessment in Criminal Procedure**

The essence and significance of forensic psychiatric and forensic mental health assessment in the process of proving from the point of view of criminal procedure, forensic science, forensic medicine, forensic psychiatry, and forensic psychology have been examined by scientists, and practitioners of law enforcement institutions and other areas in many countries.

In criminal procedure law, the concept of assessment and its implementation can be used in two meanings – narrow and broad. Assessment in the narrow sense is the activity of an expert or commission of experts on conducting research and the formulation of expert conclusions. The specified activity is carried out by an expert (or experts) on behalf of the investigator (and at the stage of the trial – the court). The carrying out of an assessment in the broad sense is a system of procedural actions aimed at obtaining an expert opinion as evidence.<sup>1</sup>

The study of the provisions of forensic psychology and forensic psychiatry is required to analyze the influence on expert opinion, the structure and content of expert knowledge, and the inner conviction of the expert.

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1 Ш.Н. Хазиев, Уголовно-процессуальное право Российской Федерации: учебник. – 3-е изд., Москва 2011, p. 403. [Xhazijev S.N., Ugolovno-processualnoje pravo Rossijskoj Federaciji: uchebnik - 3-e izd, Moskva 2011].

Everyone shall be presumed innocent until found guilty according to law.<sup>2</sup> Therefore, in the course of a pre-trial and judicial investigation of a criminal case, it is important that the criminal procedure is conducted in compliance with internationally recognized human rights without the assumption of the unjustified imposition of criminal procedural obligations or disproportionate interference in personal life.<sup>3</sup>

It should be noted that in forming the expert's opinion as a means of proof, the personality of the expert plays a role, as well as his/her inner conviction and legal awareness.

In the Latvian Criminal Procedure Law, article 193 stipulates that the examination is an investigative action that is carried out by one or several experts on behalf of the person directing the process and whose content lies in the assessment of the object submitted for assessment in order to find out the facts and circumstances that are relevant to the criminal procedure about which an expert opinion is given.

The grounds for the commissioning of an assessment are circumstances when it is necessary to conduct a study in order to clarify issues that are relevant to the criminal procedure, in which special knowledge is used in any branch of science, technology, art or craft.

The choice of a specific form of using special knowledge should be tactically and organizationally justified. The main role here is played by the evidentiary value of the established circumstance.<sup>4</sup>

The basis for the commission of a forensic psychiatric assessment can be the doubts of the person directing the process in the psychic fullness of the person if there is a doubt about the legal capacity of the detained person, or about the possibility of the victim or witness to adequately testify in the criminal procedure. A forensic psychiatric assessment can determine whether a person was ill during the commission of a criminal act with any mental illness; if a person was ill with a mental illness during the commission of a criminal act, could this person be aware of his/her actions and supervise them, or should these allegedly incriminating actions be considered to have been committed in a state of responsibility; at the moment, the subject is suffering from a mental illness or he/she has mental abnormalities, and whether the person can be aware of his/her actions and manage them.<sup>5</sup>

Forensic assessment is an independent procedural form of obtaining new evidence and verification of evidence in criminal procedure.

2 Latvijas Republikas Satversme. Spēkā no 07.11.1922. Latvijas Vēstnesis, Nr. 43, 01.07.1993. Ar grozījumiem no 14.06.2016.

3 Kriminālprocesa likums. 2005. gada 21. aprīlis, spēkā no 01.10.2005., Latvijas Vēstnesis Nr. 112 (4918) ar grozījumiem no. 01.01.2019.

4 Е. Ищенко, Криминалистика в вопросах и ответах, Москва 2018, p. 166. [Ishchenko E.P., Kriminalistika v voprosach i otvetach, Moskva 2018].

5 A. Kavalieris, Z. Sočņeva, O. Teteris O. u.c., Tiesu ekspertīze Latvijā. Rokasgrāmata policijas, prokuratūras un tiesu darbiniekiem, Rīga 2001, pp. 76-77.

In paragraph 4 of the 12th article «Guarantees of human rights» of Latvian Criminal Procedure Law, it is noted that an official conducting a criminal process is obliged to protect the privacy and financial secrets of a person. Information about them is allowed to be obtained and used only if it is necessary to clarify the circumstances of the criminal case.

