CHAPTER 4

PRE-TRIAL PROCEDURE IN ESTONIA

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DOI: 10.26650/B/SS26.2020.014.04

ABSTRACT

The aim of this chapter is to cover the main rights of suspects in pre-trial criminal proceedings in Estonia, and Estonian procedural rules from initiation of criminal proceedings to detention and/or custody of a person to the decision to file charges, which marks the beginning of the court proceedings, and to the use of evidence gathered in pre-trial proceedings in court. While reading this chapter, one has to keep in mind that Estonian criminal procedure is mixture of inquisitorial and adversarial elements with trials being adversarial since the reform that came into force in 2004. However, the concept of pre-trial proceedings as proceedings in which State officials act with the aim to find the truth has remained untouched. Therefore, both suspects and their counsel who should in later stages of the proceedings contest the accusation made by the State in effective and adversarial manner, and the victim who has a choice to stand next to the prosecutor almost as a co-accuser, have to stay more or less passive in the pre-trial stages of proceedings unless they are called for any evidence gathering act. Interestingly, suspects have a right to counsel from the very beginning of criminal proceedings, a right that was indisputable in Estonia even before the European Court of Human Rights' case of *Salduz v. Turkey* hit the waves in Europe. The main problem is that suspects, with or without their counsel, do not have general right to access to case materials in pre-trial proceedings, not for preparing their interrogation and not even for contesting the court's decision on taking them into custody. The access to case materials is in most cases provided only after the Prosecutor's Office comes to the conclusion that the pre-trial proceeding activities have been completed. Suspects and counsel do have a right to request access to case file before this final time point, but it is up for the Prosecutor's Office to grant the access based on specific circumstances of the case. These and other problems of Estonian criminal proceedings are discussed in detail in this chapter.

Keywords: Estonian criminal procedure, initiation of criminal proceedings, rights of suspects, the right of access to a lawyer, the right to access the case file, detention and custody, decision to file charges, use of evidence

1. Historical development and status quo of the system of Estonian criminal procedure

As a former member of the Soviet Union, Estonia has a background of inquisitorial tradition. After restoration of its independence in 1991 Estonia continued to conduct criminal proceedings by the Code of Criminal Process of the Soviet Republic of Estonia (in force since the 1st of April 1961), which was adapted as much as needed for the rules of criminal proceedings to be suitable for democratic country. Nevertheless, the general nature of the criminal proceedings remained similar to the one conducted during Soviet times, i.e. purely inquisitorial, and continued to be so for 13 years. On the 1st of July 2004 the Code of Criminal Procedure (hereafter CCP)[1] entered into force. With the new code Estonian criminal proceedings took a huge step towards the adversarial system.[2] As it is provided for in § 14 (1) of the CCP, 'in the court proceedings, the functions of accusation, defence and adjudication of the criminal matter shall be performed by different persons subject to the proceeding'. Thus, court proceedings are conducted by courts, whilst the Prosecutor's Office, the accused[3] and their counsel are parties to a court case. According to the explanatory memorandum of the CCP, the aim of the draft of the Code was to raise the effectiveness of criminal procedure by giving active roles to the parties to a court case, i.e. task of the prosecutor is to accuse, the task of defence counsel is to defend the accused, and the court's task is to decide the case based on the evidence presented by the parties to the court case.[4] Therefore, the main reason for adopting the adversarial system for court cases was effectiveness of the proceedings, which the drafters hoped to improve by defining significantly more clearly the functional roles of the subjects in the court cases.[5] It is important to note that Estonia's accession to European Union in 2004 did had no bearing on the country's decision to reshape its criminal proceedings in 2004.

1 Code of Criminal Procedure. Adopted on 12 February 2003 by the Estonian Parliament Riigikogu (published: RT I 2003, 27, 166); last amended on 16 January 2020 (published: RT I, 20.12.2019, 8). In English available at < https://www.riigiteataja.ee/en/eli/507012020008/consolide > accessed 16 January 2020.

2 Andreas Kangur, 'Märkusi seoses võistleva menetluse rakendamisega kriminaalkohtupidamises' ('Comments Regarding the Implementation of Adversarial Procedure in Criminal Court Cases') [2005] JURIDICA 176, 176; Eerik Kergandberg, Priit Pikamäe, 'Eesti uue kriminaalmenetluse seadustiku eelnõu lähtekohad' ('Points of departure for the new Estonian Code of Criminal Procedure') [2000] JURIDICA 555, 561.

3 In pre-trial proceedings a person is suspected of crime and, therefore, called a suspect. At the end of the pre-trial proceedings the Prosecutor's Office prepares the statement of charges and submits them to the court as a result of which a person is not a suspect anymore, but accused of committing a crime and, therefore, becomes the accused.

4 Explanatory Memorandum to the Draft of the Code of the Criminal Procedure. 594 SE, 9th Riigikogu. The draft is not available via Internet anymore and its hard copy is in the possession of the authors of this chapter. Also, Meris Sillaots, 'On the Scope of Competitiveness of Court Proceedings in the Draft Code of Criminal Procedure'[2001], JURIDICA INTERNATIONAL 198, 198.

