

# Issues in separation of criminal procedural functions

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**Abstract.** The term “criminal procedural function” has historically been used by scientists. In order to identify primary issues in procedural functions, the competition principle was analyzed. This strengthened such important issues as separation of prosecution and court functions, parties’ equality, independence of courts, etc. Therefore, the concept of three concept functions – prosecution, defence and adjudication – was developed in criminal proceedings. In the context of the Criminal Procedure Law having taking effect, this term was included into the law, including the principle of separation of criminal procedural functions. The aim of this paper is to offer the insight into interpretation of the concept of the criminal procedural function with the special focus on specific issues in function separation. Section 17 of Criminal Procedure Law determines the function of control of restrictions of human rights in a pre-trial. The functions of prosecution, defence and adjudication do not determine their priority over all other criminal procedural functions. These functions are claimed to be separate and therefore cannot be applied to the same person. This paper examines the equivalence of procedural functions as one of the most fair of the court elements. In the end, key conclusions are summarized.

**Key words:** criminal procedural function; defence; prosecution; court adjudication.

## 1 Introduction

The term “criminal procedural function” has historically been used by scientists [1, 2]. In the context of the Criminal Procedure Law (henceforth CPL) having taking effect, this term was included into the law, including the principle of separation of criminal procedural functions [3]. Thus, this term has undergone transformation from a theoretical to an applied concept that has received the legal status and that is used in CPL today.

*Aim.* The aim of this paper is to offer the insight into interpretation of the concept of the criminal procedural function with the special focus on specific issues in function separation.

*Materials and methods.* In order to attain the aim, the paper examines legal regulations and analyzes relevant legal literature and court cases. In the end, key conclusions are summarized. The following research methods were applied: 1. Historical method (the analysis of historical development of criminal procedural functions), 2. Analytical method (the overview of legal literature, periodicals and other sources), 3. Descriptive method (detailed analysis of the research subject).

## 2 Results and discussion

**The division of the criminal procedure into particular stages characterizes its structure, succession of implementation of procedural tasks**, however, it does not offer the opportunity to spot and distinguish the nature of procedural activities, the so-called functions [1]. **A function is not only a particular criminal procedural activity but also the entirety of activities and decisions that serve the same aim.**

Different views are expressed in the literature regarding the concept of the criminal procedural function. Some lawyers interpret it as directions of activities that are implemented during the court proceedings [3]. According to others, the division of procedural activities into functions represents particular types (elements) of such activities with their own aims that are realized through special roles of the parties involved in the activities [2].

The Supreme Court points to actions that are viewed as criminal procedural actions, which, in turn, is determined by the Criminal Procedure Law. In other words, criminal procedural actions are the actions that are regulated by the Criminal Procedure Law [4]. Specifically, criminal procedural activities are the activities that are regulated by the Criminal Procedure Law. Therefore, if a function is provided for in the sources of rights in the criminal proceedings, it is done so in order to be consistent with the features of public administration functions. It is a criminal procedural function that is administered according to the Criminal Procedure Law and other sources of criminal procedure rights.

It is feasible to determine functions of the persons involved in criminal proceedings by assigning rights and duties. Mostly this depends on whether a particular person acts in defence of private or public interests. For persons that have personal interests in the outcome of criminal proceedings (the suspect, accused, victim, etc.) the functions mostly derive from rights that have been assigned to them. Conversely, the functions for officials that deliver criminal proceedings are assigned based on their duties.

In order to identify primary issues in procedural functions, the competition principle was analyzed. This strengthened such important issues as separation of prosecution and court functions, parties' equality, independence of courts, etc. Therefore, the concept of three concept functions – prosecution, defence and adjudication – was developed in criminal proceedings. This view of the concept is also supported by the University of Cambridge professor J.R. Spenser, who indicated that traditionally a prosecutor prosecutes, a defender defends and the court adjudicates [5].

However, this concept touched neither on the functions triggered in the pre-trial investigation nor the functions of witnesses, experts, etc. According to Professor A. Liede, the following key functions could be identified within the criminal court proceedings: an investigation function, incrimination and defence functions, adjudication function as well as the function of the supervision of the Office of Prosecutor [1]. A few authors suggest that criminal procedural functions be divided into the main or basic functions, subsidiary functions and supplementary functions. However, this classification of functions might not be necessary. Figuratively speaking, criminal procedural functions could be compared to human blood-vessels. All blood-vessels are essential for healthy life of a human being and therefore all of them are equal. The only difference lies in that some of them ensure greater blood flows than others, yet overall, their integrity secures healthy functioning of a human body [6]. This comparison could easily be applied to criminal proceedings: any minimization of the value of any criminal procedural function leads to less attention to attaining the goals of criminal proceedings, which results in the inability of criminal procedural activities to fully fulfil the assigned duties. Having completed the analysis of the Criminal Procedure Law norms, it is plausible to conclude that the legislator does not

provide any grounds for the division of criminal procedural functions into categories based on their significance.

