

SEPARATION OF THE FUNCTIONS OF THE HEAD OF THE INVESTIGATIVE BODY AND THE SUPERVISING PROSECUTOR IN THE CONTEXT OF RELATIONS BETWEEN THE PUBLIC PARTICIPANTS IN THE PROCEEDINGS

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Abstract. This article addresses the fundamental issue of distinguishing the functions of organizing, managing, supervision and oversight of the preliminary investigation. Acknowledging that this issue is not new in the theory of criminal proceedings, the author first outlines its historical background and identifies the factors that have prevented its resolution to this day.

Subsequently, by presenting the existing theoretical approaches to the content of the aforementioned functions, the author concludes that there are no objective and applicable criteria for their delineation.

Based on a combined analysis of the powers vested in the supervising prosecutor and the head of the investigative body, the author concludes that the legislature has failed to implement the “one subject – one function” concept, which is proclaimed as the foundation for regulating the relationships between public participants in criminal proceedings. Although each has been formally assigned a distinct function, in practice, they have also been endowed with powers that are inherent to the function of the other participant. Given the organic interconnection between the functions of organizing, directing, supervising and overseeing the preliminary investigation, the author considers the overlap of certain powers between the supervising prosecutor and the head of the investigative body to be natural, however, the author criticizes the authority granted to the supervising prosecutor to annul procedural acts issued by the head of the investigative body that pertain to the organization of the investigation.

Keywords: *public participant in the proceedings, Prosecutor, Head of the Investigative Body, Chief of the Investigative Division, supervision, oversight, organizing the preliminary investigation, procedural management, functional separation.*

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1. Introduction

The delineation of the directions of public criminal procedural activity is one of the most contested issues in criminal proceedings, an issue that, although it has long concerned both legal scholarship and practice, remains unresolved to this day due to both objective and subjective factors. The point is that public criminal procedural functions are closely interrelated, and the delineation of the powers arising from them presents a truly serious challenge for the science of criminal procedure. On the other hand, the issue of differentiating these functions has consistently been influenced by institutional interests, and discussions on the matter have been conducted not so much with the aim of finding the best solution to the underlying problem, but rather with the objective of expanding spheres of institutional influence. The issue of delineating the powers of public participants in criminal proceedings has always been accompanied by institutional ambitions of various bodies to be regarded as the “master of the criminal proceedings”, a tendency that has not only failed to contribute to resolving the problem, but on the contrary, has further exacerbated situations of conflict between criminal procedural functions.

Meanwhile, it is impossible to properly define and implement the legal status of procedural subjects and their interrelations without functional delineation. The duplication of procedural powers not only creates practical obstacles to their implementation, but also undermines values such as the autonomy of public participants in the proceedings.

2. A historico-theoretical analysis of the issue

2.1 The Essence of the Issue:

The issue of the interrelations between the public participants in the proceedings is multifaceted and multilayered, encompassing questions concerning the correlation of all the functions assigned to them, among which the most relevant is the delineation of functions between the head of the investigative body and the supervising prosecutor. In light of the new Criminal Procedure Code designating the head of the investigative body as an independent procedural subject, the implementation of the “one subject – one function” concept, proclaimed as the foundational principle governing the interrelations of public participants in the proceedings, warrants examination, particularly in the context of the functional correlation between the head of the investigative body and the supervising prosecutor. In this regard, questions have solidified in theory and practice concerning whether the prosecutor, besides supervision, also exercises procedural control over the preliminary investigation; if so, what is the fully independent role

of the head of the investigative body in criminal proceedings; whether the function of organizing the preliminary investigation also implies procedural oversight of it; and if so, how these functions correlate with those of the prosecutor. It is important to emphasize that the issue is not merely the formal functional separation of these subjects, but rather whether, ultimately, the supervising prosecutor and the head of the investigative body, regardless of the names given to their functions, perform the same role in criminal proceedings or not.

2.2 The History of the Core Issue:

The issue of duplication of functions between the head of the investigative body and the supervising prosecutor has existed since 1963, when the investigative bodies were reconstituted as a relatively autonomous system within the Soviet Ministry of Internal Affairs, established as a distinct subordinate division. Investigative departments, divisions, and units were established, whose heads were entrusted with the authority to manage their operations and to exercise oversight over the propriety of the preliminary investigation. Shortly thereafter, the issue of vesting the chiefs of investigative subdivisions with procedural powers, aimed at ensuring the proper organization of the investigator's work, was brought to the agenda, but it was dismissed as a "violation of the investigator's independence and a duplication of prosecutorial supervision"¹.