5 Uno Lõhmus, '*Quo vadis*, kriminaalmenetlus?' ('*Quo vadis*, Criminal Procedure?') [2020] JURIDICA 198, 199.

However, despite this move to more adversarial court process, the pre-trial processes remain fundamentally inquisitorial, with the Prosecutor's Office being responsible for ascertaining the facts which vindicate or implicate a suspect,[6] with only limited access to the case file being provided to defence counsel. This arrangement puts prosecutors in a controversially more powerful role, with defence counsel confined to more passive role and reliant on being fed crumbs of information by prosecutors. To be more specific, in pre-trial proceedings prosecutors are obliged to gather all evidence both for and against the suspect (this obligation arises from § 211 (2) of the CCP) at the same time keeping in mind that they have to go to the court with the same body of evidence to accuse a person. This arguably gives rise to the temptation to discard leads and pieces of evidence that do not match the scenario the Prosecutor's Office has developed and seeks to presenting at court. In addition, defence counsel is resigned to being a parallel investigator in pre-trial proceedings, but without the resources and legal authority to conduct their own investigation Further, even if they did possess such resources, they also lack information about the case to make any tactical decisions on the investigation due to the Prosecutor's Office being subject to a very limited obligation to disclose any information prior to the conclusion of pre-trial proceedings. Therefore, in pre-trial proceedings defence counsel often need to postpone the development of their strategy to the later stages of proceedings, which may adversely affect both the outcome of the case (e.g., witnesses may forget important information if the need to interrogate them does not raise early enough) and efficiency of the proceedings (e.g., without relevant information defence counsel is not able to make the decision on entering the plea negotiations, which causes delays in the proceedings).

In summary, it is important to consider the fundamental disconnect between the nature of Estonian inquisitorial pre-trial proceedings and adversarial court proceedings described above is something to be considered when analysing the rules of Estonian pre-trial criminal procedure and the effectiveness of safeguards in it. This chapter will now discuss the relevant stages of the Estonian pre-trial process in greater detail.

2. Initiation (commencement) of criminal proceedings in Estonia, including application of legality and opportunity principle

Similarly to many criminal justice systems, the criminal process in Estonia is an organic process that traditionally starts with initiation of the proceedings, which is followed by

6 'CCP, § 211. Purpose of pre-court proceedings
(1) The purpose of pre-trial proceedings is to collect evidentiary information and create other conditions necessary for judicial proceedings.
(2) In pre-trial proceedings, an investigative body and the Prosecutor's Office shall ascertain the facts vindicating or accusing the suspect or accused.'

investigative activities, culminating with the full court proceedings. Of course, there are many alternatives to this route, such as termination of the criminal proceedings in pre-trial stage due to number of reasons stated by law, or escaping the full court proceedings via its alternatives. Nevertheless, the case never proceeds without a formal commencement, which is regulated by division 1 of chapter 8 of the CCP ('Commencement and Termination of Criminal Proceedings').

Prior to the introduction of the CCP, the commencement of criminal proceedings was an extremely formal and bureaucratic exercise, which involved the completion of a number of official papers by the authorities. The CCP has regulated this issue in more holistic manner, stating that:

> 'the investigative body or the Prosecutor's Office commences criminal proceedings by the first investigative activity or other procedural act if a reason[7] and grounds[8] for commencement are present and if the circumstances provided in subsection 1 of section 199 of the CCP are absent.'[9]

Therefore, the proceedings are commenced by the initiation of investigative activities, rather than by the completion of official papers. In practice it also means that the authorities could take unofficial (pre-commencement) steps in order to determine if official investigative activities are needed (for instance, talk to potential witnesses). However, these unofficial steps are normally not extensive, do not involve evidence gathering, i.e. the information received via these unofficial steps cannot be used as evidence unless it is later gathered by official evidence gathering act. As Estonia follows the legality principle, its criminal proceedings are mostly carried by the idea that one should not commence proceedings in situation where the reasons and/or grounds for doing so are very questionable. This is because the termination of proceedings is always more difficult and time consuming than taking some prior steps in order to ascertain further need for commencement of the proceedings in the first place. Proceedings may be commenced both by the Prosecutor's Office and investigative bodies[10], but according to the structure of the pre-trial proceedings, everyday investigative activities are performed by the investigative bodies while the Prosecutor's Office supervises these activities and the course of the proceedings as such.

7 'CCP, § 194.Reason and grounds for criminal proceedings
(1) The reason for the commencement of criminal proceedings is a report of a criminal offence or other information indicating that a criminal offence has taken place.'

8 'CCP, § 194.Reason and grounds for criminal proceedings
(2) The grounds for criminal proceedings are constituted by ascertainment of criminal elements in the reason for the criminal proceedings.'

9 CCP, § 193 (1).

10 This is mainly the Police Office, but the law gives a status of investigative body to number of other institutions, such as the Tax and Customs Board and the Competition Board

As previously stated, where the reasons and grounds for the commencement of criminal proceedings exist, a case is commenced only if the conditions provided for in § 199 (1) of the CCP are absent. Paragraph 199 (1) of the CCP reads as follows:

> '(1) Criminal proceedings shall not be commenced if:
>
> 1) no grounds for criminal proceedings are present;
>
> 2) the limitation period for the criminal offence has expired;
>
> 3) an amnesty precludes imposition of a punishment;
>
> 4) the suspect or accused is dead or the suspect or accused who is a legal person has been dissolved;
>
> 5) a decision or an order on termination of criminal proceedings has entered into force in respect of the person on the same charges on the grounds provided for in § 200 of the CCP;
>
> 6) a suspect or accused is terminally ill and is therefore unable to participate in the criminal proceedings or serve a sentence;
>
> 7) these criminal offences are specified in §§ 414, 415, 418 and 418^1 of the Penal Code and the person voluntarily surrenders the firearms, explosive devices in illegal possession or the substantial part, ammunition or explosive thereof;
>
> 8) criminal proceedings are concentrated in another state on the basis provided for in §§ 436^1-436^6 of this Code.'