Confidentiality is a prerequisite for the collection of materials for carrying out forensic psychiatric and forensic mental health assessment in criminal procedure.

Part 5 of Article 12 of the CPL states that an individual has the right to demand the criminal case does not include information on the private life, commercial activity and property status of that person or their fiancé(e), spouse, parents, grandparents, children, grandchildren, brothers and sisters, as well as the person with whom the corresponding person lives together and with whom s/he has a joint (undivided) household (hereinafter referred to as relatives) if this is not required for a fair settlement of criminal and legal relations.

In addition, paragraph 6 of part 5 of article 10 of the law “On the protection of patient data”<sup>6</sup> states that the court, prosecutor’s office, police, state inspectors for the protection of children’s rights, orphan’s court, state probation service, ombudsman, as well as pre-trial investigation authority — are to perform the functions prescribed by law.

Thus, the Latvian legislation enshrines confidentiality issues in carrying out forensic psychiatric and forensic mental health issues assessment during the investigation of criminal procedures.

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6 Fizisko personu datu apstrādes likums. 2018. gada 21. jūnijs, spēkā no. 05.07.2018, Latvijas Vēstnesis Nr. 132 Ar grozījumiem no. 31.05.2019.

Tasks solved by forensic experts during forensic psychiatric and forensic mental health assessment are determined by the possibilities of researching the object and its subject.

A correct solution to the issue of the further procedure for the criminal procedure and the need to apply compulsory medical measures to a person in case of doubt in the mental state of a suspect, accused, victim or witness is impossible without the commissioning and carrying out of the forensic psychiatric assessment.

If the person directing the process has doubts about the mental state of the suspect, accused, victim or witness, s/he directs him/her to a forensic psychiatric assessment, which is carried out only by experts who have knowledge in the field of psychiatry.

Forensic psychiatric assessment is a special study conducted by one or a group of forensic psychiatric experts in order to give an opinion on the mental state of a subject in a criminal procedure.

Regarding the carrying out of a forensic psychiatric assessment, there are rules of the Cabinet of Ministers No. 695 of 13 November 2018. The object of the assessment is an individual, specified in the decision on carrying out the assessment, his/her medical documentation, criminal cases, cases on an administrative offence or civil cases, as well as, if necessary, other objects, the study of which can give answers to the questions that are specified in the decision on the commissioning of assessment.<sup>7</sup>

Preparation for the commissioning of a psychiatric or mental health assessment, like any other assessment, begins with an assessment of materials of the criminal case and an analysis of the information available to the person directing the process for the commissioning of the specified assessment.<sup>8</sup>

Forensic psychiatric assessment can be carried out on an inpatient and outpatient basis. The forensic psychiatric assessment is carried out on an outpatient basis in the presence of the subject under investigation in a medical institution, in the office of the investigator, or in court. In some cases, a forensic psychiatric assessment can be carried out at the location of the tested person if it is difficult to transport the tested person to the assessment facility, due to the state of health of the tested person or as a safety measure.

Among persons committing murders, compared with other subjects of crimes, a relatively large number of people have mental disorders.<sup>9</sup> The public opinion formed over centuries is that a perfectly normal person, i.e. a person without men-

7 MK noteikumi Nr. 695 "Tiespsihiatriskās ekspertīzes veikšanas kārtība" ("LV", 226 (6312) 15.11.2018).

8 Н.Н. Егоров, Е.П. Ищенко, Руководство к производству следственных действий, Москва 2017, p. 119. [Yegorov N.N., Ishchenko E.P., Rukovodstvo k prizvodstvu sledstviennykhdeystvij, Moskva 2017].

9 A. Kavaliera (ed.), Latvijas Policijas akadēmijas autoru grupa vadībā, Kriminālistika, III daļa, Rīga 1998, pp. 20-21.

tal disabilities, cannot take the life of another person, and therefore, in almost every murder case, a forensic psychiatric assessment is mandatory.<sup>10</sup>

## **2. General Provisions on Conditions for Conducting a Comprehensive Forensic Psychiatric and Forensic Mental Health Assessment**

The subject of any forensic assessment is determined by the subject of that science which is basic for it. The general subject of psychological assessment is understood to mean individual psychological attributes, mental conditions and processes.

