

THEMIS COMPETITION 2016

Judicial Ethics and professional conduct

Semi - Final D

CODE OF ETHICS FOR ESTONIAN PROSECUTORS.

OVERVIEW FROM THE PERSPECTIVE OF ADDRESSEES

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1. General part of the Code of Ethics

1.1 Origin and development

On 23 December 2003, the Code of Ethics (henceforward the Code) containing the ethical standards set out for the professional ethics and conduct of prosecutors entered into force. The Prosecutors' Assembly adopted the renewed version of the Code of Ethics on 12 April 2013.¹ This was done according to the written recommendations of Group of States Against Corruptions (GRECO) and since its adoption, the Code has become quite a useful tool for interpreting the main principles of ethics for officials and solving different kind of ethical problems which may occur in prosecutors' every day work. Hereinafter some practical examples of such cases will be given. It also established a new association elected by all prosecutors – The Prosecutors' Ethics Council, which consists of five members, representing each of four district prosecutors' offices and the General Prosecutor's Office. During the past three years, Prosecutor General has several times lodged requests to the Ethics Council to get the official opinion on some ethical matter arisen in some prosecutors' conduct.

Even though the current scope of the Code is broadly applicable, it recognizes and takes into account the growing fragmentation and specialization in lawyers work. The Code gives the understanding of today's legal profession in a changing world and uses different approaches to define and defend its boundaries. It is well-known that professional ethical obligations may sometimes be rather unclear and therefore such regulations should bring clarity to the lawyers work and specify their ethical obligations in quasi-legal roles. Explanations of the Prosecutors' Ethics Council as well as the decisions of the prosecutors' disciplinary committee are also available to all Estonian prosecutors, as these have been made public on the Prosecutors Office intranet according to art 1 sec 5 of Chapter 1 of the Code. The explanations of the Ethics Council on a conflict of interests, available on the webpage of Prosecutor's Office, are also considered as part of the Code and these are designed to set specific examples of the most common occurrences.²

¹ Estonian Code of Ethics for Prosecutors. Available electronically:
<http://www.prokuratuur.ee/et/organisatsioon/prokuroride-eetikakoodeks>.

² Webpage of the Prosecutors' Office. www.prokuratuur.ee. The Explanations for the conflict of interest.

1.2. Values and ideas represented

Public and the media, especially investigative journalism, nowadays are very conscious and demanding, their expectations to the public officials in general and to the prosecutors in particular are very high. Hence, prosecutors are expected to remain honest, fair and impartial not only during the decision-making but also outside the office and working hours. Moreover, prosecutors must not only be honest, fair and impartial, but they also have to appear as such. Violation of the Code or situations of conflicts of interest or insufficiently dealing with situations of conflicts of interest in media may directly affect the image of organization and therefore public trust to officials and organization as the part of the state can be lost. For instance, Council of Ethics has discovered violations of art 7 sec 2 of Code of Ethics of Prosecutors already in autumn 2013. According to mentioned Codes provision, differences in opinion caused by professional matters between the prosecutors are strive to settle primarily by agreement. Failing agreement, the differences in opinion shall be settled by the management of the Prosecutors Office. Prosecutors shall not bring internal matters before the public. Information that was provided for prosecutors' internal use only had been passed on to media and Council of Ethics considered this with one consent very non-ethical and reprehensible behavior. Council of Ethics also noticed that the Prosecutors Office respects prosecutors' rights and liberties granted to prosecutors and freedom to express their thoughts but they should solve independently the question where and with whom to share their thoughts, especially if it concerns to professional matters.³

The purpose of the Code is to settle the main public standards to the officials. It is like the agreement with the society, which describes suitable behavior to those who carry out their worktasks on positions where reliability and public trust are especially needed. The legislator settles minimum standards in laws and other legal acts but codes of ethics provide wider scope of restrictions and recommendations for officials. In addition, such codes can be more flexible and the ethical principles can be described more specifically.⁴

Codes of ethics are widely recognized as one set of tools to limit corruption. The functions and the essential concept of codes of ethics, as well as their possible application, supports it in the fight against corruption. The new version of the Anti-corruption Act (27.01.1999) amended the Public Service Act and added as an annex the Code of Ethics of Public Service. We should not

³ S.-H. Evestus. Prosecutors' Code of Ethics. *Juridica* II/2014.