The most common reason not to commence criminal proceedings falls within §199 (1) subsection 1 – the grounds for criminal proceedings are not present, which basically means that the authorities are on an opinion that there is no crime to investigate. The official refusal to commence criminal proceedings is sent to the victim within ten days of their reporting an alleged crime.[11] Unless the law prescribes confidentiality or confidentiality is required in order to prevent crime, the person against whom the complaint was made is also informed about the refusal to commence proceedings.[12] In cases where criminal proceedings are commenced, this person normally learns officially about the fact of the proceedings when they are summoned to interrogation or detained and taken to the interrogation as a suspect.[13]

Estonia's legal system comes from the tradition of legality principle, an assertion supported by § 193 (1) and § 199 (1) of the CCP. Namely, the authorities are always obliged to commence proceedings if the reason and grounds for criminal proceedings do exist and all reasons not to commence criminal proceedings provided for in § 199 (1) of the CCP are

11 CCP, § 198 (1).

12 CCP, § 198 (3).

13 In Estonia it is very common that a suspect is not detained for interrogation, but summoned to interrogation via e-mail, letter or a phone call.

absent. As can be seen from the above extract of § 199 (1) of the CCP, the grounds not to commence criminal proceedings do not include any of the reasons that could be considered part of an *opportunity principle*. As the Supreme Court of Estonia has stated:

> "The Chamber of Criminal Procedure notes that pursuant to the obligatory criminal procedure or the principle of legality of criminal proceedings, the investigative body and the Prosecutor's Office are obliged to commence and conduct criminal proceedings if the circumstances of the crime become evident, unless the circumstances precluding criminal proceedings listed in section 199 of the CCP exist or the ground to terminate the proceedings due to expediency do not exist. It is important to notice that for reasons of *expediency* it is only possible to terminate the initiated criminal proceedings, as according to the law in force such discretion does not exist when decision to initiate criminal proceedings is being made, and here the principle of obligatory procedure applies without reservation."[14]

As a result, once criminal proceedings have been commenced they can be terminated due to the reasons of expediency if the prosecutor and the suspect reach an agreement to do so. Such cases, though, require an absence of public interest and existence of negligible guilt of the suspect. It should be noted that in these cases suspects do not plead guilty in order to terminate proceedings, as a termination for reasons of expediency does not presume guilty mind of a person, nor is a person found guilty as a result of termination of the proceedings for reasons of expediency and there is no note added to their criminal record. In addition to the absence of public interest and existence of negligible guilt, that offence must be a second degree offence (i.e. punishable up to five years of imprisonment) and the suspect must remedy the damage caused by the offence and pay for the costs of the criminal proceedings. Not only does the suspect and the prosecutor have to agree the termination, the court must also verify a termination, save for very minor cases in which the prosecutor has authority to terminate the proceedings themselves.[15] Separate consent from the counsel of the suspect and the victim is not required. The former often participates in negotiations for termination as in Estonia a person has a right to counsel from the point where they acquire the status of the suspect (the right to counsel is discussed further below). The interests of the victim are considered to be

14 Judgment of the Criminal Chamber of the Supreme Court, 22 September 2010, court case no. 3-1-1-60-10, p. 7. The judgement and orders of the Estonian Supreme Court are available unfortunately mostly only in Estonian at < https://www.riigikohus.ee/en > accessed 16 January 2020.

15 The rules for terminating the proceedings for expediency purposes are provided for in § 202 of the CCP ('Termination of criminal proceedings in case of lack of public interest in proceedings and negligible guilt'). The principle of expediency can also be found in additional grounds for termination of the proceedings, which, however, are not so widely used as § 202: § 203 ('Termination of criminal proceedings due to lack of proportionality of punishment'), § 203[1] ('Termination of criminal proceedings on the basis of conciliation'), § 204 ('Termination of criminal proceedings concerning criminal offences committed by foreign citizens or in foreign states'), § 205 ('Termination of criminal proceedings in connection with assistance received from person upon ascertaining facts relating to subject of proof').

represented by the prosecutor who also stands for the damage being remedied to the victim. If the proceedings have been terminated by the prosecutor, the victim has a right to file a complaint. If the proceedings have been terminated by the court, the right to file a complaint does not exist at all as in this case the proceedings have been terminated under the supervision of judicial power.[16]

Although the principle of legality is central in Estonian criminal proceedings, it might lose its absolute nature in the near future. To be more exact, for the last couple of years the Estonian Ministry of Justice has been discussing the ways to broaden application of the principle of restorative justice by enacting the possibility not to commence criminal proceedings in cases the offender and victim have been reconciled. Thus far, this idea has not found its way to law.

3. The rights of the suspect including the right of access to a lawyer and the right to access the case file

In Estonian criminal proceedings the term 'suspect' is used to describe a person who has been detained on suspicion of a criminal offence, or a person whom there is sufficient basis to suspect of committing a criminal offence and who is subject to a procedural act.[17] This definition of a suspect originates from the case law of the European Court of Human Rights (henceforth ECtHR).[18] Personal liberty and dignity are the keywords that outline the rights of suspects in Estonian Constitution[19]. According to § 22 (1) of the Constitution, 'no one may be deemed guilty of a criminal offence before he or she has been convicted in a court and before the conviction has become final.' Paragraph 22 (2) sets the burden of proof to the State stating that, 'no one is required to prove his or her innocence in criminal proceedings.' However, the Constitution is very scarce when it comes to determining the conditions the criminal proceedings have to meet in order the conviction of a person to be deemed legitimate. It enacts the right to liberty and the grounds for deprivation of liberty (§ 20), the rights of a person whose liberty has been deprived (§ 21, will be discussed below), the presumption of innocence (§ 22 (1)), the burden of proof (§ 22 (2)), the right to silence (§ 22 (3)), *nullum crimen nulla poena sine lege, lex praevia,* and *ne bis in idem* (§ 23), and the requirements for the court proceedings, including public sessions and the right to appeal (§ 24), but is silent on

16 Eerik Kergandberg, Priit Pikamäe, *Code of Criminal Procedure, Commented Edition* (Juura 2012), § 202 commentary 17.2.