Section 17 of CPL determines the function of control of restrictions of human rights in a pre-trial. The functions of prosecution, defence and adjudication do not determine their priority over all other criminal procedural functions. These functions are claimed to be separate and therefore cannot be applied to the same person. Precisely, the legislator has determined the functions that can be separated in criminal proceedings, thus, prohibiting the realization of two or more particular functions by one person in one case of criminal proceedings.

The legislator does not provide any reason to question the nature of another criminal procedural function that is not determined in Section 17 of CPL, for example, Section 36 of CPL points to that the public prosecutor in criminal proceedings performs the following functions: supervision of investigation, investigation, criminal prosecution, sustaining of state incrimination and other functions identified in the Criminal Procedure Law.

A specific person involved in criminal proceedings can simultaneously realise multiple functions except for the functions that are specifically separated.

Constructing Section 17 of CPL, the legislator has specified four procedural functions and most importantly has stressed that these functions can be separated. This separation means that relevant spheres must be functionally and institutionally separable.

In the absolute majority of cases, this is how it works, specifically, **at the pre-trial stage the control over the restrictions of human rights is implemented by the investigating judge, the accusation is delivered by the prosecutor, the defence is conducted by the person who has the rights of defence, his/her representative and his/her attorney, in turn, administration of justice is delivered by a judge or court.** One circumstance does not fit into the scheme, that is, in accord with the subsequent formulation of the text in the Criminal Procedure Law, the investigating judge controls the restriction of human rights only on the limited scale, in other words, only within the framework of specific warrant. Other controlling activities are mostly assigned to the public prosecutor [7]. The investigation judge realizes the control function of the restriction of human rights not only in the pre-trial but also in specific cases determined by the CPL in the Court of First Instance until the beginning of the case adjudication.

The second part of Section 41 of the CPL claims that from the Court of First Instance to the commencement of trial of a case, an investigating judge has a duty to decide on the following: (1) the application of an accused in relation to the amending or revocation of security measures; (2) the proposal of a public prosecutor in relation to the selection or amendment of a security measure; (3) the acquaintance of a person involved in criminal proceedings, who has the right to get acquainted with the materials of a criminal case, with special investigative actions that are not attached to the criminal case (primary documents).

It is important to stress that an investigating judge shall not be permitted to replace a person directing the proceedings and a supervising public prosecutor in pre-trial criminal proceedings by giving instructions regarding the direction of an investigation and the performance of investigative actions.

The impartiality of the court is viewed based on the procedure of the court composition, and the fact that in criminal proceedings a judge participates who has previously been involved in the proceedings indicates that the impartiality requirement is breached. In order to avoid it, Section 52 of the CPL claims that the investigating judge shall not be the person who has been the person directing the proceedings or supervising public prosecutor in the same criminal proceedings. A judge shall not participate in the adjudication of a case if he or she: (1) has participated in the criminal proceedings in any status; (2) is in kinship to the third degree, affinity to the second degree, or married to

another judge involved in the adjudication, the maintainer of prosecution, or the public prosecutor who has transferred the criminal case for trial, or if he or she has a common household with the referred to judge, maintainer of prosecution, or public prosecutor.

Today the quality of criminal proceedings largely depends on the rights to fair, open and timely case hearing in the independent and impartial court determined by the law. According to Chapter 8 of the Constitution of the Republic of Latvia, a fundamental human right is state recognition and defence of fundamental human rights consistently with the Constitution, laws and binding international agreements [8]. Section 92 of the Constitution also guarantees that anyone can defend his/her rights and legal interests in a fair court.

This guarantee is consistent with the most important international legal acts, such as Section 10 of ANO General Human Rights Declaration, Section 6 of the European Convention of Human Rights and Protection of Fundamental Freedom and Section 14 of ANO International Pact of Civil and Political Rights.