Nonetheless, by virtue of directing investigators' work, the heads of investigative bodies gradually began to assume roles in specific procedural matters, as a result of which, pursuant to the amendments to the criminal procedure legislation of January 12, 1966, the chief of the investigative division was, for the first time, designated as an independent procedural subject, entrusted with the functions of overseeing and directing the investigation.

The 1998 Criminal Procedure Code granted the chief of the investigative division a procedural "semi-status", on the one hand, excluding them from the list of subjects of criminal proceedings, while on the other hand, under the general conditions of preliminary investigation, assigning them powers including monitoring investigators' timely execution of investigative actions, compliance with time limits for preliminary investigation and detention, execution of prosecutorial instructions and assignments from other investigators, as well as issuing directives to investigators to carry out certain investigative actions.

Through such regulation, by conferring primarily organizational powers on the chief of the investigative division, specifically, to monitor and supervise the

¹ Chistyakova, V.S. Bodies of Preliminary Investigation of Crimes and the Delimitation of Competence Between Them: Abstract of the dissertation. Moscow, 1964, p. 9.

execution of decisions already made in the case, the Criminal Procedure Code significantly alleviated the dual-subject nature of supervision and management functions over the preliminary investigation, a duality that would have become unmistakably evident following the abolition of the prosecutor's general supervisory role. During the effective period of this criminal procedure legislation, the functional conflict between the supervising prosecutor and the chief of the investigative division was indeed attenuated, primarily by assigning the latter an "institutional" role, by opposing "institutional" to "procedural" in legal interpretation, and by denying the existence of a procedural component within the powers of the chief of the investigative division. Moreover, due to the balance of influence between the investigative and prosecutorial systems, legal practice appeared to accept the purely institutional role of the chief of the investigative division, who almost never exercised their sole genuinely procedural power - the authority to issue instructions to conduct certain investigative actions.

By removing the chief of the investigative division from procedural matters related to ensuring the conduct of the preliminary investigation, the 1998 Criminal Procedure Code not only vested the supervising prosecutor with the powers necessary to exercise supervision over the legality of the preliminary investigation, but also directly defined their function of exercising procedural management over it.

2.3. Prosecutorial Supervision, Institutional Oversight, and Procedural Management over the Preliminary Investigation: A Theoretical Debate.

The discussions concerning the relationship between prosecutorial supervision, institutional oversight, and procedural management over the preliminary investigation remain rather restrained, creating the impression that authors interested in this issue either avoid a thorough analysis of the substantive content of these functions to refrain from acknowledging the overlaps between the prosecutor's and the head of the investigative body's roles or from questioning the status of either, or they limit themselves to noting merely formal distinctions that do not preclude the existence of functional duplication. For example, definitions of institutional supervision as "a system of actions and decisions related to the verification of the investigator's activities"² or as "an activity encompassing the verification of the legality and validity of procedural decisions, procedural

² Olefirenko, T. G. "Institutional Procedural Control as the Main Means for the Head of the Investigative Body to Ensure the Legality of the Preliminary Investigation," *Historical, Philosophical, Political and Legal Sciences, Cultural Studies and Art History. Issues of Theory and Practice*, 2014, No. 2, Part 2, pp. 148–150.

management of the preliminary investigation, and measures aimed at organizing the preliminary investigation and eliminating legal violations”³, do not clearly specify the boundary between institutional oversight and prosecutorial supervision, where the former ends and the latter begins, or how procedural management over the preliminary investigation relates to both.

In more substantive approaches to the issue, the distinguishing factor between procedural oversight and supervision is identified as the “organizational component of the former, which implies that oversight primarily involves reviewing the activities of a subject operating under an organizational and legal subordination, whereas supervision is always exercised over a subject who is not subordinate”⁴ and is carried out “without administrative interference” in their activities⁵.

According to theorists, another distinction between the functions under discussion is that, “in the case of oversight, its object is subject to a comprehensive examination, assessing not only the legality of the actions taken but also their justification, expediency, and the overall effectiveness of the preliminary investigation, whereas the sole purpose of supervision is to verify whether the supervised activity complies with the law”⁶.

The professional interpretation of the content of the procedural management function is based on the linguistic meaning of the term “to manage”, which is understood as leading, guiding, and directing the preliminary investigation, that is, procedural powers that enable determining the course of the investigation and issuing instructions to the subject conducting the investigation regarding the performance of procedural actions or the adoption of decisions. Although there are opinions that “procedural management is an additional, yet by its nature independent, criminal procedural function compared to supervisory functions”⁷, the more prevalent view is that it is “derivative of the prosecutor’s supervisory

³ Tabakov, S. A. Institutional Procedural Control over the Activities of Investigators and Inquirers of Internal Affairs Bodies: Abstract of the Dissertation for the Degree of Candidate of Legal Sciences. Omsk, 2009, p. 15.