17 CCP, § 33 (1).

18 Eerik Kergandberg, Priit Pikamäe, *op. cit.,* § 33 commentary 3.

19 The Constitution of the Republic of Estonia. Adopted on the 28th of June 1992 by the referendum (published: RT 1992, 26, 349); last amended on 22nd January 2020 (published: RT I, 15.05.2015, 1). In English available at < https://www.riigiteataja.ee/en/eli/ee/530102013003/consolide/ > accessed 22 January 2020.

the right to fair trial and the safeguards that have to be given to suspects and accused persons within this concept. Here the CCP is much more specific.

The general idea that the CCP follows is that it is the duty of State authorities (i.e. investigative bodies, the Prosecutor's Office and courts) to guarantee the rights of suspects and accused persons. Paragraph 8 of the CCP reads:

> 'Investigative bodies, Prosecutors' Offices and courts shall:
>
> 1) in the performance of a procedural act, in the cases provided by law, explain to the participants in proceedings the objective of the act and their rights and obligations;
> 2) provide the suspect and accused with a real opportunity to defend themselves;
> 3) ensure the assistance of a counsel to the suspect and accused in the cases provided for in subsection 45 (2) of this Code or if such assistance is requested by the suspect or accused;
> 4) in the cases of urgency, provide a suspect or accused held in custody with other legal assistance at his or her request;
> …'

Furthermore, pursuant to § 9 (3) of the CCP, the authorities 'shall treat the participants in proceedings without defamation or degradation of their dignity. No one shall be subjected to torture or other cruel or inhuman treatment.' Rights which have to be guaranteed to suspects and *mutatis mutandis* also to the accused persons are provided for in § 34 (1) of the CCP in the following wording:

> '(1) A suspect has the right to:
>
> 1) know the content of the suspicion and give or refuse to give testimony with regard to the content of the suspicion;
> 2) know that his or her testimony may be used in order to bring charges against him or her;
> 2^1) the assistance of an interpreter or translator;
> 3) the assistance of a counsel;
> 4) confer with counsel without the presence of other persons;
> 5) be interrogated and participate in confrontation, comparison of testimony to circumstances and presentation for identification in the presence of a counsel;
> 6) participate in the hearing of an application for an arrest warrant in court;
> 7) submit evidence;
> 8) submit requests and complaints;
> 9) examine the minutes of procedural acts and give statements on the conditions, course, results and minutes of the procedural acts, with such statements being recorded in the minutes;
> 10) give consent to the application of settlement proceedings, participate in the

> negotiations for settlement proceedings, make proposals concerning the type and term of punishment and enter or decline to enter into an agreement concerning settlement proceedings.'

Counsel, either retained or appointed by the State, may participate in criminal proceedings from the moment a person acquires the status of a suspect.[20] A person's financial situation is irrelevant to the right to use assistance of state appointed counsel in criminal proceedings in Estonia. As a result, counsel is appointed either to any suspect who has not chosen counsel but has requested appointment of counsel, or to one who has not requested counsel in a case where the participation of counsel is mandatory.[21] Participation of counsel in pre-trial proceedings is mandatory from the presentation of the criminal file for examination to counsel, which means that when the Prosecutor's Office declares a pre-trial proceeding activities completed, it discloses a copy of the criminal file to defence counsel, who introduces it to the suspect.[22] In some cases, participation of counsel is mandatory throughout the criminal proceedings (e.g., if at the time of committing the criminal offence the person was a minor), but this does not deprive the suspect their right to defend themselves in person.

The duty of counsel in criminal proceedings is to use all means and methods of defence that are not prohibited by law in order to ascertain the facts that either vindicate the suspect, prove their innocence, or mitigate their punishment, and to provide other legal assistance necessary in a criminal matter to the suspect.[23] In addition, the duty of confidentiality lies on counsel.[24] In order to fulfill the duty provided for in § 47 (2) of the CCP, counsel has a number of rights, including the right to submit evidence (CCP, § 47 (1) 2)); submit requests and complaints (CCP, § 47 (1) 3)); examine the minutes of procedural acts and give statements on the conditions, course, results and minutes of the procedural acts, with such statements being recorded in the minutes CCP, § 47 (1) 4)); after joining criminal proceedings, examine the record of interrogation of the person being defended and the record of detention of the suspect and, upon the completion of pre-trial proceedings, all materials in the criminal file; (CCP, § 47 (1) 7)); and confer with the person being defended without the presence of other persons for an unlimited number of times with unlimited duration, unless a different duration of the conference is provided for in the CCP (CCP, § 47 (1) 8)).

20 CCP, § 45 (1).

21 CCP, § 43 (1) 1) and 2). As the financial situation is not considered while counsel is appointed, upon conviction the person assumes the obligation to reimburse the costs of legal aid, from which he can be partially released only if his financial situation does not allow him to perform this obligation (CCP, § 180).