According to Part 1 of Section 6 of the Convention of Human Rights and Protection of Fundamental Freedom that defines civil rights and duties as well as the validity of incrimination in criminal proceedings, anyone has rights to fair and open timely hearing in an impartial court determined by law. The court decision is to be publicly announced, however, the presence of press and public in the proceedings can be fully or partially prohibited for ethical reasons or in the interests of public order and state security in the democratic society that demands the protection of the interests of the minor or private life of the participants of the proceedings, or else to the extent that the court considers absolutely essential in special circumstances when the publicity endangers the interests of justice.

Section 48 of the CPL claims that considering the criminal case the court has the warrant of the person directing the proceedings in administration of criminal proceedings and securing the procedural order, as well as the exclusive rights to administer justice. Consistently with Section 23 of the Criminal Procedure Law, the court considers the validity of incrimination in acquitting innocent persons or pleading persons guilty of committing a criminal offence and determining the mandatory adjustment of criminal legal relations for state institutes and persons. In turn, the accusation function in criminal proceedings is delivered by the public prosecutor. Although the concept of the state prosecution is mentioned in Section 42 of the Criminal Procedure Law, the classical definition is not included. Part 1 of Section 42 of the Criminal Procedure Law states that "Public prosecution in the first instance is maintained by the public prosecutor who has submitted the criminal case to a court. A senior public prosecutor can assign the case to another public prosecutor." Yet, Part 2 of the same section states that "As far as possible, instances of public prosecution appeal in court are maintained by the same prosecutor who presented the case in the Court of the First Instance. A senior public prosecutor can assign the case to another public prosecutor."

**Currently criminal proceedings are formed in such a way that the same public prosecutor can be involved throughout criminal proceedings.** In criminal proceedings the public prosecutor fulfils the supervision of investigation, investigation, prosecution, maintenance of state prosecution and other functions outlined in the law (Sect. 36 of the CPL). Initially, the public prosecutor is the public prosecutor supervising investigation (Sect. 37 of the CPL). The supervising public prosecutor acquires the status of the person directing the proceedings from the moment he/she takes over the administration of criminal proceedings and decides about the initiation of criminal prosecution (Sect. 38 of the CPL). Public prosecution in the Court of the First Instance is delivered by the public prosecutor who has submitted the criminal case to court (Sect. 42 of the CPL), etc. Each

public prosecutor is controlled by senior public prosecutor who, following the law, controls the way the public prosecutor uses his/her warrant [9].

**Incrimination restrictions and content are determined by the public prosecutor; it is the exclusive function of the public prosecutor to decide if a person is to be held criminally liable** and if yes, then for what type of an offence. In turn, **incrimination of the public prosecutor determines the restrictions of court hearing**. Without intervening into incrimination maintenance and delivery of defence, by fulfilling its function, the court participates in the examination of evidence.

In order not to intervene into realization of separate functions in criminal proceedings, the law puts forward a number of restrictions to the court and judge. For example, the court and the judge:

1. do not make the decision on the initiation of criminal proceedings. Part 2 of Article 476 of the CPL is an exception example that states that the court makes a decision on the criminal procedure separation, which is simultaneously considered as the decision about the initiation of new criminal proceedings;
2. cannot send the criminal case for supplementary investigation;
3. cannot continue adjudication if the public prosecutor has declined incrimination in the order consistent with Article 476 of the CPL;
4. following own initiative, cannot acquire evidence or vary it in court hearing, except for the cases when the defendant conducts his/her own defence and the court has justified doubts about the defendant's accountability or possible guilt in the incrimination (Part 2 of Article 455 of the CPL);
5. the court rights to state other circumstances that are different from the incrimination are restricted.

According to Part 3 of Article 455 of the Criminal Procedure Law, the court can recognize as proved the factual circumstances different from incrimination for offence only if these circumstances do not worsen the condition of the defendant's and the defendant's rights for defence are not breached [10]. This condition includes not only the court's rights to replace factual circumstances that have not been proved in the offence with evidence but also exclude from incrimination factual circumstances that have not been proved and if there are legal grounds to reclassify the incriminated criminal activities if this does not worsen the defendant's condition and his/her rights for defence are not breached [11].

According to the European Convention of Human Rights and Basic Freedom Protection Act, there exist main guarantee categories for fair case examination: (a) organic guarantees that are aimed at ensuring that such case examination is possible, which assigns state institutions a number of duties (form a legal court, impartiality, publicity of the case hearing, etc.); (b) functional guarantees that are aimed at ensuring equality at all stages of the procedure [12]. Article 6 of the Convention requires that procedural equality insurance is attributed to the functional guarantees.

The concept of fair court includes the principle of equal opportunities for all parties involved, which provides an opportunity for all parties involved to present case circumstances and which forbids any party to be assigned more significant advantages in comparison to the opponent [13].

