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Estonian Code of Criminal Procedure as Legal Political Decision

Introduction

All larger Estonian political parties agreed that Estonia needs a new Code of Criminal Procedure (hereinafter: CCP). A commission consisting of Estonian lawyers and three foreign experts was formed by the Ministry of Justice, which had to formulate all the most important options related to the new CCP for the politicians and explain the consequences arising from the selection of different variants. The commission completed its work in three months and forwarded the catalogue of options to the politicians, who then made their choices and started preparing the code... Unfortunately, it has to be said that no such systematic and planned work as described above has actually occurred in Estonia.*[1] Subsequently, the draft of the Estonian CCP may undoubtedly be called a certain option (or sum of options) if one so wishes, but as a participant in the working group*[2] that prepared the draft, I have to admit that since there was no legal political order for development of a catalogue of options, there was no substantial theoretical discussion of the main conceptual issues of the draft. This does not mean that the persons who prepared the draft did not rely on the standpoints of special literature, or did not try to follow the contemporary tendencies in the law of criminal procedure and solutions from the practice other states have in the creation of laws. Despite this, many choices in the work group were made as a result of voting and sometimes they were rather intuitive than anything else. Therefore, it may be said that to a large extent, the drafts of the CCP have been designed by the great magician, chance.*[3] In my opinion, one of the reasons why accidental factors have actualised that could be mentioned above all is knowledge of foreign languages (for example, the opinion of a person

[1] The most recent variant of the CCP was sent on the "coordination round" in the end of May 2000 and the government hopes to pass it as an act in spring 2001. See Ministry of Justice. Arengustrateegia aastani 2003 (Development Strategy until 2003). Tallinn: 2000, p. 61.

[2] Obviously I should also mention here that two supreme court judges and a lecturer of criminal procedure belonged to the working group that prepared the original variant of the draft; the working group that prepared the final variant of the draft included one supreme court judge from the working group that prepared the original variant and two justice officials who had just graduated from university. But this was not the entire circle of people who came in touch with the preparation of the law. Both the original as well as the final variants were discussed with members of the so-called expert group. This group consisted of representatives of the most important institutions of legal protection (courts, prosecutor's office, the bar, police).

[3] Valdur Mikita has written on the back cover (!) of his book that deals with the signs of language and culture: "There are many possibilities for creating things. Maybe the two most interesting ones are emergence through chance and emergence as a result of failure of something." See V. Mikita. Äparduse rõõm (The Joy of Failure). Greif, 2000. When it may be assumed on the basis of the above that chance and failure are opposites, then one may hope that a draft that has emerged with the help of accidental factors may turn into a law that is not a failure.

who speaks only Swedish is that no issue can be solved better anywhere else than in Sweden): the opinion that some regulation seems to be "too Soviet" and therefore a completely different solution should be used; the standpoint that "I have treated this issue so thoroughly in my scientific articles that my *de lege ferenda* proposal simply must become law"; the understanding of practising lawyers that "how come things are suddenly like this when they have always been otherwise"*[7], etc. At the same time one may assume that the described situation in the preparation of the draft of the Code of Criminal Procedure is not exceptional in the creation of laws in Estonia (maybe even in all of the so-called former Eastern bloc countries). For example, in his treatment of the problems related to the effect of legal acts, A. Kasemets has pointed out that in the creation of laws after Estonia regained her independence, the possible social, psychological, economic, foreign and security political, institutional-economical, cultural, etc. effects and consequences of new laws have usually not been analysed.*[8] In the described situation, it may even be good when the finished draft is left pending for a somewhat longer time.

The first work group who prepared the draft of the CCP handed the draft over in 1993. Even though it was not passed as a law, many of the draft's institutes or norms have actually been passed as amendments to the valid Criminal Procedures Act, which could also be treated as legal experiments preceding the introduction of the innovations to the draft. When we consider the aforementioned amendments to the valid Law of Criminal Procedure (hereinafter: LCP), we could mention acknowledgement of the solutions of the *Riigikogu* (Estonian parliament) as sources of justice in criminal procedures in such issues, which have not been resolved in other sources of criminal procedure or which have arisen at the application of law (§ 1 (4) of the LCP)*[9]; simple procedure (Chapter 33 of LCP)*[10]; principally new regulation for initiation of criminal procedure (Chapter 8 of LCP). But all this is just introductory talk, as can be seen from the subheading. The actual objective of this article is to try to describe some of the most important situations of choice, which in the opinion of the author could arise in the compilation of contemporary law of criminal procedure, also whether they actually arose in the compilation of the draft of the CCP and what was done in these situations of choice.