⁴ Spirin, A. V. “On the Theoretical Foundations of Distinguishing Prosecutorial Supervision and Procedural (Institutional) Control at the Pre-trial Stages of Criminal Proceedings.” Bulletin of the Ural Law Institute of the Ministry of Internal Affairs of Russia, 2016, No. 1, p. 56.

⁵ Kashtanova, Kh. Ts., & Shegebaev, I. B. Prosecutorial Supervision and Institutional Control: The Issue of Correlation. Bulletin of Omsk University. Law Series, 2018, No. 2(55), p. 172.

⁶ Markelova, O. N. The Correlation Between Procedural Management, Prosecutorial Supervision, and Judicial Control. Humanities, Socio-Economic and Social Sciences, 2019, No. 9, p. 152.

⁷ Solovyov A. and Yakubovich N., “Preliminary Investigation and Prosecutorial Supervision in Light of Judicial Reform,” *Zakonnost (Legality)*, 1995, No. 8, pp. 41–42. .

function and the investigative body head's oversight function⁸ and either serves as a method for implementing them, or vice versa"⁹:

An analysis of the presented approaches clearly shows that they do not distinguish the discussed functions based on any tangible characteristic and do not allow for a clear determination of which procedural authority corresponds to which function and to which subject it should be assigned. Thus, the organizational-legal factor, which serves as the basis for distinguishing judicial oversight from supervision, is related not to the scope or nature of the investigative actions, but to the existence or absence of a service relationship between the body conducting those actions and the investigator, reflecting the subject-object dynamic rather than the substantive content of the function. However, the essence of any activity is determined not by the subject carrying it out, but by the specific characteristics of its content, particularly when the issue is whether the same function has been assigned to different bodies.

The core issue is not clarified by the alternative criterion either: by defining the object of prosecutorial supervision as solely the legality of the investigator's actions, and that of oversight as including, in addition, their expediency, this criterion not only fails to exclude, but in fact directly implies, that oversight is likewise aimed at ensuring the legality of the preliminary investigation. A linguistic analysis of the terms under discussion does not offer a solution either, as the terms "to supervise" and "to oversee" are used synonymously in explanatory sources and both denote the act of monitoring the execution of an activity¹⁰.

The situation is further complicated by attempts to clarify the content of procedural management over the preliminary investigation and its relationship to the aforementioned functions. The presented approaches, while not denying that procedural management of the preliminary investigation aims to ensure both its legality and effectiveness, nonetheless fail to distinguish it clearly from either supervision or oversight.

⁸ Chebotareva I. Yu. "Certain Issues Regarding the Correlation Between the Functions of Procedural Management and Prosecutorial Supervision," *Bulletin of Chelyabinsk State University*, 2015, No. 17 (372), p. 171.

⁹ Pobedkin A. V., "Some Problems Concerning the Content of the Procedural Powers of the Head of the Investigative Body," *Bulletin of Voronezh State University. Series: Law*, 2008, No. 2, p. 279.

¹⁰ Aghayan E., *Explanatory Dictionary of Modern Armenian*, "Hayastan" Publishing House, Yerevan, 1976, Vol. 1, p. 899 and Vol. 2, pp. 930 and 1377.

3. The concept of the relationships between public participants in the proceedings and their implementation:

3.1. The “One Subject — One Function” Concept.

The new Criminal Procedure Code of the Republic of Armenia separately regulates the relationships among public participants in the proceedings by establishing the principle of functional differentiation and the “one subject—one function” concept, which requires each subject to perform only one function without interfering with or duplicating another’s, and provides that their powers stem organically from their functions to create systems of checks and balances¹¹.

Accordingly, the Code establishes the prosecutor’s responsibility, among other things, for the lawfulness of initiating, not initiating, and terminating criminal prosecution, as well as for the legality of the pre-trial proceedings and the application of restraint measures by public participants in the proceedings, thereby assigning to the prosecutor two functions within the pre-trial phase: initiating criminal prosecution and exercising oversight over the legality of the pre-trial proceedings. In order to ensure the legality of the preliminary investigation, the supervising prosecutor is authorized to verify compliance with legislative requirements for the receipt and registration of crime reports, determine the lawfulness of decisions not to initiate criminal proceedings, examine the materials of the criminal proceedings, resolve motions of recusal and self-recusal concerning the relevant public participants in the proceedings, review complaints against their procedural acts, and perform other related functions.