Persons involved in the criminal procedure have warrants (rights and duties) that ensure tasks that are determined for them in legislative acts and provides for equal realization of guaranteed rights. The principle of equivalence of procedural warrants applies to entire criminal proceedings. Procedural equivalence of warrants **does not mean that the rights and duties of the persons involved in criminal proceedings must be absolutely identical**.

It is important to stress that this principle is regulated generally, and “equivalent realization” obviously represents a value concept that is filled in each specific case. Similarly, it must be noted that this principle is not identical to the equality principle. While the equality principle asserts equal attitude to the persons in the same status and same circumstances, the **procedural warrant equivalence principle can be attributed to various process participants who on a particular occasion in the process were assigned the same duties, rights**, etc. This principle means that relevant process participants have to ensure equivalent (but not necessarily the same) opportunities to use them, etc. Adjusting various criminal procedure norms to practice, directly practicing employees must be the ones who thoroughly observe the realization of equivalence ideas [7].

The quality of arms principle is both a significant element of the rights to fair court and is special manifestation of legal equality principle that refers to all types of cases subjected to court. This determines that in case hearing the rights of the participants involved in the process have to be fairly balanced, in other words, **each participant has to be ensured with adequate opportunities to use procedural tools and must not be subjected to groundless unfavourable conditions in comparison to other process participants**.

Therefore, the principle of procedural equality leads to the state duty to form such case hearing regulation that would ensure it. This, however, **does not mean that in some cases (or specific category cases) such advantages could not be groundless [14]**.

The defence that is conducted by the person who has the rights of defence, his/her representative and defender, in the CPL is regarded as “weaker” than the incrimination that represents state interests. Therefore, the defence receives additional procedural advantages (**defence privileges** (*favor defensionis*)), for example, the presumption of innocence (*praesumptio innocentiae*), doubt interpretation in favour of the person who has the rights of defence (*in dubio pro reo*), mandatory defence in cases determined by law, rights (not duties) to provide testimony, etc.

The legislator has included the principle of rights of defence in Article 20 in the Criminal Procedure Law. This article asserts that each person regarding whom an assumption or allegation has been expressed that such person has committed a criminal offence has the right to assistance of a defence counsel, that is, the right to know what offence such person is suspected of committing or is being accused of committing, and to choose his or her position of defence.

The rights of defence as the essential component of the rights to fair court are constitutionally guaranteed fundamental human rights. Article 92 of the Constitution of the Republic of Latvia asserts that anyone has the right to the defender’s help.

Legal profession is an essential component of the state legal judicial system. Only having the legal profession is it possible to converse about the actions of the state legal judicial system, courts and state investigation institutions in a state that functions based on law [15].

The rights of defence include a number of aspects:

1. Assignment of procedural rights to the person that has the rights of defence. This person has the rights to know incriminated suspicions, to defend own rights using any possible legal means, etc.
2. The person that has the rights of defence can conduct own defence or has to have real opportunities to use the service of a defender.
3. The duty of the person directing the proceedings is to ensure that the person who has the rights of defence is provided with an opportunity to defend his/her case using all legal means. The duty of the person directing the proceedings is not only to ensure the

application of such rights but also to defend such rights and not to obstruct their application. The person directing the proceedings must understand that only by observing such personal procedural guarantees in the criminal procedure is it possible to ensure the effective application of the Criminal Law norms and fair regulation of criminal legal relations in specific criminal proceedings and to overcome the protest of the person who has the rights of defence.

However, the person directing the proceedings:

- does not make a deal regarding the defence and does not invite a specific lawyer to act as a defender; however, this person has to provide the person involved in the case with all necessary information and provide with an opportunity to use communication devices to invite a defender (Article 80 of the CPL);
- in cases when the person who has the rights of defence has not made a deal about the defence and yet the defender's participation is mandatory or the person wishes to have a defender, the person directing the proceedings has to inform a senior certified attorney in the relevant court territorial jurisdiction about the necessity to ensure a defender's participation in criminal proceedings (Article 80 of the CPL);
- in cases specified in Article 81 of the Criminal Procedure (in specified procedural activities), the person directing the proceedings has to invite a defender in accord with the defence schedule of the relevant senior attorney in specific procedural activities.

The University of Zurich Criminal Law Professor Stefan Trechsel claims that the arguments that justify the offer of legal help to the person that has the right of defence could be viewed from technical, psychological and humanistic perspectives [16].