Competing and Noncompeting Criminal Procedure

There is no other branch of law where the conflict between the two main contemporary legal systems – continental European and Anglo-American – is as acute as in the law of criminal procedure. It is true that in contemporary systems of lawmaking, this conflict tends to be solved mainly in one direction – by introducing different elements from the competing criminal procedure in the continental criminal procedure.*[11] The issue of the "competing/noncompeting" model arose also in the preparation of the Estonian Code of Criminal Procedure, but it did not happen in its classical form, because no one in Estonia has wanted to introduce American criminal procedure, at least not loudly enough. It has obviously also been caused by the fact that historically there have been no arbitration courts in the territory of Estonia. Without these, purely American criminal procedure would be unthinkable. The authors of the draft were rather interested in states that had introduced elements of competition in their traditional criminal procedure. Above all, we looked towards Italy. Evidently there were some people responsible for creation of laws,

7 When we talk about the standpoints of practising lawyers, we have to consider that there are hardly any other laws besides the law of criminal procedure, which would evoke interest in so many different institutions that often have relatively conflicting interests.

8 A. Kasemets. Mõttevalik seaduseelnõude sotsiaalsete, majanduslike, institutsionaalsete jm mõjude analüüsimise teemal (Selected Thoughts on the Subject of Analysis of the Social, Economic, Institutional, etc. Effects of Drafts of Law). – Riigikogu kantselei MSI (Economic and Social Information Office of the *Riigikogu*). Tallinn, 1997, p. 3. Referred to through the following source: M. Kiviorg. Õigusakti mõju ja rakendamise analüüs (Analysis of the Effect and Application of a Legal Act). In: K. Merusk, M. Kiviorg *et al*. Õigusriigi printsiip ja normitehnika (Principle and Normative Techniques of a State Based of the Rule of Law). Tartu: Eesti Õiguskeskus, 1999, p. 34.

9 Let us emphasise that this is the first and so far the only case in Estonian law when a court precedent is directly accepted as source of justice.

10 This is a special procedure similar to the American plea-bargaining. For more, see: E. Kergandberg. Expedience of Arrangement in German and Estonian Criminal Care. – Juridica International. Law Review. University of Tartu, II, 1997, pp. 76–90; M. Sillaots. Arrangement – From Procedure Based on Guilty Plea and Presumption of Guilt?. – Juridica International. Law Review. University of Tartu, 1998, pp. 76–84.

11 As is the case with American film art or McDonald's, it is difficult to distinguish actual goodness from the purposefully created impression of goodness, it is actually rather difficult (not to say impossible) to justify the advantages of "American criminal procedure". On the contrary, the American court soaps that flood from our television should actually force us to ask at some point whether the fate of a person can really depend only on the verbal talent of the lawyer! But we have to admit that the main question/reproach of the Americans to continental criminal procedure is equally rhetorical and as impossible to answer. And their question is, do you actually believe yourself that with this inquisition-like procedure, you can always ascertain the objective truth that you search for?

