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Theory of Criminal Process Functions: Retrospective and Realities

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Abstract: *This article states the presence of a full-fledged theory of criminal procedural functions in criminal procedural science. At the same time, despite the continued interest of scientists in the criminal procedure area of the same name, there is a lack of research aimed at further development of this theory in the conditions of a significantly changed functional and typological model of the criminal process in Russia. In addition, the article highlights the problems of the theory of criminal procedural functions as one of the important areas of science.*

Keywords: *theory, criminal procedural law, functions of criminal procedural law, theory of criminal procedural law, claim, accusations, functions of accusation.*

The problem of criminal procedural functions today is an interesting and topical topic of the same direction in legal science. With its versatility and theoretical value, it has attracted the attention of scientists for more than one decade. Scientific research in this area of criminal justice led in the middle of the twentieth century to the formation of the theory of criminal procedural functions. Its content covers today the scientific views of well-known Russian proceduralists concerning the definition of the concept of criminal procedural functions, their number, the relationship with the goals and objectives of the criminal process, principles, the role in forming the family of participants in criminal proceedings, determining their place in the investigation and resolution of a criminal case, etc. However, as evidenced by the sources, until today, scientists still have not come to a common understanding of the essence of most of the categories listed. Despite the rather large number of publications, designated by the topic of complex scientific developments that characterize the functional structure of modern criminal procedure.

The ongoing judicial reform, which is the result of social and political transformations, pursues the goal of creating criminal procedural legislation that meets the needs of modern society and recognized international standards for the power of human rights. This circumstance testifies to the need for a detailed study of issues related to the functional content of criminal proceedings, which, in our opinion, will contribute to the optimal construction of the criminal procedural legislation of Russia.

The theory of criminal procedural functions was basically formed by the time of the adoption of the Code of Criminal Procedure of the RSFSR in 1960. However, its origins were laid down by the Statutes of the Criminal Proceedings of Emperor Alexander II. We are conducting a judicial reform in the presence of a set of fresh ideas that have contributed to the development of national criminal procedural legislation. One of these innovations is the idea of competition, acting as a method of organizing judicial selection, which makes people aware of the need for a clearer demarcation of the direction of activity in the criminal process. The names of the dissenters are described in the works of Russian scientists of the procedural functions of the prosecution, defense and resolution of the criminal claim on the merits.

So, S.I.Viktorsky, reasoning about the forms of the head of the process, writes: “The mixing of procedural functions was complete, the principle of division of labor had no application. Such a judicial order is called investigative or investigative... Only after the development of the

consciousness of the need for separation of labor, the investigative principle began to soften and the process began to pass through the form of a binding, because it agrees with the public of criminal law"[1]. I.Ya.Foynitsky, revealing the nature of the order, noted: "Just as the economic life of the mixing of labor with the development of culture is replaced in the historical succession by the order of the division of labor, and in the process of the development of state life, special organs are developed for each process function. Then... it becomes adversarial; the court is assigned a strictly defined task of resolving the criminal claim brought by the prosecutor acting as an independent party in the process… The defendant, ceasing to be a subject of investigation, is equal to being reinstated on the side of the case, receiving the right of protection on the widest possible scale"[2].

N.N.Polyansky and V.Sluchevsky also wrote about various areas of criminal procedural activity in the light of competition. The analysis of the works of famous Russian processualists evidently testifies to the continuity of the principle of adversariality with the separation of the prosecution, defense and resolution of the criminal case. The thoughts of scientists, such a union is the basis of the fundamental process of any legal state [3].

Moreover, reasoning from the perspective of the necessity of the significance of the division of functions between the main participants of the process, pre-revolutionary jurists did not investigate the existence of the category of "criminal procedural functions". The work of the Ministry of Justice and the distribution of the designated legal phenomena or attempts to manifest the functional content of the Russian criminal process, the system of criminal procedural functions, take a look at the above-mentioned manifestations of the crisis of the procedural activities of the participants.