Psychological research can provide evidence in a case during which significant circumstances are established for the case. The legal significance of circumstances is determined by the court based primarily on the presence of an objective connection with the facts of the subject of proof.

The subject of a forensic mental health assessment is the clarification of the possibility of the interrogated person, due to individual characteristics of the course of mental processes, to correctly perceive, store in memory and reproduce information about the facts included in the subject of proof.

Forensic mental health assessment is the main channel for introducing the achievements of psychology into forensic practice. This research is appointed and carried out in compliance with certain legal norms based on the use of special psychological knowledge, to which the law attaches importance to the source of evidence or the means of proof.<sup>11</sup>

Comprehensive assessments are carried out by experts-specialists from various branches of scientific knowledge. Forensic psychologists usually conduct a comprehensive assessment in conjunction with forensic psychiatrists and forensic doctors. Comprehensive assessment is an assessment in the implementation of which several experts of various specialties or narrow specializations (profiles) participate. A comprehensive assessment is commissioned (Article 199 part 1 of the CPL) if it is necessary to clarify a matter of importance for the criminal procedure, and one object or several objects are subject to investigation by experts from various disciplines.

Part 2 of Article 199 of CPL determines that experts conducting a comprehensive assessment submit a joint opinion, and part 3 of the same article states that a separate conclusion can be submitted by an expert who does not agree with the joint conclusion.

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10 J.F. Nijboer C.R. Callen, N. Kwak, *Forensic expertise and the law of evidence*, North-Holland, Amsterdam, Oxford 1993, p. 91

11 J.D. Lieberman, D.A. Krauss, *Psychological expertise in court. Psychology in the Courtroom*, England 2009, p. 17.

Despite the fact that the expert's opinion represents the result of a scientifically based study, it does not have an advantage over other evidence.<sup>12</sup>

It should be agreed that the expert's opinion is subject to assessment by the person directing the process, i.e. the investigator, the prosecutor, the judge on a common basis.

The goal of a comprehensive psychological and psychiatric assessment is to make it more differentiated than when conducting a forensic psychiatric assessment, an assessment of the individual ability of the subject to fully recognize the importance of his/her actions and to determine to what extent he/she could control them.

The decision on the commissioning of the assessment is a binding legal document and cannot be replaced by another (cover letter, list of questions to experts, etc.).

### **3. The Procedural Order of the Commissioning and Registration of an Assessment**

The procedural order of the commissioning of an assessment is defined in article 200 of the CPL, and the commissioning of a forensic psychiatric assessment of a suspect or accused is defined in article 596 of the CPL.

The implementation of an assessment is one of the most complex investigative actions aimed at obtaining and verifying evidence. In all the diversity of assessments, the following general rules must be observed in their commissioning and implementation.

The assessment is carried out on the initiated criminal procedure. Its necessity must be proved. The arbitrary, rash commissioning of an assessment is not allowed, since its implementation significantly affects the rights and interests of participants of a criminal procedure during the assessment, and in some cases limits them. The ground for the commissioning of the assessment is the discovery of the circumstances for the study and understanding of which knowledge is needed that go beyond legal knowledge. In these cases, the law grants the person directing the process the right, and in some cases, as the commissioning of a forensic psychiatric or forensic mental health assessment, imposes an obligation to commission an assessment.

Two procedures have been established for the commissioning of a forensic psychiatric and forensic mental health assessment, in the pre-trial process – by the decision of the investigator, and by the decision of the court to consent with the request of the investigator to commission an assessment. The legal basis for the commissioning of an assessment in a pre-trial investigation is the issuance of a decision on the commission carrying out the assessment by the investigator or judge. The investigative procedure involves the issuance of a decision on the commissioning of an assess-

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12 И.В. Данько, Уголовный процесс. Досудебное производство, Минск 2016, р. 229. [Danko I.V., Ugolovnyj process. Dosudiebnoje proizvodstvo, Minsk 2016].

ment, before which investigative actions must be carried out, the goal of which is to prove the need for assessment.

In the process of disclosing a criminal act and investigation, as well as in imposing punishment for a committed criminal act, the person directing the process may order a forensic psychiatric assessment. A forensic psychiatric assessment can only be carried out when there is a decision on carrying out this assessment.