who wanted to establish the Law of Criminal Procedure of that state in full.*[12] Finally, the opinion that prevailed in the work group was that the new law of criminal procedure of Italy will only be used as a background system in order to achieve more exact determination of the functional roles of the court and the parties of a criminal procedure in the future criminal procedure of Estonia. This means that whether the accused is convicted or not should first and foremost depend on the success of the work of the prosecution or the defence. But at the same time it also means that at least the first-degree judge should decide on the basis of what happens in the courtroom rather than the criminal file prepared during preliminary investigation. According to the draft (after the example of Italy), the so-called system of two files will be introduced into Estonian criminal procedure. This means that when investigation of a criminal case by simple procedure (which has three subtypes) is excluded after pre-trial investigation, the criminal file created as a result of the pre-trial investigation will be divided in two. The material that is neutral in its essence (crime notice or other documents on the basis of which the criminal case was initiated; extract from the conviction register; prosecution deed; list of persons who the prosecution and defence want to summon to court) will be collected into the so-called court file that will be sent to court and which will allow the judge to manage the session, but the examination of which provides no grounds for the judge to develop any preliminary decision. The other materials collected as a result of pre-trial procedure (above all, evidence collected during pre-trial investigation) will remain in the other, the so-called prosecutor's file. The draft understandably also regulates in which exceptional cases it will be permitted to disclose materials from the prosecutor's file at court investigation. Discussions in court will generally run in a rather competing manner and classical principles of cross-examination will be used. When compared to the original variant of the draft, the final variant is much more radical about guaranteeing the neutrality of the judge. According to the original variant (based on the Scandinavian model), it was not considered necessary to "cut" the criminal file. It was sought to achieve the neutrality of courts by the way that the first degree judge was to proceed in the procedure from the prosecution deed prepared by the prosecutor and ... the defence summary prepared by the defence lawyer. The prosecutor was supposed to bring the criminal file to the court only when arriving for the session. At the same time the authors of the original variant thought that the second-degree court could have the criminal file on the table while discussing the case...

Corpus Juris and Estonian Code of Criminal Procedure

Development of the draft of the Estonian Code of Criminal Procedure occurred at the time when *Corpus Juris* (hereinafter: *CJ*)*[13], probably the most ambitious model of supra-criminal procedure of all times, was completed. As we know, *CJ* is a draft developed by the working group formed at the initiative of the Council of Europe and led by acknowledged French professor Mireille Delmas-Marty, which was completed in 1997, and the explanations thereto. The draft includes criminal law protecting the economic space of the EU as well as the provisions corresponding to its law of procedure, and it has often been declared the first step in the creation of a common European criminal welfare system (*i.e.* a system that unites criminal law and criminal procedure). However, not all opinions of the future of the *CJ* and the possibility of European criminal welfare are too optimistic. Obviously there are only a few such theoreticians at the present time who would deny the necessity to integrate European criminal procedures.*[14] At the same time, there is also the understanding that since the factors that prevent frequent and substantial cooperation between the states in the area of criminal procedure can not be eliminated in the nearest future, then the policy of "small steps" should rather be used, *i.e.* it should be sought to harmonise single institutes of the law of criminal procedure

12 I have heard the opinion expressed by many officials of justice that simply taking over the law of another state would exclude the occurrence of problems in Estonian court practice, because these problems have already been solved in the court practice of the relevant state...

13 Corpus Juris. Portant dispositions pénales pour la protection des intéréts financiers de l`Union européenne (Introducing penal provisions for the purpose of the financial interests of the European Union). Sous la direction de M. Delmas-Marty. Paris: Economica, 1997.

14 With regard to this, one of the most acknowledged specialists of international criminal law, Prof. Ulrich Sieber, has written that "considering the contemporary level of European integration, especially standardisation of the guarantees of criminal procedure that has occurred due to the European Human Rights Convention, the situation, where the judgements made by judges in Brandenburg or Hessen are acknowledged in Bavaria and those made by their colleagues in Austria or Luxembourg are not, must be considered anachronistic." See U. Sieber Einführung ins Buch: Corpus Juris der strafrechtlichen Regelungen zum Schutz der finanziellen Interessen der Europäischen Union.... . Cologne; Berlin; ...: Heymann, 1998, p. 3. Walter Perron has also emphasised the need for European criminal procedure when writing about the future of European pre-trial procedure. See W. Perron. Auf dem Weg zu einem europäischen Ermittlungsverfahren. ZStW 112 (2000), Heft 1, p. 204.

and eliminate unjustified impediments.*[15] It has to be said that considering the rather vague situation described, the work group did not consider it possible to consider the standpoints presented in the *CJ* too seriously and so to say, conceptually.*[16] At the same time I think that one of the aspects of the "policy of small steps" that strengthens cooperation between states could be the provisions in § 60 of the CCP, pursuant to which "evidence collected in a foreign country pursuant to the laws of that country shall be used in Estonian criminal procedure, unless this is contrary to the principles of Estonian criminal procedure." In a somewhat paradoxical manner, the circumstance that the Constitution of Estonia basically allows the extradition of a citizen of Estonia to a foreign state should also be considered a positive small step. Constitutional prohibition of extradition of the state's own citizens has been considered one of the most serious impediments to legal cooperation between states.