⁴ K. Ahi, L. Saarniit. Codes of Conduct and Ethics section of infrastructure for the prevention of corruption. *Juridica* VIII/2000.

underestimate the importance of promoting ethical principles in the public service because of the specific nature of the development of Estonian society as well as the social, cultural and common traditions. The concept of preventing corruption is based on widely recognized principles and such provisions are included to the codes of ethics.

One of the basic principles of the public ethics is integrity concept that means steadfast adherence to a strict moral or ethical code. In the public service in general and in prosecutors' service in particular this means in short among other aspects the use of money, power, property etc. in the public interest only. However, it should be kept in mind that the conflict of interests is very closely associated with integrity.⁵ Prosecutors as well as all other officials while performing their work tasks should avoid such situations to be involved in when questions may arise as to whose interests they present. Therefore, prosecutors as the only representatives of the state indictment monopoly and guarantors of the lawfulness of pre-trial proceedings are highly expected to act not only under laws, but also in strict accordance with both one's conscience and Code of Ethics. The latter is designed to help prosecutors to assess their behavior preventively through the eyes of a bystander as well as to assist the Ethics Council to give a conclusion about the admissibility of the conduct of prosecutor in arguable situations. The Code can possibly prevent situations when conflict of interest will appear because it defines prohibited and permissive behavior, specifies possible problems and gives „warning signs“.

Like the codes of ethics for public officials of other countries, Estonian Code of Ethics of prosecutors is based on the same general values and prosecutors' should adhere to these principles or try to follow below mentioned recommendations and rules according to art 2 of the Code: 1) legality principle, means to respect the Constitution of the Republic of Estonia and human rights; 2) impartiality or neutrality and independence principle, means to perform the duties impartially, independently and in the best possible manner not letting the politics or the media to influence them; to perform the duties without trying to win someone's favor; 3) dealing from the perspective of the public interest, means to refrain from the use of official authority or the official title for the purpose of personal gain or from undignified use thereof, to maintain the reputation of the Prosecutors Office and the prosecutors; 4) continuous self-improvement and professionalism, means that prosecutors shall take care of their professional qualification, share their knowledge and skills with colleagues and, if necessary, shall take part

⁵ Addressing conflicts of interest in the public sector. OECD handbook. State chancellery 2007.

in professional events as lecturers. In addition, prosecutors shall maintain professional confidentiality and not to submit incorrect or misleading information.

1.3. Necessity to inform publicity vs restrictions from the law

According to Prosecutor Generals' public relations guide, Prosecutor Office should inform community to certain extent about criminal cases and crimes, crimes statistics, ensure reliability to criminal justice, to introduce Prosecutors Office and prosecutors work, to increase legal awareness of community, also to prevent crimes. During the pre-trial proceedings when the necessity to disclose information occurs, every prosecutor should take into consideration next recommendations: 1) disclosure of the information should not harm person's private and family life and ensure presumption of innocence; 2) if possible prosecutors should avoid possible identification of the person concerned because Estonia is too small country (especially if video or pictures were used) and disclosure of information should take place only if it needed for investigation or community interests; 3) only persons' first name, gender and age are being disclosed. Persons name should not disclosed if the individual could be identified; 4) if underage person is victim or suspected in some criminal case, prosecutor should ensure underage anonymity and can give information only about his or her gender and age. According to journalist code of ethics, children should be interrogated only with parent or some other person who is responsible for the child. Depend on the situation, but journalist should take into account mental stress possibility and it influence to underage persons, their relatives and close people life when criminal case, court trial or accident details are disclosed; 5) disclosure of information concerning pre-trial proceedings is permitted if it does not endanger a business secret or violate the activities of a legal person; 6) before disclosure of information about made decisions persons to whom it may concern should be informed because of avoiding possible violations of their rights and interests; 7) participants in criminal proceedings should be informed about appeal procedures; 8) disclosed information reflects objectively police and prosecutors office actions during preliminary investigation.

But when it is possible to talk about situation where information concerning some criminal investigation is disclosed illegally and journalist interfere in the preliminary investigation? For instance, if journalist got examination report and published his comments upon it in his article, it would not be a violation of law if he had found by himself new witnesses of the crime and interviewed them before the investigator. Therefore, this information doesn't include criminal investigation data and hence, it is not an illegal disclosure of protected information according

to art 214 of Code of Criminal Procedure of Estonia. Information concerning pre-trial proceedings shall be disclosed only with the permission of and to the extent specified by a Prosecutor's Office and under specified conditions. From the point of view of legal provisions there is no violation of aforementioned provision of law, it is not a dispute, yet on the other hand, it would be ethically correct if information which became known to journalist was passed on to investigator. Public as well as the journalists are to understand that freedom of the press is not unlimited; the journalist should adhere to the ethics of journalism, take into account the rights of other persons concerned and also take responsibility for the published information as well as the possible consequences.