22 CCP, § 45 (3), § 223 (3) § 224 and § 224^1.

23 CCP, § 45 (2).

24 CCP, § 45 (3).

As according to § 47 (1) 6) counsel has a right to participate in the investigative activities carried out in the presence of the person being defended during pre-trial proceeding (incl. during interrogation), the judgment of *Salduz v. Turkey*[25] did not add anything new in Estonian interrogation rules. Also, the CCP does not provide any restrictions on the participation of counsel during interrogation of the suspect in pre-trial proceedings, which means that in Estonia the right to have counsel present in pre-trial proceedings is an absolute one, unless the suspect himself chooses to participate without counsel.[26]

Interrogation of a suspect in pre-trial proceedings consists of two stages: implementation of questioning, which is a formal stage, and substantive questioning. In the first stage the suspect's identity is verified and it is explained to them that they have the right to refuse to give statements and that the statements given may be used against them.[27] It is interesting to note that the question on whether the right to silence also extends to personal data remains unanswered in Estonian law and legal theory. In any case, a person cannot be punished for hiding their identity.[28] In the second stage, the suspect is asked whether they committed the criminal offence of which they are accused and they are given the opportunity to give statements in their own words concerning the facts relating to the criminal offence.[29] Leading questions from the investigator are allowed only in very limited cases.[30] After the interrogation the suspect and counsel receive the copy of the interrogation record. For adults suspects the law requires documentation of interrogation, but not audio or video-recording, and therefore, recording is rarely practiced.[31]

In Estonia the right to access the case file is much more complicated and far less defence friendly than the right of access to a lawyer. In most cases the suspect and counsel see the case file

25 ECtHR, 27 Nov 2008, *Salduz v. Turkey,* app. no. 36391/02.

26 Jaan Ginter, Anneli Soo 'The Right of the Suspect to Counsel in Pre-trial Criminal Proceedings, its Content, and the Extent of Application' Procedure'[2012], JURIDICA INTERNATIONAL 170, 172 and 178.

27 CCP, § 75 (1) and (2).

28 Eerik Kergandberg, Priit Pikamäe, *op. cit.,* § 75 commentary 1.1.

29 CCP, § 75 (3).

30 CCP, § 75 (4) which makes reference to CCP, § 68 (4) which makes reference to CCP, § 288^1 (2) 2)-5), which provide:
'(2) For the purpose of a smoother progress of the hearing of a witness, a court may allow to pose leading questions in other cases if:
2) the question pertains to a fact or contains a statement which is not contested;
3) the question is necessary to for making an introduction to the object of questioning;
4) due to the age or state of health of the witness it is difficult for him or her to understand questions which are not leading;
5) the witness states that he or she does not remember well the circumstances which are the object of the questioning.'

31 CCP, § 76. According to the first sentence of CCP, § 70 (3), 'If necessary, the hearing of minors is video recorded.'

for the first time only once the activities of pre-trial proceedings are completed and the prosecutor sends the case file to counsel. This means that the interrogation takes place in a situation in which counsel is familiar with the circumstances of the case based on information provided only by their suspect. Here the declaration made in law according to which, 'suspects have the right to request access to the evidence which is essential for specifying the content of the suspicion filed against them, if this is required for ensuring fair proceedings and the preparation of defence'[32] remains only declaration as the decision to provide access to the case file before competition of pre-trial proceedings is vested in the Prosecutor's Office.[33] Taking into account the position of the Prosecutor's Office in pre-trial proceedings and the pressure it is under to solve criminal cases, it is no wonder that prosecutors prefer to hold back information from the defence until access is necessitated by law. It should be noted that the defence has a right to challenge the refusal made by the Prosecutor's Office at the court, but these challenges are often unsuccessful.

4. Detention and custody of a person and alternatives to custody

In Estonia a person may be detained for a maximum period of 48 hours without an arrest warrant from the court.[34] Here § 21 (1) of the Estonian Constitution states,

"Everyone who has been deprived of his or her liberty must be informed promptly, in a language and manner which he or she understands, of the reason for the deprivation of liberty and of his or her rights, and be given an opportunity to notify those closest to him or her. A person suspected of a criminal offence must also be promptly given an opportunity to choose a counsel and to confer with him or her. The right of a person suspected of a criminal offence to notify those closest to him or her of the deprivation of liberty may be circumscribed only in the cases and pursuant to a procedure provided by law to prevent a criminal offence or in the interests of ascertaining the truth in a criminal case."

32 CCP, § 34^1 (1) first sentence.

33 CCP, § 34^1 (3).

34 Constitution, § 21 (2). First sentence of the CCP, § 217 (1) states that, 'detention of a suspect is a procedural act whereby a person is deprived of liberty for up to 48 hours.' The CCP, § 217 provides for the grounds for detention:

'(2) A person shall be detained as a suspect if:

1) he or she is apprehended in the act of committing a criminal offence or immediately thereafter;

2) an eyewitness to a criminal offence or a victim indicates such person as the person who committed the criminal offence;

3) the evidentiary traces of a criminal offence indicate that he or she is the person who committed the criminal offence.

(3) A suspect may be detained on the basis of other information referring to a criminal offence if:

1) he or she attempts to escape;

2) he or she has not been identified;

3) he or she may continue to commit criminal offences;

4) he or she may evade or otherwise hinder criminal proceedings.'

The CCP specifies the procedural rules for detention. Namely, upon detention of a suspect they are notified of their rights[35] and obligations immediately and they are interrogated with regard to the content of the suspicion.[36] They are also given a written declaration of rights, either in their mother tongue or in a language in which they are proficient, which they are allowed to keep in their possession during the time in which they are deprived of their liberty.[37] Immediate interrogation may be postponed only if it is impossible due to the state of health of the suspect, or if postponing is necessary in order to ensure the participation of a counsel and interpreter or translator.[38] If the suspect does not request counsel, participation of counsel at interrogation is not mandatory unless mandated by law.