The beginning of discussions about the existence and clear delineation of the Soviet criminal process of the function of the accusation, protection and resolution of the criminal case, the implementation of modern research is associated with the name of M.A.Cheltsov. As noted by A.P.Lobanov[4], the statements of the revolutionary jurists and the idea of the Russian process, assuming the existence of three main procedural functions and their distribution by specific bodies or representatives of the head of the process, were accepted by Soviet scientists, including M.A.Cheltsov [5]. However, in the middle of the twentieth century, in the scientific legal literature, there are articles by A.A.Cheltsov, S.A.Golunskogoy, and N.N.Guseva, who put the concepts of the existence of three basic procedural functions under doubt[6]. Thus, shortly after the adoption in 1958 of the Fundamentals of Criminal Proceedings of the USSR and the Union Republics, M.A.Cheltsov first opposed the existence of the Russian criminal proceedings of the functions of prosecution, defense and resolution of criminal proceedings, as peculiar only to the bourgeois criminal procedure of the principle of the obligation [7, p.6]. This erroneous, in our opinion, understanding of the essence of the criminal process was caused by a number of objective reasons.

Firstly, the content of the Foundations of Criminal Proceedings, which rejected the category of a party and provided for the unity of tasks of all state bodies, assumed the existence of the obligation to prove the event of a crime and the guilt of the person who committed it, both the court and the prosecutor and investigator [7, p.7]. This circumstance left the necessary for the adversarial impartiality of the investigative bodies and formed an accusatory bias in the activities of the court. In addition, it was then, on reflection, that prerequisites appeared for an error-free understanding of the principle of a complete, comprehensive, objective investigation of the merits of a criminal case as incompatible with the principle of competition, which negatively affected the formation of the concept, and ultimately the text of the Criminal Procedure Code of the Russian Federation of 2001. In this sense, the fundamentals of criminal proceedings "threw" the domestic criminal process 100 years ago. Back in the middle of the XIX century, when drafting judicial

statutes, the united departments of the laws of the Civil Department of the State Council, which discussed the main provisions of judicial reforms in 1862, expressed a satisfactory assessment of the existing laws, in accordance with which the charges against the protection of suspected cases were laid by investigators, prosecutors and the court [8]. In the course of the Head of the Court proceedings I.Foynicki brought a single-digit position of the departments to the question: "The duty to mediately participate in the arousal of the criminal, atembolism, the investigation of crimes and the investigation of innocent, obviously not compatible with the court's appeal. By intervening in the conduct of the criminal proceedings or prescribing or other following actions, he may be forced to put himself forward by understanding the merits of the proper investigation of the action or by not being suspected of the person, and he may be able to influence us further by considering the decision of the case… The above considerations lead to the Department's prejudice, that: 1) the prosecutorial power should be separate from the judicial; 2) the judicial power ... should be provided to the judicial places without any participation of the administrative authorities; 3) the accusatory power, i.e. the detection of crimes and the investigation of the perpetrators, should be provided to the prosecutors" [9].

Secondly, the crises of foreign policy of the same historical period of Russia's life, the preservation of the concept of inevitability of ideological struggle, the desire for the victory of socialism on a global scale [11]are inevitable and the formation of domestic policy in the country. Together with the Party ideology, this wealth led to the denial of a number of pre-revolutionary legal categories because of their so-called "bourgeoisness".[1]

However, despite the current political situation and new legislative prerogatives, the far-right processualists supported, in this part, the position of M.A.Cheltsov, S.A.Golunsky and L.N.Gusev. Moreover, in the legal literature, there have been numerous critical responses to the above-mentioned images [11]. Over time, Russian processualists came to the need to spread the theory of criminal procedural functions to all criminal proceedings, not limited to the final (judicial) proceedings of criminal proceedings. The desire for deeper scientific research in this area of the theory of criminal procedural law leads to the emergence of various approaches to the problem of criminal procedural functions.