Generally, community will be informed about crimes and investigations by answers to journalists' inquiries. Sometimes, on the contrary, prosecutors should use mass-media and give information about lasting investigation or committed crime:

- to find possible witnesses of the traffic accident or victims or to help the police to seize the suspect, so if it needed for investigation or community interests.
- if one criminal investigation or crime is under special interest of community or it can be alleged (priority criminal case, tough crime committed on public place, criminal proceedings are done in public place etc.),
- to prevent possible crimes (for instance, to inform community about internet frauds and more often committed crimes in this area),
- to disprove incorrect allegations or misleading information spread in mass-media.

Generally, public relations division of the Office of Prosecutor General organizes daily communication with the community. Local public relations division organizes communication with the community in the district prosecutor's office. Journalists should contact directly the prosecutors' offices public relations divisions and their spokesperson. If journalist turns to some prosecutor, he or she can forward journalists request to the public relations division. If possible, journalists' inquiries should answered within reasonable time, for instance, during first 24 hours after receiving inquiry. If composing the reply takes more time, journalists' should be informed about the delay as well as about the response deadline. In case it is for some compelling reason impossible to provide the journalists' the information inquired, prosecutor or spokesperson from public relations division should shortly explain the reason of the refusal. Some examples to illustrate how the well-timed communication with the public in the different situations can affect the public opinion about certain cases and how it can influence the rating of the law

enforcement entities in society will be given from our recent experience in the last chapter of the paper.

2. Prosecutors and Media

2.1. Communication with the media

In communication with the public, the Prosecutor's Office primarily follows the Code of Criminal Procedure, the Personal Data Protection Act and the Public Information Act. Information related to pre-trial proceedings is disclosed by the Prosecutor's Office. Investigative bodies may disclose information related to criminal proceedings only with the permission of and to the extent of specified by the Prosecutor's Office.⁶

Estonia's media landscape is diverse, including many national and local news outlets and a growing collection of popular online sources.⁷ The prosecution of professional ethics specifications results from the prosecutor's role: 1) uniform prosecution policy versus the independence of prosecutors, 2) prosecution function in an adversarial procedure versus an objective truth detection.⁸

Estonian Code of Ethics for prosecutors brings out the general rules for all prosecutors. In their conduct the prosecutors shall always comply with the following rules: 1) to respect the Constitution of the Republic of Estonia and human rights; 2) to maintain the reputation of the Prosecutor's Office and the prosecutors; 3) to retain professional dignity and good conduct both in professional relationships and outside the working time while participating in the social and cultural life; 4) to perform the duties impartially, independently and in the best possible manner not letting the politics or the media to influence them; 5) to perform the duties without trying to win someone's favor; 6) to maintain professional confidentiality; 7) to refrain from the use of official authority or the official title for the purpose of personal gain or from undignified use thereof; 8) not to submit incorrect or misleading information; 9) to dress correctly. It is marked that prosecutors must be independent in the best possible manner and do not let media influence them.

⁶ Webpage of the Prosecutor's Office. Available electronically: www.prokuratuur.ee/en.

⁷ Nations in Transit. Available electronically: <https://freedomhouse.org/report/nations-transit/2014/estonia>.

⁸ N. Aas. Prosecutors' Ethics. Available electronically: <http://www.riigikohus.ee/?id=795>.

In Estonian Prosecutor's Office it is prohibited to use media for self-advertisement and this restraint comes from article § 7 of the Code, which stipulates clearly that prosecutors shall not use the press to advertise themselves or the persons close to them. Prosecutor comments or gives legal opinions not personally but as represents Prosecutor's Office entirely. It means that every prosecutor's public opinion applies as Prosecutor's Office official opinion. According to Prosecutor's General public relations guide, Prosecutor's Office should inform community to certain extent about criminal cases and crimes, crimes statistics, ensure reliability to criminal justice, increase legal awareness of community and also to prevent crimes.⁹