When the period of 48 hours expires, it is up to the Prosecutor's Office to decide whether to request for that the suspect be remanded in custody.[39] The procedure for taking a person into custody is as follows:

> i The court receives the request from the Prosecutor's Office;
> ii. a hearing is held in which the prosecutor, the suspect and their counsel (if they have one) participate and during which the court studies the case file and examines the suspect;
> iii. following the hearing the court makes the decision either to take the person into custody or to refuse it.[40]

In order to take a person into custody, two conditions need to be met – there must be a reasonable suspicion that the suspect committed the crime. There must also be reason to believe that the suspect may abscond from criminal proceedings or that they may continue to commit further criminal offences. The suspicion of the suspect having committed the crime must be well-founded, because deprivation of a person's liberty must always take place with the aim of them being brought to court. One can speak of reasonable suspicion of crime if the court reaches the conclusion that it is highly likely that the suspect played at least some part in committing the crime. Here the suspicion must be based on the material evidence of the case.[41] However, as at this moment the court does not make a decision about the guilt of a person, examination of evidence does not have to be as thorough as when the final verdict is made.[42] In order to verify

35 Notification is confirmed by their signature (CCP, § 35^1 (1)).

36 CCP, § 33 (1).

37 CCP, § 35^1 (3).

38 CCP, § 33 (1).

39 According to CCP, § 130 (1), 'taking into custody is a preventive measure which is applied with regard to a suspect, accused or convicted offender and which means deprivation of a person of his or her liberty on the basis of a court order.'

40 A detailed procedure for taking a person into custody is provided for in §§ 130-134 of the CCP.

41 Eerik Kergandberg, Priit Pikamäe, *op. cit.*, § 130 commentary 5.1.

42 Ruling of the Criminal Chamber of the Supreme Court, 1 February 2012, court case no. 3-1-1-105-11, p. 12.1.

the second condition – the reason to believe that the suspect may abscond from the criminal proceedings or may continue to commit criminal offences – the court may not only consider evidence that led the court to conclude that the reasonable suspicion that the suspect committed the offence existed, but also the attitude of a person and their tendency to commit certain types of crime, previous history, personal and economic relationships and the like.[43]

The most serious problem with the procedure for taking a suspect into custody is not the lack of a legal assistance, as the presence of counsel is guaranteed in cases where a suspect requests counsel or in such cases where the presence of counsel is mandatory. The most serious problem is the lack of information available to the defence, which comes from the fact that in many cases, the defence is not provided with the access to case file prior to or during the court session. It is common place that when at court the prosecutor and the court are familiar with the contents of the case file, but defence counsel are left in either completely or partially unaware of the said contents. It is here that § 34^1 of the CCP again comes to light, with its second section providing suspects with the right to request access to any evidence which is essential for the hearing on whether an arrest warrant is justified and for contesting detention and taking into custody in court. This is caveated by the third section, which states that the Prosecutor's Office may refuse such access if this may significantly damage the rights of another person or if this prejudices criminal proceedings in the matter. Legal Counsel has previously tried to contest § 34^1 (3) once at the Supreme Court of Estonia, stating that the provision may be contrary to Article 7 of Directive 2012/13.[44] In this case,[45] the prosecutor refused to allow the defence to have access to a case file in the proceedings in which the lawfulness of custody of a person was determined. Counsel filed an application to the Supreme Court with a request to seek a Preliminary Ruling from the European Court of Justice [46]in order to determine if Article 7 (1) grants limitation to access to a case file upon arrest. The Supreme Court refused to make such reference based on an argument that in the case law of the ECtHR, in light of which Article 7 (1) must be interpreted, the right of a suspect to access a case file upon arrest may be restricted under certain circumstances.[47] As the case did not reach to the European Court of Justice, the doubts remain whether Supreme Court's interpretation to Article 7 of the Directive 2012/13 is, in fact, correct.[48]

43 *Ibid*, p. 12.1.

44 Directive 2012/13/EU on 22 May 2012 on the right to information in criminal proceedings, OJ 2012, L 142/1.

45 Ruling of the Criminal Chamber of the Supreme Court, 4 May 2016, court case no. 3-1-1-110-15.

46 Pursuant to Treaty on the Functioning of the European Union [2016] OJ C202/1, Art 267 (1).

47 Here the Supreme Court referred to the ECtHR's cases *Mooren v. Germany* (13 Dec 2007, app. no. 11364/03) and *A. and others v. the UK* (19 Feb 2009, app. no. 3455/05).

48 See also, Anneli Soo, 'Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? *Ibrahim and the others v. the UK* (13th of September 2016)' [2017], EJCCL & CJ 327, 327-346.

The law determines the maximum periods of keeping someone in custody in pre-trial proceedings. As a general rule a person suspected of a criminal offence in the first degree (criminal offence for which the maximum term of punishment is more than five years) may not be held in custody for more than six months, and a person suspected of a criminal offence in the second degree (criminal offence for which the maximum term of punishment is five years or less) for more than four months. A minor may not be held in custody during pre-court proceedings for more than two months.[49] However, here two additional aspects have to be taken into account. First, in the case of particular complexity or extent of a criminal matter or in exceptional cases arising from international cooperation in criminal proceedings, a preliminary investigation judge may extend the time limit for holding a person in custody in two-month steps at the request of the Prosecutor General.[50] Second, the maximum time limit only affects pre-trial proceedings. For court proceedings there is no such time limit. In these cases the requirements provided for in the European Convention on Human Rights (ECHR) and in the case law of the ECtHR apply.[51]

Applying a preventive measure, such as the custody of a person is not always required in criminal proceedings. Here the CCP, § 127 (1) states that,

> "A preventive measure shall be chosen taking into account the probability of absconding from criminal proceedings or execution of a court judgment, continuing commission of criminal offences, or destruction, alteration or falsification of evidence, the degree of the punishment, the personality of a suspect, accused or convicted offender, his or her state of health and marital status, and other circumstances relevant to the application of preventive measures."