Exploring the directions of development of scientific views in this area of criminal procedure in the period from 1917 to 1991, V.A.Chernyshev identifies two main approaches to the definition of criminal procedural functions [12, pp.16-17]. The author connects the first direction with the names of such scientists as M.S.Strogovich, F.N.Fatkullin, M.L.Yakub, A.M.Larin, V.P.Nazhimov, L.D.Kokorev, and comes to the conclusion that representatives of the Moscow school point to the tasks established by law as a system of values on which criminal procedural functions are oriented, objecting to the substitution of directions in procedural activity by the activity of participants in the process, but allow the possibility of unification in the sphere of legal regulation of psychological processes occurring in human consciousness and external, actual behavior[12, p.16]. Thus, A.M.Larin defines procedural functions as types (components, parts) of criminal procedural activity, which differ according to special immediate goals achieved by entering the proceedings in the case [13]. It seems that the identification of functions with a part of procedural activity is not quite correct. All criminal procedural activity consists of the procedural actions of participants in the criminal process, implemented by them in the course of exercising rights, duties, aspirations to satisfy legitimate interests, and achieving goals in line with certain directions, i.e. functions. This means that the content of each criminal procedural function is the range of procedural actions carried out by the participants within the framework of the powers

[1] So, along with competitiveness, the principle of presumption of innocence was considered bourgeois for a long time.

established by law. Thus, the function acts as the basis for the division of criminal procedural activity as a whole, but is not in any way a part of it, a component.

The second direction in the teaching of criminal procedural functions, according to V.A.Chernyshev, is connected with the research of the processualists of the Leningrad School of law. Its essence boils down to the understanding of criminal procedural functions as the functions of participants in criminal proceedings, represented by a combination of three elements -the direction of activity, the special purpose of the participant and the goals of criminal proceedings, as well as procedural duties [14].

Not uninteresting, although often criticized, is the position of P.S.Elkind in this regard. Based on the purpose of the activities of individual subjects, the author concluded that criminal procedural functions should be understood as defined by the norms of law and expressed in the relevant areas of criminal procedural activity, the special purpose and role of its participants [15]. Depending on the significance of the procedural activity carried out by one or another subject of the process, P.S.Elkind divided the criminal procedural functions into main, auxiliary and secondary. According to her theory, the activities of the investigator, the investigator, the prosecutor, the court and the defender are attributed to the first. Auxiliary functions are performed by witnesses, experts, translators, witnesses and specialists. The third group of subjects is represented by a civil plaintiff and a civil defendant [16, pp.59-69]. However, for all its external attractiveness, such an author's view of the system of criminal procedural functions is somewhat ill-conceived. In particular, A.M.Larin, criticizing the position of P.S.Elkind, identifies three points that, in his opinion, indicate a simplified approach. Firstly, the formation of the first group of functions was explained not by the possibility of criminal proceedings without the activities of the prosecutor, defense counsel, as well as trial and resolution of the case on the merits [16, pp. 66-67], which does not correspond to reality. A.M.Larin points out: "...the termination of the criminal case provided for by law at the investigation stage before involving someone as an accused excludes both the prosecution, and the defense, and the consideration and resolution of the case by the court… In criminal cases of private prosecution, as a rule, no investigation is carried out" [17]. Secondly, the attribution of witnesses, experts and other participants to persons performing an auxiliary function on the basis of a limited, partial expression of it in the process will lead to incomplete investigation of the circumstances of the criminal case [17]. And, finally, the opinion about the secondary functions of the civil plaintiff and the defendant also has its own significant exceptions [17]. Indeed, one should agree with the argumentation of A.M.Larin, who criticizes this approach. In addition to the comments he made, it can also be noted that this classification does not cover all criminal procedural activities within the framework of the investigation of a criminal case, excluding judicial control and prosecutorial supervision from the system of functions.

In addition, the above system of functions lacks a clear idea of the activities of a number of other participants in criminal proceedings, veils the content of the entire criminal process.

In 1989, the creators of the Course of the Soviet criminal procedure tried to resolve the contradictions associated with the desire of Russian processualists "to lay all criminal procedural activity in the procrustean three functions-prosecution, defense and case resolution"[18, p.7]. The authors support the processualists who believe that the functional structure of criminal procedural activity cannot be limited to the content of three traditionally allocated procedural functions. In this regard, L.B.Alekseeva comes to the conclusion about the need for a functional analysis of criminal procedural activity with mandatory consideration of a number of methodological rules. They consist in the fact that the analysis of functions should be preceded by a thorough interpretation of the task of the goals of criminal proceedings, and also take into account the fact that in any allocated system of functions, the relationship between them should be clearly traced,

since the functions are always interrelated [18, p. 423]. This work has made a significant contribution to the development of the theory of criminal procedural functions by also justifying the need to include educational and preventive functions in the traditional system of areas of criminal procedural activity.