Legality and Opportunity

One important purposeful option that the CCP is based on is decision in favour of the selection of the introduction of the principle of opportunity (or more exactly, on expansion of the effect of the said principle). Above all, this means (mostly after the example of the German Code of Criminal Procedure, *StPO*) provision of the opportunity to terminate criminal procedure on the consideration of practicality.*[17] But agreement procedure is undoubtedly one manifestation of the said principle in Estonian criminal procedure.*[18] There is also no doubt that we have to agree with the statement that making the principle of opportunity legal does not mean that this principle will take root in actual criminal procedure. How everything will look like in reality depends largely on the attitudes of the prosecutor's office and the national criminal policies.

Structural Choices or Necessity of the General Part and Permissibility of Definitions

There is no doubt that some choices related to structure have to be made in case of every draft.

Unfortunately, weakness of the institutions that deal with the creation of law did not allow raising of the question about whether Estonia (like Sweden, for example) could have a law of procedure which at the same time would cover all provisions containing court procedures. However, I think that raising this or a similar question is not hopelessly late. Even when we decide in favour of separate codes of procedure, it would be reasonable to standardise the regulation of several institutes (parties of procedure, deadlines, documents, evidence, etc.).

From the very beginning, preparation of the draft proceeded from the wish "to put something before the brackets", therefore from the understanding that the Code of Criminal Procedure must have both the general as well as the specific part. According to the original version of the draft, the general part consisted of four chapters: the chapter of general provisions covering the sources and principles of law of criminal procedure; the chapter dealing with the subjects of criminal procedure; the chapter dealing with activities of criminal procedure; the chapter dealing with documents, deadlines and costs of procedure. As we know, only the theory of procedure had formerly dealt with classification of activities of procedure. The persons who prepared the original variant of the draft found that giving a thorough list of the subclasses of the activities of procedure in the general part of the code would help to better understand the essence of every single activity of procedure. This is why the relevant chapter of this variant of the draft began with the statement that activities of procedure are the substance of criminal procedure:

15 See W. Perron, p. 211.

16 It is difficult to consider the *CJ* a serious "conversation partner" also because it changes too much. I have heard that it is planned to give a new version of the *CJ* for discussion to the persons concerned. See *e.g.* W. Perron, p. 203.

17 The bases for termination of criminal procedure by consideration of practicality in the draft of the CCP have been thoroughly analysed in a BA thesis defended in the Faculty of Law of the University of Tartu in spring 2000. See T. Ploom. Oportuniteedi ehk otstarbekuse põhimõte (Principle of Opportunity or Practicality). BA Thesis. Tartu: 2000.

18 Agreement procedure means "renaming" and further development of the simple procedure functioning in Estonian criminal procedure today. See also Note 7 in this article.

1) submission of application for procedure;
2) submission of complaint of procedure;
3) making the decision of procedure;
4) proving and collection of evidence;
5) guarantee of criminal procedure.

However, the traditional path has been chosen again in the later version of the draft and the former heading of the relevant chapter of the general part "Activities of Procedure" has been replaced with a new and, it could be said traditional heading "Proving". The reasoning behind this, in my opinion, regrettable choice is that "let us leave the issue of activities of procedure an issue of theory".

According to the initial version of the draft, it was purposely sought not to avoid definitions, even though everyone was aware of the risks of defining. Therefore the draft tries to determine what is criminal procedure, who is the subject of criminal procedure, what is evidence, etc. The issue of how definable could/should laws be is definitely one worthy of separate discussion. One question that could be asked is why refuse to define, if the legislator agrees or would agree with the relevant definition at the given time? In any case, I do not think that refusal to define can be justified only with the statement that the relevant definition is missing in the laws of some other state. The number of definitions is minimal in the later version of the draft and I hope that this has opened possibilities for the science of law to prosper.