For giving an example as how Prosecutor's Office increases legal awareness of community it is unavoidable to talk about case which it is called "Varvara" in Estonia. Short and infrequent information was given by the police and Prosecutors Office during the criminal investigation concerning murder and rape case of 9-years old girl Varvara that was committed 4 years ago in Narva town. In march 2012 a 9-year old girl disappeared and found dead on the wasteland four days after disappearance. The crime was continuously in the spotlight everywhere in Estonia because the community was seriously shocked by this outrageous crime. To the prosecutor it is mandatory to give information, which is correct and controlled, therefore in this case there were lack of information in media not because prosecutor did not have something say but prosecutor waited concrete evidences to say out the official opinion. This investigation was terminated after 4 years of long and hard work when the investigation group came to conclusion that possible perpetrator committed suicide two years ago but only a few days after the police had taken his DNA reference sample for expertise. When the results of expertise's were known and the decision of termination of the preliminary investigation was made, Prosecutors' Office decided for the first time in Estonian history to arrange the press conference in order to inform the community about the results of investigation because there was a nationwide public interest in the outcome of the procedure. However, it appeared that the public and the press criticized the Prosecutor's Office for the extremely curtly proceedings and superficially information. Three and a half years after Varvara case 15 years old Darja was found dead in December 2015 in Narva suburban area. This case showed that it was very reasonable and correct decision to let the representatives of the Prosecutor's Office and the Police to inform community about some details of the crime. The Prosecutor's Office was obliged to do so in order to calm down the local community and reassure people that this was

⁹ *Ibid*, p 6.

not the same situation like in the Varvara case and that there was no serial killer and rapist out there endangering children and teenagers.

Every prosecutor must think in this situation if public interest outweighs the protection of the rights of victims. However, we would like to cite the former Prosecutor General of Estonia Normas Aas who claimed that the concept of public interest is one of the most misunderstood terms. Norman Aas believes that the concept on public interest in the proceedings shall not thereby equalize the public thirst for news or media interest, it does not also depend on the extent which the public is aware and how reacts of the particular case.¹⁰

2.2. Prevention and concept of public interest

The Prosecutor's Office bases its actions on the principles of a democratic and social state ruled by law and on the principles of open society. The goal of the Prosecutor's Office when communicating with the public is to inform the public to the justified extent about criminal proceedings and crimes, to ensure the public's trust towards the criminal justice system, to increase the law awareness of the public, and to explain the nature of the duties of prosecutors and the Prosecutor's Office. According to need of prevention Estonian Government has adopted priorities which give prosecutors and also investigators a understandable and clear goals. One of the priority is to investigate and ensure maximum protection of children who are victims of crime. The role of prosecutor in these cases are not only investigate crimes but to prevent them.

Also the Prosecutor's Office spreads preventive messages to avoid people becoming victimized by crimes or committing violations of the law. For instance, this possibility was widely used by the Prosecutor's Office in 2008-2011 when a large number of so to called fake cop frauds were committed. Several preventive messages where in television and newspapers, which where giving information about the felonies. This is effective measure when people who prosecutor want to reach are reading newspapers or watching television, nor reading official announcements in Prosecutor's webpage.

However, multi-tasking and information overload encourage greater reliance on stereotyping and emotional cues in judging and deciding how to react to other persons. Severe time pressure leads its victims to experience negative emotions, in turn, focusing primarily on negative rather

¹⁰ N. Aas. Avalik menetlushuvi ei võrdu avalikkuse uudistejanuga. <http://www.postimees.ee/904398/norman-aas-avalik-menetlushuvi-ei-vordu-avalikkuse-uudistejanuga>.

than positive information.¹¹ According to the Code, it is possible for the courts or the Prosecutors' Offices to terminate criminal proceedings in event of lack of public interest in proceedings and in case of negligible guilt.

Therefore if the object of criminal proceedings is a criminal offence in the second degree and the guilt of the person suspected or accused of the offence is negligible, and he or she has remedied or has commenced to remedy the damage caused by the criminal offence or has paid the expenses relating to the criminal proceedings, or assumed the obligation to pay such expenses, and there is no public interest in the continuation of the criminal proceedings, the prosecutor's office may request termination of the criminal proceedings by a court with the consent of the suspect or accused.¹²

Prosecutors claim to act in the name of the sovereign or society as a whole, seeking to punish offenses against the common good. That makes them different from most other lawyers who work on behalf of an identifiable client whose interests may differ from the common good.¹³ Although in theory they represent the public interest, prosecutors are employed by the state.