In terms of the development of the above-mentioned theory, the works of Z.Z.Zinatullin and T.Z.Zinatullin are of undoubted interest, where the authors offer their vision of the problem of criminal procedural functions in accordance with modern achievements of Russian criminal procedural science and the needs of law enforcement practice [19, p.5]. Scientists have developed a conceptually new approach to the evaluation of the system of functions. In particular, they identify a number of generating functions, the content of which includes various types of procedural activities.

Thus, drawing attention to the fact that "the social value of the entire institution of criminal procedural functions lies in the ability to reflect the objective demands of social life in the field of criminal proceedings and serve the successful implementation of its purpose defined in Article 6 of the Code of Criminal Procedure of the Russian Federation", scientists give the following list of criminal procedural functions [19, p.20], which, in particular, includes:

1. Criminal prosecution, as its components are procedural activities for the disclosure of a crime, the investigation of a criminal case, the accusation and exposure of the accused of committing a crime, as well as compensation to victims of the damage caused by the crime [19, p. 20].

It seems that the term "criminal prosecution" can be used in a broad and narrow sense. In its broad sense, this term means the activities of all law enforcement agencies (excluding the court) to achieve the tasks assigned to them, starting with operational investigative measures and ending with the activities of penal institutions. However, in order to determine the criminal procedural functions, taking into account the tasks assigned to the process, it would be more correct to understand criminal prosecution as the activity of an inquirer, investigator, prosecutor:

a) collecting evidence incriminating the suspect and the accused of committing a crime or establishing aggravating circumstances, and b) related to the restriction of freedom and other rights of the individual in connection with the investigation.

If we look at this activity from the standpoint of its narrow understanding, it should also be added that it is carried out "targeted" (i.e. it arises within the framework of a criminal case initiated against a particular person, and not by the fact of the commission of a crime) and necessarily necessitates the implementation of the protection function [20]. It is the interpretation of criminal prosecution in a narrow sense that can be used as the basis for the content of the function of criminal prosecution.

Since both criminal prosecution (in its narrow sense) and the formation of charges by the prosecutor take place within the framework of the investigation of a criminal case, it is the latter that should be considered as the generating function of the criminal process.

This area of activity (investigation of a criminal case) includes all of:

A. proof (investigation of the circumstances of the case);

B. criminal prosecution;

C. the formation of the charge;

D. securing a civil claim.

These sub-functions[2] are carried out at the stage of preliminary investigation of crimes, where there are only reasonable suspicions, including in relation to the fact of causing harm and the amount of damage. In this connection, it is hardly possible to include the actual compensation for the damage caused by the crime as part of the function of investigating a criminal case.

An exception may be cases of voluntary compensation to the accused for the damage caused, while the victim agrees with the amount of such compensation.

2. Protection of the rights, freedoms and legitimate interests of participants in criminal procedural activities, which includes protection of the legitimate interests of a person suspected and accused of committing a crime, rehabilitation of unreasonably prosecuted persons, as well as refutation of claims for damages [21].

Pointing out that the content of the function of protecting the rights and legitimate interests of a person and a citizen manifests itself in two planes, namely: in relation to those who are brought to criminal responsibility, and to those who are admitted to the criminal process to defend their interest and restore violated rights, the authors of the analyzed monograph, as can be seen from the wording given in paragraph 2, in our opinion, not quite justifiably ignore the rights of victims of crime.[3]