A forensic psychiatric assessment is mandatory in order to establish the mental state of a suspect or accused, or the mental state of such a person in relation to whom the legal proceeding is carried out to impose compulsory medical measures, if the person directing the process has reasonable doubts regarding the sanity of the relevant persons; the person's ability to adequately perceive and remember the facts relevant to the case and testify about them, as well as his/her ability to independently exercise his/her rights and legitimate interests in the criminal procedure, if there are reasonable doubts about this.

According to article 596, the CPL directing the process shall order a forensic psychiatric assessment of the suspect or the accused if information has been received in the criminal procedure that the person suffering from a mental disorder committed a criminal offence, being in a state of insanity, or fell ill after committing a criminal offence.

The decision on the commissioning of the assessment consists of three parts: introductory, descriptive and resolute. In the introductory part of the decision, the date and place of its adoption, the position, rank and surname of the investigator, the number of the criminal case by which it was appointed, the type of assessment (method of its implementation) – outpatient, inpatient, part-time, posthumous shall be indicated. A brief description of the crime is included in the narrative part; the evidence is weighted so that it justifies the need for an assessment, and the type of assessment. In the narrative part, the legal basis for the assessment is indicated; a reference is made to the articles of the law. The substantive or operative part establishes the institution that will be entrusted to carry out the assessment or the person involved as an expert, the questions are formulated, materials presented to the expert are listed, personal data of the person who is subject to the investigation, the procedure for warning the expert about criminal liability for refusing to give an opinion and for giving a false opinion, the position, rank and surname of the investigator, and the signature of the official are determined, if in the decision the specific expert who is entrusted with the implementation of the assessment is not indicated or if, on behalf of the person directing the process, the assessment is carried out by an expert institution. In the decision, it is important to correctly formulate the expert task using questions that are subject to expert resolution. Questions should be clear, understandable and specific, not allowing for ambiguous interpretations, asked in sequential, logical order, first general questions, then detailed questions. Questions must also comply with the materials of the criminal case, the law, the provisions of

psychiatric science, and not go beyond the knowledge of the expert. The accuracy and procedural evaluation of the expert's opinion often depend on the wording of the questions.

If a forensic psychiatric assessment is scheduled, the accused is not notified of the decision to order the assessment in the event that due to his mental state of health this is not possible.

The decision on the commissioning of the assessment is a binding legal document and cannot be replaced by another.

The court makes the decision on issues that must be resolved in preparing a criminal case for consideration at the court hearing, during the trial of the case, and transferring the sentence for execution.

The investigator is obliged to draw up a report on the impossibility, due to the accused's mental state, to carry out investigative actions with his/her participation. In cases when, for the above-mentioned reasons, the accused is not familiarized with the decision on the commissioning of a forensic psychiatric assessment, the defence lawyer, whose participation in the case is mandatory (article 91, 598 of the CPL), familiarizes him/her with the decision.

The importance of the evidence obtained using the assessment depends on the nature of the questions asked by the expert, on the materials transferred to the expert, on the expert's professional knowledge, and on the quality of the actions in the assessment process. The use of special knowledge can be crucial for a case when it is necessary to resolve some issues in order to correctly state the *corpus delicti*, or when criminal liability depends on the mental state of a person, as well as to state the person's ability to testify. The facts revealed as a result of carrying out the assessment can contribute to establishing circumstances characterizing other signs of *corpus delicti* and the person who committed it, including those that are important for the criminal legal assessment and the correct qualification of the crime to determine the guilt, the motives, and goals of the crime.<sup>13</sup>

In order to use the expert's opinion as a source of evidence in the case, it is necessary to properly assess it.

The expert's opinion, as evidence in a criminal case and evidence of the facts, which contains the opinion is subject to the general order and rules of the evaluation of evidence.

Evaluation of the fact of evidence which contains the expert's opinion, the assessment of the findings given by the expert, and the statement of facts is carried out on the statement and the validity of conclusions and internal logic of the expert, as well as in accordance with or contrary to other stated facts. The expert's personal assump-

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13 А.Ф. Вольнский, В.П. Лавров, Криминалистика: учебник для вузов, 2-у изд., Закон и право, 2008, p. 470. [Volynskij A.F., Lavrov V.P., Kriminalistika: uczebnik dla vuzov, 2-e izd., Zakon i pravo, Moskva 2008].

tions cannot be included in the opinion. They cannot justify the opinion and personal assumptions, and do not have the value of the evidence.<sup>14</sup>

Structurally, the expert's opinion is divided into three parts: introduction, investigative part, and conclusions.<sup>15</sup>

The expert's opinion is a means of evidence in the criminal procedure.