The choice about how detailed the regulation of certain activities of procedure should be in the law should obviously also be regarded as a problem of structure. When the Code of Criminal Procedure of Latvia was discussed, West European experts criticised the draft because the regulation of how to conduct cross-examination, present line-ups for recognition or an experiment of investigation and what should be specified in the protocol of the relevant activity of procedure was too detailed. For example, the German expert thought that such details should be regulated (of course after the example of the *StPO*) in guidelines prepared by the Ministry of Justice. It has to be said that the regulation of activities of procedure may be too detailed in the Estonian CCP (and thereby probably increases the share of pre-trial investigation too much) and different from the depth of detail of the remaining regulation. At the same time the authors of the draft were not too convinced by the standpoint that "let us regulate half of cross-examination in the law and leave the rest of regulation to the Ministry of Justice".

Choices in Proving

But the differences in the original and last versions of the CCP are not only in the amendment of the heading of one chapter. Treatment of proving and evidence has also become significantly shorter and less defining.*[19] The principle according to which a court may in making its judgement rely on the circumstances proven by the judge as well as on generally accepted circumstances has been preserved in the text of the draft (§ 55 of the CCP).*[20] But unlike in the original variant, evidence is regrettably no longer determined through use of the categories of substance, form and source of evidence. According to the last version of the CCP, evidence is testimony of the suspect, the accused and the witness, conclusion of expertise, material evidence, protocol of investigation activity, court session and surveillance or any other document, also photo, film or any other technical recording of information. But pursuant to subsection 2 of the relevant section, evidence not listed above can also be used to prove circumstances of criminal procedure. The main disputes (which have actually not been resolved by today) have concerned evidence obtained though experts and as a result of surveillance.

According to the present text of the draft, only the conclusions fixed by the expert in writing and concerning the questions asked in the expertise regulation continue to be regarded as evidence. This means that what the expert says in court does not have independent meaning of evidence. At the same time there are relatively many persons who think that the expert (like the witness) could also testify in court. Obtaining evidence by surveillance has been discussed in no less than twenty sections of the draft. According to the present text of the draft, it is allowed to use surveillance for collection of evidence only when first-degree crimes

19 About treatment of evidence in the original version of the CCP, see E. Kergandberg. The Bill concerning the Estonian Criminal Procedure Code and the Construction of Evidence as an Institution. – Juridica International. Law Review. University of Tartu, I, 1996, pp. 69–75.

20 The following text of the draft (§ 57) shows, however, that declaration of something proven and generally accepted are not equal alternatives for the court. The said section stipulates that all "classical" circumstances of a crime must be proven.

are being proceeded and when the principle of *ultima ratio* is followed (*i.e*. only when collection of evidence with other activities of procedure would be excluded or considerably more complicated).

Another thing that could be mentioned here is that by changing the valid regulation to some extent, the draft provides that by an application of the prosecutor, the witness may be made anonymous when first-degree crimes are investigated.*[21] But unlike the current regulation, an anonymous witness will not have the right not to appear in court. Pursuant to the draft, an anonymous witness is examined in court via telephone and voice-changing equipment is used when necessary.

Choices Related to Subjects of Criminal Procedure

Among the choices related to the subjects of criminal procedure, the one that should be mentioned first is that according to the draft the plan is to introduce the institutes of preliminary investigation and executive judge. The idea is that these judges are ordinary first-degree judges to whom relevant tasks have been assigned with a work division plan. I think that such a solution may help the state save money, but does not offer a substantial solution to the problem and therefore does not reflect a principal choice. My standpoint is that in the current situation of Estonia, additional positions for judges of preliminary investigation should be created, because the enormous workload of existing judges does not allow to change any of them into judges of preliminary investigation.