Communicating with media will help to apply the principle of public access. The principle of public access applies to the pronouncement of decisions without restrictions unless the interests of a minor, spouse or victim require pronouncement of a decision in a court session held in camera.¹⁴

As it is told in The Constitution of the Republic of Estonia section 24 that court hearings are public. The court may, in the cases and pursuant to a procedure provided by law, order a hearing or a part thereof to be held in camera to protect a state secret or a trade secret, public morality or the private and family life of individuals, or where the interests of a minor, a victim, or the administration of justice so require. Judgments are pronounced publicly, except in cases where the interests of a minor, a spouse, or a victim require otherwise. In accordance with the

¹¹ A.E, Taslitz. Information Overload, Multi-Tasking, and the Socially Networked Jury: Why Prosecutors Should Approach the Media Gingerly, p 95.

¹² Estonian Code of Criminal Procedure. Available electronically:
<https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530052016003/consolide>.

¹³ W. B. Wendel. Ethics and Law, p 156.

¹⁴ *Ibid*, p 12.

procedure provided by law, everyone is entitled to appeal a judgment rendered in his or her case to a higher court.¹⁵

2.3. Prosecutors and cooperation – key to success

According to the Code § 2, prosecutors shall take care of their professional qualification, shall share their knowledge and skills with colleagues and, if necessary, shall take part in professional events as lecturers.¹⁶ Assistant prosecutors shall act under the supervision of the Prosecutor General, chief state prosecutor, chief prosecutor, state prosecutor, senior prosecutor, specialized prosecutor or district prosecutor.

In Estonia it is common that prosecutor works together as a team with police officers and other investigating body. The Police and Border Guard Board, the Security Police Board, the Tax and Customs Board, the Competition Board, the Military Police, the Environmental Inspectorate and the Prisons Department of the Ministry of Justice and the prison that perform the functions of an investigative body directly or through the institutions administrated by them or through their regional offices are investigative bodies within the limits of their competence.

Prosecutors make the two decisions that essentially drive the whole criminal-justice system: what charges to bring and when to offer a plea bargain. Estonian Prosecutors' Office act § 1 says that the prosecutor's office is a government agency within the area of government of the Ministry of Justice which participates in the planning of surveillance necessary to combat and detect criminal offences, directs pre-trial criminal procedure and ensures the legality and efficiency thereof, represents public prosecution in court and performs other duties assigned to the prosecutor's office by law.¹⁷

After an arrest is made, the case then goes to the prosecutor's office to be reviewed and disposed of or referred elsewhere and after that to the court. Prosecutors control much of the court machinery, but unfortunately, even though people understand much about *what* prosecutors do, they know remarkably little about *why* they do it.¹⁸ Therefore, it is almost unavoidable to explain formation of position not only in court but also in public.

¹⁵ The Constitution of the Republic of Estonia. Available electronically:
<https://www.riigiteataja.ee/en/eli/521052015001/consolide>

¹⁶ *Ibid*, p 1.

¹⁷ Estonian Prosecutor's Office act. Available electronically:
<https://www.riigiteataja.ee/en/eli/525032015008/consolide>

¹⁸ R. F, Wright, K. L, Levine. The Cure for Young Prosecutors' Syndrome, p 1067.

When an individual prosecutor combines life experience with the relevant lessons learned from work in a prosecutor's office, the result is a more balanced conception of the job. This transformation does not happen at the same pace for every individual prosecutor, though. While personality might account for some of this variance, it is noticed that individuals who arrived at the office with greater life experience – for instance, those who entered prosecution as a second career – seemed to evolve more quickly toward balanced prosecution, requiring fewer years of on-the-job experience before embracing a new self-image.¹⁹

2.4. Prosecutors as public figures - ancillary activities and corruption

Prosecutors shall be independent in the performance of their duties and act only pursuant to law and according to their conscience, whereas they shall not be subject to the pressure exerted by the authorities of the state and local governments or administrative agencies or officials and to any other direct or indirect influence which will damage or cause a precondition for damaging the prosecutors' objectivity, impartiality or the requirement for professionalism or the reputation of the Prosecutor's Office or the prosecutors' position.²⁰ The fundamental belief is that prosecutor is free in its decisions.