The CPL clearly regulates the procedure for the commissioning of an assessment, the content of the decision on the commissioning of an assessment, the procedure for presenting an expert's opinion, and the significance and evaluation of the expert's opinion as evidence in a criminal case. This detailed regulation in the Act is required because according to the results, the expert's opinion in the criminal procedure receives new evidence important and sometimes decisive in the investigation of a criminal act, but only a specialist can state it.

Assessing the opinion of the expert, the following types of opinions take place in practice: categorically affirmative, categorically negative, and hypothetical.

The results of a forensic psychiatric and forensic mental health assessment in the criminal procedure have evidentiary value in the pre-trial investigation and in court. In practice, the expert opinion when conducting this type of assessment is fully taken into account by the court when imposing a punishment or exemption from it, since the forensic psychiatric and forensic mental health assessment primarily reflects the state of health of the suspect or the accused.

When considering a criminal case on the imposition of compulsory measures of a medical character the court must decide: whether a criminal act was committed; whether this act was committed by the person against whom the process is being conducted; whether this person committed a criminal act while being sane or in a state of insanity, and whether s/he had mental disorders at the time of making a decision; whether the person fell ill with a mental disorder after committing a criminal act and whether this disease is temporary and as a result, the trial should be suspended; whether the person is a danger to society; what measures of a medical character should be prescribed in relation to him/her; whether it is worth satisfying the application for damages, to whom and to what extent; from whom the procedural costs are recovered; what to do with material evidence (article 604 of the CPL).

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14 A. Liede, *Latvijas PSR Kriminālprocess (vispārīga daļa) un tiesu pierādījumi*. 1970. gadā publicētas grāmatas faksimilizdevums, papildināts ar zvērināta advokāta Vara Klotiņa priekšvārdu, Rīga 2010, p. 376.

15 А.Р. Шляхов, *Теория и практика криминалистической экспертизы*, сборник № 9-10. Государственное издательство юридической литературы, Москва 1962, p. 426. [Schlahov A.P., *Teoria i praktika kriminalisticheskoj ekspertizy*, sbornik nr 9-10. Gosudarstvennoje izdatielstvo juridicheskoj literatury. Moskva 1962].

## Conclusions

The result of carrying out a forensic psychiatric and forensic mental health assessment are – the expert's opinion is an important and integral part, as proof in qualifying an alleged criminal act to a person, the use of further procedural steps in conducting pre-trial proceedings, and making a final decision by the court in a criminal case.

Knowledge of the fundamentals of the forensic psychiatric and forensic mental health assessment enhances the professional training of the person directing the process, the investigator, the prosecutor, the judge, as well as the lawyer.

Expert opinion on forensic psychiatric and forensic mental health assessment is an integral source of evidence in a criminal procedure.

Based on the study, I believe it is advisable to amend Article 70 of the Latvian Criminal Law, supplementing it with part 2<sup>1</sup>, and should be amended as follows: “Persons released from places of deprivation of liberty who were treated in mental health care institutions in a closed-type hospital, the court must also impose an obligation upon the decision to undergo medical supervision in a psychiatric medical institution every month to these persons after serving their sentences”.

Supplement Article 70 with section 3 of the Latvian Criminal Law, and should be amended as follows: “A person who commits a criminal act in mental excitement and is found to be insane should be treated in a closed-type psychiatric hospital under the supervision of a guard for a maximum period of 1 year, and then given monthly medical supervision in the mental health care institution until recovery”.

A separate provision, in my opinion, will be the enshrining in the Latvian Criminal Procedure Law of the norm on the general conduct of a comprehensive forensic mental health and forensic psychiatric assessment during which the presence of the person directing the process and the defender of the person who has the right to defence will be mandatory upon condition that they are in a separate room during its implementation.

Such innovations will allow persons directing the process to better investigate criminal procedures, while observing the rights of the participants of the criminal procedure.

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