Due to legal political reasons, it has been very difficult to specify the character of the prosecutor and the investigator and the relationships between them in the preparation of the draft of the CCP. In the determination of the role of the prosecutor in Estonian criminal procedure, it was considered to proceed from the role of the prosecutor in German criminal procedure. But not only *de jure*, also *de facto*. According to the official concept of German criminal procedure, the prosecutor should be the so-called "master of investigation"*[22] (*Herrin des Ermittlungsverfahrens*) in pre-trial procedure. The idea is that the prosecutor should be the leader of the entire investigation. But not only the leader. As soon as the prosecutor becomes aware of the characteristics of a crime, he or she should also investigate it – find out about the circumstances in favour and against the suspect, collect evidence, apply to the judge to restrict the principle rights of the accused, etc. In the final stage of the investigation, the prosecutor should decide whether to conclude the procedure or apply for suing the accused. According to the idea of German criminal procedure, the police should basically act as the "extension of the hand" of the prosecutor. *De facto*, the situation is completely different. In practice, the actual subject of investigation is the police, who forward the materials to the prosecutor only when "the case has basically been investigated"*[23] and the role of the prosecutor in criminal procedure borders mainly on legal supervision over the investigation. According to H.-H. Kühne, prosecutors only become aware of such circumstances in the course of the investigation that the police allow them to know.*[24] What was just described is justified with the circumstance that the development of police equipment and their specialisation gives them an informational lead.*[25] It has to be admitted that German legislators have tried to oppose the exclusion of wider and wider areas of pre-trial investigation from under the actual control of the prosecutor. But the steps of the legislator with which the competence of the prosecutor was increased to some extent (*e.g.* it was stipulated in § 161a of the *StPO* that the prosecutor has the right to independently appoint expertise and summon and cross-examine witnesses) did not change the situation too much: the legal master of pre-trial investigation still remained in the shadow of his servant in the actual landscape of criminal investigation.

Considering this situation, the commission that deals with reforming the German criminal procedure made the proposal that let us finally be honest and sincere and regulate the actual situation in law: let us establish independent police investigation and turn the prosecutor's office into just an institution of prosecution also

21 Practising lawyers who have examined the draft insist strongly on allowing witnesses to remain anonymous also in case of some less serious catalogue crimes and not only of first degree crimes.

22 One should not be bothered about the fact that the Germans use the term "investigation" for their pre-trial procedure. This is not the lower form of pre-trial procedure known from Soviet criminal procedure, but the same homogenous pre-trial procedure which we now call preliminary investigation.

23 H.-H. Kühne refers to the data of the research conducted by Blankenburg, etc., pursuant to which in 90% of cases, the prosecutor enters the criminal procedure only after police investigation has been completed, when the police have done their work. See H.-H. Kühne. Strafprozesslehre. Heidelberg: Müller Jr. Verl., 1988, p. 32.

24 *Ibid*., p. 30.

25 *Ibid*., p. 29.

in the law! As was expected, this proposal evoked stormy discussions that have produced no results and have still not been concluded. In a rather irritating manner, that actually deserves to be noted also in the situation in Estonia, H.-H. Kühne has noted that if we want to preserve the role of the prosecutor as the master of investigation, or actually when we want to give this role to the prosecutor, we have to give the prosecutor the relevant training, especially teach him or her criminalistics.*[26] Somewhat conditionally, it may be said that what is *de facto* with the status of the prosecutor in criminal procedure in Germany, is now *de lege lata* in Estonia and in my opinion could also be *de lege ferenda* with some corrections. This means that considering, *inter alia*, the actual situation in Germany, we have no need for making the prosecutor the master of investigation by force, even though opinions in this direction have been presented here. It seems more practical to differentiate first – let us say – the initial period and final period of investigation. In the initial period, we could let the investigator do his or her interesting investigation work in peace and hopefully also objectively in order to specify the circumstances of the crime. This hope may be naïve, but I really do believe that it is possible to legislatively create the situation where the investigator clarifies with equal interest both the accusing as well as the acquitting circumstances. Of course the condition precedent is that the investigator should be well trained, motivated in the work (also in terms of money) and not harassed by statistics. In the initial period of pre-trial procedure the prosecutor could only have the role of the legal supervisor and, in my opinion, it is not necessary to give the prosecutor any independent investigative competence (the right to independently conduct investigation).*[27] The initial period of pre-trial procedure (and together with this, the period of life under the supervision of the prosecutor!) could end when the investigator has completed his or her work, prepared a summary of the pre-trial investigation that is as objective as possible and submitted the file to the prosecutor. Now, in the final period of pre-trial investigation, the prosecutor should enter in order to fulfil his or her substantial task in the criminal procedure – the function of prosecution. To be more specific, the prosecutor should now decide on the basis of the collected material whether there are sufficient grounds for launching the function of prosecution. But the level of modern crime rather forces the prosecutors to take the so-called dispatcher's role in the said situation, which is a role where they have to hold themselves back in the fulfilment of their substantial task, where room has to be made on account of the principle of legality to the principle of opportunity that proceeds from considerations of purpose. As the dispatcher, the prosecutor should decide whether to close the proceeding of a criminal case, return it to the investigator to improve the file, refer the criminal case to some simple procedure or whether the criminal case should be discussed in a full-scale procedure. It would probably be sensible to let the prosecutor who is in the role of the dispatcher to conduct some activities of investigation within a limited extent – first and foremost cross-examinations. Such competence of the prosecutor would no longer be interference with the work of the investigator and undermining the prestige of the latter, but at the same time it would help the prosecutor to find inner conviction and avoid unjustified return of the criminal case to the investigator. The competence of the prosecutor has been specified in a somewhat similar way in the draft of the CCP. The only exception to that described is that according to the draft, the prosecutor may at any time; therefore also in the initial period of pre-trial investigation, conduct independent investigation. I tend to believe that such a solution does not favour optimal relationships between the investigator and the prosecutor.