If none of these needs exist, the case may proceed without any preventive measure applied to the suspect or the accused. Moreover, where a preventive measure is applied, it has to be remembered that remand of a person in custody person is the most restrictive of preventive measures. As § 130 (2) of the CCP requires, a suspect an only be remanded in custody cases where it is inevitable where no other preventive measure can serve the purpose of preventing the suspect from absconding or committing further criminal offences.

The most lenient and most often used preventive measure in criminal proceedings is a prohibition on the suspect leaving their residence (CCP, § 128)[52]. The goal of this measure is

49 CCP, § 131^1 (1).

50 CCP, § 131^1 (2) and (4).

51 Eerik Kergandberg, Meris Sillaots, *Criminal Proceedings (Kriminaalmenetlus)* (Juura 2006) 212.

52 CCP, § 128 (1) states that, 'prohibition on departure from the residence means the obligation of a suspect or accused or the representative of a suspect or accused who is a legal person not to leave his or her residence for more than seventy-two hours without the permission of the body conducting the proceedings.'

to guarantee the availability of a suspect for procedural acts. Applying this measure presumes that the suspect has the place of residence in Estonia.[53] Prohibition to depart from one's residence can be usually be applied for up to one year, though in exceptional cases a two year prohibition can be levied. The violation of such a prohibition may result in the imposition of a fine by the court, and, of course, the application of a more restrictive measure.[54]

There are two alternatives to custody in cases where the grounds for a remand in custody exist. There are bail (CCP, § 135)[55] or electronic surveillance (CCP, § 137[1]).[56] Bail as a preventive measure is a sum of money of at least 500 days' wages of the suspect that must be paid by the suspect or another person on their behalf. If a suspect absconds from criminal proceedings, intentionally commits another criminal offence or violates the prohibition on departure from their residence, the bail is charged to public revenue.[57] If the grounds for taking into custody cease to exist in pre-trial proceedings and the suspects has not violated the terms of bail, the bail is annulled and the bail monies are refunded.[58]As for electronic surveillance, this is the newest alternative to custody, available since 2015.

5. Prosecutor's decision to file charges and its consequences

The statement of charges is a procedural document that is prepared and submitted to the court with the aim of initiating the court proceedings. It can be considered as a "criminal claim" through which the Republic of Estonia, via the Prosecutor's Office, calls the suspect, now the accused, to account. It is the Prosecutor's Office, with the statement of charges, who seeks the conviction of the accused and the consequences that follow the conviction.[59]

The main functions of the statement of charges are to determine the exact scope of the court proceedings, as well as to provide the accused with information relating to the specific act performed, for which the charges have been filed. The goal of notifying the accused is to

53 Eerik Kergandberg, Priit Pikamäe, *op. cit.*, § 128 commentary 1.

54 CCP, § 128 (3) and (4).

55 'CCP, § 135. Bail
(1) A preliminary investigation judge or a court may, with the consent of the suspect or accused, impose bail instead of taking into custody. The terms and conditions of and the time limit on imposition of bail instead of taking into custody may be prescribed in an arrest warrant.'

56 'CCP, § 137[1]. Commutation of holding in custody to electronic surveillance
(1) At the request of a suspect, accused or prosecutor, a preliminary investigation judge or court, with the consent of the person held in custody, may commute holding in custody to the obligation to submit to electronic surveillance provided for in subsection 75[1] (1) of the Penal Code. The time of electronic surveillance shall not be deemed to be custody pending trial or detention and it is not included in the term of punishment.'

57 CCP, § 137 (6).

58 CCP, § 137 (6[1]) and (7).

59 Eerik Kergandberg, Priit Pikamäe, op. cit., § 154 commentary 1.

provide them with an opportunity to defend themselves, as required by Article 6 of the ECHR. In addition to the accused and their counsel, the statement of charges must also be forwarded to the court to allow the court to prepare and, thus, effectively manage the court proceedings.[60] The statement of charges also form a basis for the statement of defence, which counsel has to submit after receiving the statement of charges to a court and to the Prosecutor's Office, no later than three working days before the preliminary hearing. In the case of particular complexity or extent of a criminal matter, the court by extend the specified term at a reasoned request of the counsel.[61]

The statement of charges consists of three sections: introduction, the main part and the end part. The introduction of a statement of charges sets out the date and place of preparation, the name and title of the prosecutor, the title of the criminal matter, personal information of the accused (such as the name, residence, personal identification code, citizenship), and the accused person's criminal record.[62] The main part of the statement of charges covers the facts relating to the criminal offence, the nature and extent of the damage caused by the criminal offence, information about the property obtained by the offence, any mitigating or aggravating circumstances, everything evidence related (like what facts are intended to be proven with each evidence), measures applied with regard to the accused and the like.[63] The final part covers the name of the accused, content of the charges against him and a legal assessment of the criminal offence.[64]

After receiving the statement of charges and the statement of defence, the judge either orders prosecution of the accused[65] or holds a preliminary session during which a judge, depending on the case, may decide on return of the statement of charges to the Prosecutor's Office, where the statement fails to comply with the requirements of CCP § 154. A judge may, at this point, order the termination of the criminal proceedings on the bases provided for in CCO § 199 (1) subsections 2)-6).[66]

60 *Ibid*, § 154 commentaries 3. to 3.2.