Such a formulation of the function does not seem to be correct enough, since it replaces the new guidelines put forward by the Constitution of the Russian Federation and the legislator, a kind of "milestones" that all state bodies should rely on in their activities. Article 6 of the Code of Criminal Procedure of the Russian Federation establishes as the purpose of criminal proceedings:1) protection of the rights and legitimate interests of persons and organizations who have suffered from crimes; 2) protection of the individual from unlawful and unjustified charges, convictions, restrictions on her rights and freedoms; 3) criminal prosecution and the appointment of a fair punishment to the guilty; 4) refusal of criminal prosecution of innocent persons, their release from punishment, rehabilitation of everyone who has been unreasonably subjected to criminal prosecution. The purpose in this case is considered as "purpose, red definition" and means something predetermined, intended for someone [22]. In this sense, the protection of the rights, freedoms and legitimate interests of participants in criminal procedural activity should be considered more correctly as the initial goal, the task for which the entire system of criminal proceedings functions, and not as the direction of the procedural activity of participants in the process to "achieve its purpose". But it's not even about the degree of correctness of the proposed wording. If we admit the presence in the criminal process of such a generating function as the protection of the rights, freedoms and interests of participants in criminal proceedings, then at least two questions are not resolved: a) why this function does not cover (according to Z.Z.Zinatullin and T.Z.Zinatullin) activities to protect the rights of persons and organizations who have suffered from a crime, as required by Article 6 of the Criminal Procedure Code of the

[2] In this case, the designated term is used to denote those areas of activity that are carried out within the framework of the generating function of the investigation of a criminal case defined by Z.Z. Zinatullin and T.Z. Zinatullin.

[3] Так, И.Р. Кузуб выделяет из общей конституционной функции охраны прав и свобод человека функцию охраны прав и законных интересов лиц, которым инкриминируется совершение преступления. На наш взгляд, его позиция является последовательной втом отношении, что она неоставляет «забортом» охрану прав и свобод потерпевшего, выделяя отдельно функцию охраны прав и законных интересов лиц, совершивших преступление. См. его: Уголовно-процессуальная функция охраны прав и законных интересов лиц, совершивших преступление: Автореф. дис…канд. юрид.наук.–Ижевск,2000. – 20 с.; Кудербаев Е.Ф., Отческая Т.И. Учение об уголовно-процессуальных функциях // Ученые записки: Сборник научных трудов Института государства и права. Вып. 3. –Тюмень: Изд-во Тюменского ун-та, 2002. – С. 48.

Russian Federation[4], and why the activities of the court for the implementation of judicial control are not within the scope of this generating function.

3. The administration of justice by allowing the prosecution to exist. Adhering to the opinion that justice and judicial control are independent, separate functions of the court, the authors rightly define the function of justice as a criminal procedural function of the administration of justice in criminal cases, linking it only with their substantive resolution in order to get an answer to the main question of the criminal process, which is the question of criminal liability of a person for a crime imputed to him [21, p. 168].

4. Educational and preventive function, which includes the entire education of citizens (including participants in criminal proceedings in a particular case) in the spirit of respect and observance of moral and legal norms, as well as procedural activities to prevent crimes.[5] In one of his works, A.M.Larin points out that both the court and the investigative bodies educate citizens with all their activities. "It is difficult to specify a site or a side of criminal procedural activity that would not have educational significance. The objectivity of the investigation of the circumstances of the case, impartiality, fairness of decisions, general procedural culture -all this can and should have an educational moral and psychological impact on citizens ... That is why the functions of educational influence ... can be spoken of as a general task of investigation and trial as a whole, but not as a separate direction or type of procedural activity"[23].

Summing up what has been said, it can be stated that there is a full-fledged theory of criminal procedural functions in criminal procedure science. At the same time, despite the continuing interest of scientists in the criminal procedure field of the same name, we note the lack of research aimed at further development of this theory in the context of a significantly changed functional and typological model of the criminal process in Russia. Most recent publications are devoted to certain areas of criminal procedural activity, which does not give a complete picture of the functional content of modern domestic criminal proceedings.

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[5] По поводу состояния правовой регламентации указанной уголовно-процессуальной функции у нас существуют критические соображения, но мы отстраняемся от ее анализа, поскольку данный вопрос прямо не связан с предметом нашего научного интереса. О воспитательно-профилактической функции. см.: Зинатуллин, З.З. Уголовно-процессуальные функции. – С. 81-92.

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