The choice made in the draft of the CCP to reduce the rights of the victim as compared to the current extent should be considered very serious. The need to accelerate the criminal procedure and the understanding that the prosecutor can represent the interests of the victim with legal competence in public criminal cases has been proceeded from in the reduction of the rights of the victim. Therefore the role of the victim has in public criminal cases been reduced only into the role of a civil plaintiff with regard to his or her "right of claim". And we have to admit that such an amendment is rather contrary to the tendency in changing the legal status of the victim.

26 Let us recall that, presumably due to the correction of the Soviet curriculum, criminalistics is no longer a compulsory subject in its whole extent in our higher schools of law. Actually it has to be said that also in Germany, Friedrich Geerds is one of the few who has actually fought for the (re)introduction of criminalistics in the curricula of faculties of law.

27 Therefore I do not consider the amendment made in § 120 (1) 1) of the CCP on 13 May 1998 justified, because according to this the prosecutor now has the right to "conduct single procedural activities in the criminal case proceeded by the detective when necessary". It is impossible to say what "when necessary" means, it is hard to prohibit single procedural activity to become double and in conclusion, unnecessary tension between the detective and the prosecutor may be predicted.

Some Choices Related to Pre-trial Procedure

The decision that in the future, surveillance conducted in the interest of criminal procedure should be regulated in the CCP, should be considered probably the major choice concerning pre-trial procedure. Currently all surveillance is regulated with the Surveillance Act (hereinafter: SA).*[28] In the circles related to creating of laws in Estonia, the understanding that currently dominates is that the SA in its present form should be eradicated. They think that the so-called criminal procedural part of the SA should be transferred to the new CCP. The remaining part of the SA should be regulated with the Security Institutions Act (hereinafter: SIA). In the explanatory note to the SIA, the necessity of this law is justified with the need to increase the efficiency of protection of principle rights. What is meant here is that pursuant to the SA, the person with regard to whom surveillance was used, may never learn about it. But this obligation of the state to inform could freely be fixed in the SIA and there is no need to create a new law just for this reason. The other reason discussed in the explanatory note to the SIA is obviously more important: decrease of the number of existing security institutions and thereby reduction of the excess expenses of the public sector. However, I share the understanding that it is actually not bad when such a sensitive field as surveillance is fully regulated in an independent act. It seems to me that in such a case this complicated field is more or less entirely in sight and in principle, it should help to better organise optimal civil control of surveillance. Only such surveillance the result of which could be obtaining evidence have been incorporated in the draft of the CCP from the valid SA. Three new forms of surveillance have been added: undercover surveillance, cross-usage of databanks and use of undercover investigator.*[29] Undercover investigator has been included in the draft according to the example of the German Code of Criminal Procedure and its objective is to fight organised crime better. Basically, an undercover investigator is a police officer, whose task is to use changed identity or a legend to penetrate criminal organisations in order to collect evidence. Evidence in criminal procedure is testimony of the undercover investigator, which means that his or her further inclusion in the criminal procedure takes place on the same bases as a witness, *i.e*. an undercover investigator may also be declared an anonymous witness.