For example, if a victim brings a flower bouquet for prosecutor as an act of thankfulness, prosecutor must always think before taking flower bouquet from victim. One of the main reasons why prosecutor must be alert is that prosecutor must know if this act commits prosecutor to do something or not to do. If prosecutor is committed after taking the flowers, then this act shows not only thankfulness but also duties and then there is no impartiality in investigating crimes.

According to a corruption survey, Estonian residents have encountered the most corruption upon taking a roadworthiness tests (11% have been asked for a bribe), upon communicating with physicians (9%), the police (8%) and nursery schools (5%), and with schools and universities (5%). Entrepreneurs have also encountered most corruption upon roadworthiness tests (5%), but also regarding public procurements (4%). Although the survey does not provide exact information in terms of how and why those areas have the highest corruption rates, it does highlight the need to deal with those topics in depth and to identify the causes of such

¹⁹ *Ibid*, p 18, p 1112.

²⁰ *Ibid*, p 1.

experiences. A bribe has been asked from 18% of people, whereas 4% of people have given a bribe or a gift.²¹

Although the number of corruption crimes is declining, 274 corruption crimes were registered in 2008 when the previous Anti-Corruption Strategy entered into force as compared to 161 such crimes that were registered in 2012. The number of corruption cases has increased in educational institutions.²² As the statistics of registered corruption, crimes primarily indicate the investigation capabilities, focus preferences of investigative bodies, and include repeated crimes by same persons (e.g. one person having taken multiple bribes from different persons), an unambiguous input is not provided to set strategic objectives; still, it helps analyze the situation.

If prosecutors doubt which manner of activity or conduct to choose, they will turn to a higher-level prosecutor or to the prosecutors Ethics Council (Council) for advice in order to avoid the breach of professional ethics requirements. After establishing the Council every year there were 10-15 cases where prosecutors asked advice. Year by year after talking about ethics the number of appeals are decreasing, not because there are no cases but prosecutors are getting more awareness and know how to balance between ethics and social life.

Criminal Law Convention on Corruption art 26 says that the Parties shall afford one another the widest measure of mutual assistance by promptly processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute criminal offences established in accordance with this Convention. Parties shall not invoke bank secrecy as a ground to refuse any co-operation under this chapter. Where its domestic law so requires, a Party may require that either a judge or another judicial authority authorize a request for co-operation, which would involve the lifting of bank secrecy, including public prosecutors, any of these authorities acting in relation to criminal offences.²³

In Estonia, the 2012 Anti-Corruption Act²⁴ came into force in early 2013, outlining the legal framework for the fight against corruption. At year's end, it was still too early to tell how the framework is functioning in practice. A bidding process was launched in October for the

²¹ Estonian Anti-Corruption Strategy 2013–2020. Available electronically: http://www.korruptsioon.ee/sites/www.korruptsioon.ee/files/elfinder/dokumentid/estonian_anti-corruption_strategy_2013-2020.pdf.

²² Estonian Corruption Statistics. Available electronically: www.korruptsioon.ee/statistika.

²³ ETS 173 – Criminal Law Convention on Corruption, 27.I.1999.

²⁴ Anti-corruption Act. The State Gazette, 01 April 2013 Available electronically: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530102013048/consolide>.

rebuilding of the electronic register for declaration of economic interests, which is intended to serve as the main tool for ensuring transparency and preventing conflicts of interest.

Estonian Code of Criminal Procedure § 49 says that prosecutor is required to remove himself or herself from a criminal proceeding if he or she has been a person close to the accused, victim or civil defendant pursuant to subsection. For an example if prosecutor investigates a crime which victim is his or her relative, it is mandatory to remove herself or himself from the proceedings. But if a prosecutor does not remove himself or herself on a bases provided for in subsections 49 (1) and (6) of this Code, the suspect, accused, victim, civil defendant, third party or counsel may submit a petition of challenge against the prosecutor.

3. Rules of the Pre-Trial Prosecution and Court Proceedings

3.1. General principles

According to the article 5 of the Code of Criminal Procedure, criminal proceedings shall be commenced and conducted on behalf of the Republic of Estonia.²⁵ As the possibility for the private charges is excluded with a law in effect, Prosecutor's Office has a monopoly for the prosecution.²⁶ Therefore, prosecutor's are representatives of the state, who have to act merit to the trust they have been given and adhere to the highest professional standards. The second chapter of the Code stipulates rules for the pre-trial procedures and for the court proceedings, which every prosecutor should follow and in the article 3 five mandatory general principles are pointed out.