The decisions of the European Court of Human Rights have included such aspects. For example, in the case of *Salduz v. Turkey* the court drew attention to the fact that the person who has the rights of defence at the pre-trial stage is particularly vulnerable because that person does not have specialized knowledge about criminal proceedings, his/her status, interrogation, evidence acquisition procedures whose knowledge is very important, particularly at the initial stage of investigation. It is exactly the evidence obtained at the initial investigation stage that often sets incrimination restrictions. In most cases such vulnerability can be overcome by the involvement of a defender in the defendant's criminal proceedings [17]. The decision of this Court has impacted on legal regulations of many states [18].

The European Court of Human Rights further asserted the necessity of engaging a defender in the criminal proceedings in the case *Melnikov v. Russia* in which the submitter complained about the absence of a defender in confrontational situations. The Court highlighted that due to absence of the defender, the submitter could not have understood the confrontation procedure and therefore could not have effectively used his rights of defence [19].

The humanistic aspect has been approved by the European Human Rights Committee in its report on the case *Can v. Austria*. Although the provision of emotional support is not included into the duties of a person who offers legal help, this aspect can be used as an additional argument when claiming the necessity of good legal support in criminal proceedings [20].

As a topical matter it is important to mention the European Parliament and Council Directive (EU 2016/343 (09.03.2016)) **regarding the necessity to strengthen certain aspects of the presumption of innocence and rights to participate in case hearing in person in criminal proceedings [21], whose goal is to ensure the rights to fair court in criminal proceedings, determining minimal limits of the presumption of innocence and the right to participate in case hearing in court in person.**

The Directive refers to the: (1) requirement that the suspect or the accused shall be considered innocent while his/her guilty has not been proved in accord with the law; (2) regulations about the defence of the suspect or the accused against the authorities announcing the guilt prior to the judgement of conviction; (3) regulations pertaining to the fact that the burden of proof lies with the person directing the proceedings and the fact that the reasonable doubt about the guilt of the accused results in this person's pleaded not guilty; (4) rights of the suspect or the accused not to give testimony against self and not to cooperate with the investigation; (5) rights to remain silent and (6) rights participate in the case hearing in court in person.

The Stockholm programme has already focused on strengthening of the person's rights in criminal proceedings. In Point 2.4 of the programme the European Council invites the Committee to submit a proposal strengthening the rights of the suspect or the accused determining the rights to common minimal standards of the fair court. Three actions have already been passed:

- 1) European Parliament and Council Directive (2010/64/EU (20.10.2010)) on the rights to oral and written translation in criminal proceedings;
- 2) European Parliament and Council Directive (2012/13/EU (22.05.2012)) on the rights to information in criminal proceedings;
- 3) European Parliament and Council Directive (2013/48/EU (22.10.2013)) on the rights to the defender's help in criminal proceedings and European arrest warrant process, on the rights to inform the third person upon restriction of freedom and on the rights to communicate with the third persons or consulting institutions during the period of restriction of freedom [22].

The Directive will supplement the legal regulation that has been created by the European Convention of Human Rights and Charter of Fundamental Rights. It will strengthen mutual trust amongst the institutions of member states and will ease the process of mutual recognition of judgements in criminal cases.

### **3 Conclusions**

1. A function is not only a specific criminal procedural action; it is the entirety of actions and decisions that are advanced to attain a specific aim.
2. It is possible to determine the functions of persons involved in criminal proceedings by assigning rights and duties.
3. The analysis of CPL norms has revealed the fact that the legislator does not provide grounds for separation of criminal procedural functions according to their distinct features.
4. The legislator has determined functions that are separate in criminal proceedings and that forbid the application of two or more separate functions to the same person within the scope of one case of criminal proceedings.
5. A person involved in specific criminal proceedings can simultaneously be applied multiple functions, except for separate functions. The equivalence principle of procedural warrant applies to entire criminal proceedings and has a significant role in ensuring the separation of procedural functions.
6. The equivalence principle of procedural warrant does not mean that all rights and duties of the persons involved in criminal proceedings must be absolutely identical.
7. The concept of fair court includes the principle of opportunity equivalence of the parties involved, which includes the provision of an opportunity to lay out the case circumstances to all parties involved in the proceedings and forbids offering significant advantages to any party as compared to the opponent.



8. However, this does not mean that in some cases (or in some category cases) such advantages cannot be justified. For example, to a certain extent the defence might be regarded “weaker” than the prosecution that stands for state interests. Therefore, the defence receives supplementary procedural advantages (defence privileges).

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