Here it would be appropriate to continue with the statement that one of the major choices that has unfortunately not been made in the preparation of the draft of the CCP is related to the permissibility of the restriction of principle rights in criminal procedure. The issue here is not that the necessity of such a choice is not known. The issue is the absence of a sufficiently acceptable criterion. In his article published a few years ago, Jürgen Wolter has admitted that both criminal sciences as well as the constitutional court have not too seriously dealt with the creation of a standard procedural and constitutional theoretical system, which would allow uniform solutions to be offered to different problems of procedural law. What are missing here to an equal extent are approaches from the aspect of principle rights and comparative science of law, also the human rights and the European starting point for criminal procedure that would simultaneously guarantee efficient protection and protection of principle rights. Therefore, the common foundation is sought in vain and with modes results from the Constitution and the constitutions of other states, the human rights conventions of Europe and America and the entire culture of the western world. In Germany, there is no discussion of values that considers law of criminal procedure, there is no coeffect of such disciplines as law of the state, law of the police and law of criminal procedure, there is no joint commission of scientists and practitioners that would deal with reforming criminal procedure suitable for the 21st century.*[30] Unfortunately, what J. Wolter says about German criminal procedure, applies manifold also to Estonian criminal procedure. This means that we also lack a complete system (criteria), which among other things would allow to solve the problems related to the permissibility of restriction of principle rights in criminal procedure.

[28] For more about this act, see E. Kergandberg. Legal Regulation of Surveillance *de lege lata* and *de lege ferenda*: Constitutional and Criminal Procedural Aspects. – Juridica International. Law Review. University of Tartu, IV, 1999, pp. 68–75.

[29] Actually only the undercover investigator is completely new. Undercover surveillance and cross-usage of databanks are basically possible also pursuant to the SA.

[30] J. Wolter. Zur Theorie und Systematic des Strafprozessrechts. Neuwied; Kriftel; Berlin: Luchterhand, 1995, pp. 267–268.

Choices Related to System of Right of Recourse to Court

The disputes that arose in the preparation of the CCP concerning right of recourse to courts were not too serious, because it was considered right to preserve the current situation with just a few improvements.*[31] A more serious amendment is that the draft of the CCP no longer contains procedure for correction of court errors. The other principle amendment concerns special procedure. According to the draft, all orders of the court can be disputed under special procedure when the possibility of such complaint is not directly excluded in law. Another thing that can be mentioned here is that the issue of whether discussion of more serious criminal cases could be in second degree court in Estonia has been raised here on different levels, also whether it would not be practical to introduce the so-called possibility of jumping reversal also in Estonian criminal procedure. But at least now, such discussions have got tangled in constitutional restrictions.

Choices Related to the Third Sector

And finally, about one more choice that was actually not made in the preparation of the draft of the CCP, but the making of which is not late yet. One of the leading principles in launching contemporary criminal procedure is the principle of legality (regardless of the principle of opportunity that keeps correcting it more and more), pursuant to which when characteristics of a crime appear, the state takes upon itself the obligation to investigate the crime regardless of the will of victim or any other person. It is hard to overestimate the importance of this principle that ends the age of vendetta in contemporary criminal procedure. But the downside of this principle is being discussed more and more these days. Namely, this principle could create and has actually created such a socio-psychological climate according to which ordinary citizens, the civil society, or the so-called third sector have not much business in fighting crime. Since this is not a field that is too pleasant emotionally, the modern emancipation aspirations and desire to participate of the third sector have not affected criminal procedure too much. The absence of such possibility to participate (or its insufficiency) creates difficulties in making the decisions adopted in criminal procedure legal (or in other words – creates mistrust about whether such decisions are right and fair). Obviously such possibility of participation should also be created and strengthened in parallel with the introduction of the CCP.

31 About contemporary topical problems of Estonian right of recourse to courts, see *e.g.* E. Kergandberg. Fundamental Rights, Right of Recourse to the Courts and Problems Connected with the Guaranteeing of the Right of Recourse to the Estonian Criminal Procedure. – Juridica International. Law Review. University of Tartu, IV, 1999, pp. 122–132.