The first and probably the most important principle established in the article 3 is that prosecutor shall be guided in its work only by law, conscience, professional ethics of the prosecutors and public interest. This guarantees that all the prosecutors work on the same grounds, that their decisions are not affected by different origin, religion, political or other personal beliefs and subjects of the criminal proceedings can expect that the same legal frames are applied for everyone. This is also safeguarded by the assumption that exercise of the duties must be carried out by using all the instruments and methods that are permitted by law, international acts and

²⁵ *Ibid*, p 12.

²⁶ Supreme Court of Estonia. Judgement no 3-1-1-60-10 of 28.10.2010.

professional ethics. Prosecutor does not have discretion to apply legal acts selectively or to choose to follow only those, which seem useful for the proceedings.

In the pre-trial proceedings, prosecutor must reckon with the rights of the victims and witnesses and ensure the right of defence for the suspects and accused persons. In October 2015, for the first time in Estonia, one of prosecutors was charged with a criminal offence.²⁷ This was because although termination of criminal proceedings due to a lack of proportionality of punishment requires the consent of the suspect, she did not ask for it, signed the corresponding document in the name of the suspect by herself and therefore terminated the criminal proceeding unlawfully. Despite the fact that the court decision did not contain reasoning, as the Prosecutor's Office and the suspect agreed the penalty in a settlement proceeding and the court just had to approve it, it can be said, that besides breaking the law, now already ex-prosecutor also infringed the fundamental principles of the Code, as she violated the Code of Criminal Procedure and precluded suspect from realizing his right to refuse from the termination of the criminal proceeding and continue with it for the matter of truth, if he had wished to do so.

Prosecutor should initiate a court proceedings only if impartial assessment on evidence leads to a certainty, that there are grounds for bringing the charges against the defendant. If a prosecutor comes to a conclusion, that there is not enough evidence for bringing the charges, it must assure termination of the proceeding or withdrawal of the charges. This principle is closely linked to the presumption of innocence and with the doctrine *in dubio pro reo*, which are both nowadays considered fundamental principles of human rights and broadly recognised as the heart of the notion of a fair procedure, both in Estonian domestic law as well as in the numerous international acts.²⁸ Although Supreme Court of Estonia has accepted that the conviction of the defendant is in certain conditions possible even if there are only circumstantial evidences, prosecutors should not take it as a general rule and when in doubt, always adjudge the question about persons quilt on a case-by-case basics and consider the experimentation with bringing the charges carefully.

²⁷ Harju County Court. Judgement no 1-15-8548 of 26.10.2015.

²⁸ The Constitution of the Republic of Estonia, art 22; European Convention for the Protection of Human Rights and Fundamental Freedoms, art 6(2); Charter of Fundamental Rights of the European Union, art 48; Universal Declaration of Human Rights, art 11(1).

3.2 Honour and dignity

If the general principles of the article 3 of the Code pointed out rules, which should altogether ensure that prosecutors discharge their functions substantially in a rightful way, article 4 accentuates the principles, which should guard the overall impression of the prosecutor, both as a representative of a state power and as a person.

According to the Code, prosecutor is obliged to act with a participants in the proceedings and with the court honestly, decourously and politely, both in speech, writing and act. Acting familiarly or in a way, which impeaches its impartiality, should be avoided. Socializing among all parts of the criminal justice system and all branches of the legal profession is expected and appropriate, but any situation that might give rise to the reality or a reasonable perception of undue closeness to any judicial officer must be avoided.²⁹ Prosecutors need to consider whether the public can be confident that the close relationship with the judge, judicial officer or defence representative does not have any impact on the public opinion about the administration of justice. In contrast, prosecutor should not, despite any emotions that can arise in the courtroom, be hostile about the defence representative or the court. Public comments about the court decisions should assess legal theory and legal reasoning and not express doubts about the competence of the court in general. As with socializing with the people outside the criminal justice system and apart from branches of the legal system, prosecutor must abstain from the contacts, who could be compromising. For example, a prosecutor, who communicates regularly with a person, who is at the same time suspect in a pre-trial proceeding with a considerable public interest, may raise doubts about the motives of the relationship and cast a shadow on the Prosecutor's Office as a whole, even if the prosecutor is not the one, who is in charge with the case itself.