61 CCP, § 227 (1). According to third section of the same paragraph:
'(3) A statement of defence shall set out:
1) the opinions of the defence concerning the charges and the damage set out in the statement of charges, and which statements and opinions set out in the statement of charges are contested and which admitted;
2) the evidence which the counsel wishes to submit to the court and a reference to the facts which are intended to be proven with each piece of evidence;
3) a list of the persons to be summoned to a court session at the request of the counsel;
4) other requests of the counsel.'

62 CCP, § 154 (1).

63 CCP, § 154 (2).

64 CCP, § 154 (3).

65 CCP, § 257 (1).

66 CCP, § 258 (2).

6. Use of evidence gathered during pre-trial proceedings (including exclusionary rule)

Estonian law on evidence is not very extensive, as in principle the judges evaluate all evidence in its totality according to their conscience, with no evidence having predetermined weight. Therefore, as a starting point, every piece of evidence that is listed in CCP, § 63 (1)[67] is with equal value to another. This is also known as the principle of free evaluation of evidence,[68] a principle which gives the court a wide discretion when deciding whether something has been proven or not.

In order to base their judgment on specific piece of evidence, the court has to first verify its admissibility, meaning that they have to assess whether procedural rules were followed during the evidence gathering act. General principles of evidence gathering are provided in § 64 (1) of the CCP in the following wording:

'§ 64. General conditions for taking of evidence

(1) Evidence shall be taken in a manner which is not prejudicial to the honour and dignity of the persons participating in the taking of the evidence, does not endanger their life or health or cause unjustified proprietary damage. Evidence shall not be taken by torturing a person or using violence against him or her in any other manner or by means affecting a person's memory capacity or degrading his or her human dignity.'

In addition, the courts have also to consider the procedural rules provided for specific evidence gathering acts. In Estonia such rules are extremely strict for surveillance with § 126[1] (4) of the CCP providing that, 'information obtained by surveillance activities is evidence only if application for and grant of authorisation for surveillance activities and the conduct of surveillance activities is in compliance with the requirements of law.' However, for all other types of evidence, infringements of evidence gathering rules do not automatically lead to their inadmissibility. This means that, as a general rule, it is for the court to assess the circumstances of the infringement as a whole and to determine whether the public interest in establishing the facts of the case allows admissibility of the evidence obtained by a breach of procedural law. Here the Supreme Court of Estonia has found evidence to be inadmissible only where the procedure for taking evidence has been *significantly violated*, considering both the purpose

67 'CCP, § 63. Evidence
(1) Evidence means the statements of a suspect, accused, victim, the testimony of a witness, an expert's report, the statements given by an expert upon provision of explanations concerning the expert's report, physical evidence, reports on investigative activities, minutes of court sessions and reports or video recordings on surveillance activities, and other documents, photographs, films or other data recordings.'

68 Eerik Kergandberg, Priit Pikamäe, *op. cit.*, § 61 commentary 3.

of the violated norm and whether such evidence would have been obtained if the norm had not been violated.[69] In addition, intention of the officials who gathered the evidence should also be considered.[70] It is important to mention here that the fruit of poisonous tree doctrine is unknown to Estonian courts and is therefore not used. As a result, only primary evidence can be considered inadmissible due to violation of procedural rules.

Inadmissibility of evidence is decided either at the moment the party to the court proceedings presents the evidence (i.e. the court declines the evidence due to its inadmissibility) or later, when the court goes to deliberate the case. There is no doubt the first option would be more appropriate, especially when one considers the defence rights, but it may not always be the feasible option as inadmissibility of evidence may also be revealed only as a result of trial. In the latter cases the court should at least express its position on inadmissibility of evidence in the judgment. However, how a judge can exclude any influence of this evidence on their deliberation is not an easy question to answer.[71]

Conclusion

The main purpose of criminal proceedings is the purposeful application of substantive criminal law with a goal of protecting the security in society. In order for criminal proceedings to fulfill this purpose the participants - especially the prosecutors and defence counsel - must understand that the proceedings are not a game in themselves, i.e. a victory should not be sought at any cost (including at the cost of suspects' rights). If the participants understand this, many of the problems that Estonia's secretive inquisitional pre-trial proceedings currently suffer will disappear. If prosecutors do not seek victory at any cost, they will have an incentive to share at least part of the information they have at early stages of pre-trial proceedings with defence counsel, including such information that will help to better determine whether or not grounds for detention exist and to enable the defence to better prepare for the court proceedings. If counsel do not seek victory at any cost, they will not misuse the information provided to them by prosecutors at early stages of pre-trial proceedings with the aim to 'rescue' the factually guilty suspects from punishment. Moreover, focus on the purpose of criminal proceedings, as opposed to the pursuit victory, allows for a much wider and wiser application of principle of opportunity and of restorative justice, i.e. application of these principles to the cases in which they serve the ultimate goal much better than traditional

69 Judgment of the Criminal Chamber of the Supreme Court, 26 June 2009, court case no. 3-1-1-52-09, p. 11.1.

70 Judgment of the Criminal Chamber of the Supreme Court, 29 December 2006, court case no. 3-1-1-97-06, pp. 31 and 32.

71 Eerik Kergandberg, Priit Pikamäe, *op. cit.*, § 61 commentary 8.6.2.

criminal sanction. We hope that someday Estonian prosecutors and defence counsel have the wisdom to realize they are not irreconcilable enemies in criminal proceedings; on contrary, they serve the same purpose, even though they hold differing roles.

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