Much of what is gathered during a criminal investigation is of a sensitive nature involving the most intimate details of a person's life, and all of that information will end up in the prosecution file. Prosecutors should preserve professional confidentiality, subject to disclosure requirements in accordance with proper professional practice, and should not use any information to which they have had access during the course of their employment to unjustifiably further their own private interests or those of others.³⁰ In Estonia, infringement of

²⁹ United Nations criminal justice handbook series. The Status and Role of Prosecutors. Available electronically: https://www.unodc.org/documents/justice-and-prison-reform/14-07304_ebook.pdf.

³⁰ *Ibid*, p 29.

this principle has resulted with the disciplinary punishment for the prosecutor, who used population register considered strictly for the work assignments for acquiring information about a colleague.

3.3 Impartiality

The need for an impartial prosecutors is confirmed by numerous international documents.³¹ According to the article 5 of the Code, prosecutor is independent in the performance of its duties, acts only pursuant to law and conscience and should not take orders or obey to the pressure from state and local authorities or any other direct or indirect influence, what impairs or creates presumption for damaging the requirement of objectivity, impartiality and professionalism of the prosecutor or harms the reputation of the prosecutors profession in general.

Impartiality of the prosecutor has to be observed externally and internally. External impartiality means, that in a democratic state parliament or government should not try to illicitly influence the decisions that are taken in a particular criminal case, to designate how it is proceeded and should not demand prosecutor to change its conclusions. On the other hand, general criminal political guidelines, for example to turn more attention to the certain crime field is not seen as problematic, although in 2013, when Ministry of Justice pointed out, that to offer detainees in prison a personal space in accordance with EU acts and court practice and to avoid numerous monetary compensation claims, Prosecutors Office should release a certain number of persons (18 in total), who had been taken into custody for pre-trial investigations (who had committed lighter crimes against property or were minor drug offenders), many prosecutors felt that their impartiality has been intervened and this kind of recommendation is *per se* unlawful. As the e-mails, where prosecutors discussed the inside matters, leaked to the media, Council found that the article 7 of the code, which stipulates that prosecutor shall not bring internal questions to the public, has been violated.

³¹ Bordeaux Declaration: “Judges and prosecutors in a democratic society” CM(2009)192, 15.12.2009; Council of Europe: The role of public prosecution in the criminal justice system”, Rec(2000)19, 06.10.2000; U.N. Commission on Crime Prevention and Criminal Justice: “Strengthening the rule of law through improved integrity and capacity of prosecution services”, E/CN.15/2008/L.10/Rev.2, 17.04.2008.

Internal impartiality means, that prosecutor does not need approval from the higher prosecutor to carry out its duties in a certain case and can do its work without any intervening. Estonian Code of Criminal Procedure sets fourth two exeptions to this principle: Firstly, prosecutor general has a competence to set guidelines (for example how and when to apply the principle of opportunity) and secondly, higher prosecutor has a right to revoke a ruling, disposition or order made by lower prosecutor in its own initiative, if it is unlawful or unjustified. In this case, positions stated by higher prosecutor for the interpretation and implementation of the legal provision are in the certain case mandatory to follow.

3.4 Conflict of interests

Article 6 of the Code stipulates that prosecutor shall avoid in its work conflict of interest coming forth from the familial, social or other grounds and meetings with parties of proceedings, that can jeopardise its impartiality or leave an impression of impartiality. Also, in criminal proceedings, prosecutor can not participate as a defence representative or contractual representative of a party. In the beforementioned situations, prosecutor has an obligation to withdraw itself according to the law. In May 2015, Council made a proposal to the prosecutor general to initiate disciplinary proceedings against a prosecutor, who facilitated to her husbands misdemeanour, failed to submit actual information about her immovables in the declaration of economic interests and gave false information to the executive staff of the Prosecutors' Office, when beforementioned circumstances emerged. In this situation, both, the Council and the Prosecutor General found, that given the facts, an employment relationship should be terminated. As for today, prosecutor who was removed from the office has contested the decision in the administrative court.

Last, but not least, the Code enacts, that a prosecutor nor a members of its family do not ask and accept gifts, bequests, loans or favours from the parties of proceedings in relation to the work it has done, has to do or not to do, when carrying out its work assignments. In whatever question-begging situations, it would be wise to avoid practice of the gifts, as it creates favourable environment for other possible influences. Prosecutor should exclude the opportunity to put in doubt its objectivity and impartiality, both in time of the criminal proceedings and also after the final decision has been made by the court.³²

³² *Ibid*, p 3.

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