The relationships between the supervising prosecutor and other public participants in the proceedings have also been formulated with the intent of attributing to the prosecutor an exclusive mission of ensuring the legality of criminal proceedings, by providing that the supervising prosecutor is authorized to issue instructions to the head of the investigative body, the investigator, and the head of the inquiry body to terminate unlawful actions or neutralize their consequences, as well as to address the consequences arising from the annulment of their unlawful decisions. The Criminal Procedure Code authorizes the supervising prosecutor to instruct the investigator to clarify specific circumstances relevant to the proceedings, but does not grant the right to instruct the performance of particular evidentiary actions, considering that the method of clarifying relevant circumstances falls within the scope of effectively organizing the preliminary investigation.

¹¹ The Practical Guide to the Conceptual Solutions, Innovative Approaches, and Key Institutions of the New Criminal Procedure Code of the Republic of Armenia, p. 190. <https://rm.coe.int/new-criminal-procedure-code-guideline-/1680a72908>, last accessed: April 27, 2025.

The current Code also designates the head of the investigative body as an independent participant in the proceedings, establishing their responsibility for the proper organization of the preliminary investigation conducted by investigators under their direct authority, including ensuring its effectiveness. Although the legislator referred to the function of the head of the investigative body not as “management of the preliminary investigation” but as its “organization”, which may suggest a purely administrative role, in reality the Code has eliminated the basis for attributing to this procedural actor merely an administrative-organizational presence, going so far as to replace the former “service-based” title of “chief of the investigative division” with the functionally meaningful procedural status of “head of the investigative body”.

The powers of the head of the investigative body may be conditionally divided into those aimed at organizing the preliminary investigation and those directed toward managing it. In particular, the powers to assign the conduct of the preliminary investigation to an investigator under their direct authority, to transfer the proceedings from one investigator to another, to replace a removed investigator, to assign the investigation to an investigative team or to instruct another investigator under their authority to carry out specific investigative actions, and to submit a request for investigative assistance are all aimed at ensuring procedural conditions for the more effective conduct of the preliminary investigation. And the authority of the head of the investigative body to instruct an investigator to carry out a specific evidentiary action is the most direct expression of leading and guiding the preliminary investigation. It is the exclusive authority of the head of the investigative body to instruct the investigator not only to carry out a particular evidentiary action, but also to determine the conditions under which it is to be carried out.

3.2. The Failure and Impossibility of Functional Differentiation.

By expressing the principle of functional differentiation in this manner, the Code formally assigns to the head of the investigative body the function of managing the preliminary investigation, and to the supervising prosecutor the function of exercising supervision over its legality. By not assigning the function of managing the preliminary investigation to the supervising prosecutor or that of exercising procedural oversight to the head of the investigative body, the legislator has, at first glance, succeeded in avoiding the simultaneous attribution of supervisory, oversight, and managerial functions over the preliminary investigation to both subjects. However, whether functional differentiation has in fact been achieved between the supervising prosecutor and the head of the investigative

body, or whether they continue to perform identical activities within the criminal proceedings, must be examined in the context of their respective powers.

Thus, the Code also authorizes the head of the investigative body to monitor the performance by the investigator under their direct authority of evidentiary and other procedural actions, the execution of the prosecutor's decisions and both the prosecutor's and their own instructions, as well as compliance with the time limits for criminal prosecution and detention. Unlike the previously discussed powers, this authority of the head of the investigative body is not aimed at managing or organizing the preliminary investigation, but rather at ensuring the investigator's compliance with legal requirements by virtue of their hierarchical relationship. In such cases, the head of the investigative body does not decide what action should be taken or create the conditions for its execution, but rather ensures the investigator's fulfillment of their duties by virtue of their hierarchical relationship. Moreover, it should be emphasized that this purely supervisory authority of the head of the investigative body is unquestionably aimed at ensuring not only the effectiveness but also the legality of the preliminary investigation. The execution of the prosecutor's decisions and instructions, as well as compliance with the time limits for criminal prosecution and the detention of the accused, are integral components of the lawful conduct of the preliminary investigation; therefore, the head of the investigative body is vested not only with the authority to manage the investigation, but also with the power to supervise and oversee it for the purpose of ensuring its legality.

As for the supervising prosecutor, the question of whether they continue to exercise management over the preliminary investigation remains a relevant issue. By granting the supervising prosecutor the authority to issue instructions regarding the clarification of specific circumstances relevant to the proceedings, the legislator has effectively enabled the prosecutor to direct the investigation toward clarifying those circumstances, essentially amounting to managing it. Moreover, the inability to formally demand the performance of a specific evidentiary action does not, in practice, deprive the supervising prosecutor of the ability to determine which action is to be carried out, as such a demand may be expressed indirectly: for instance, by recording the fact that a particular action has not been performed and thereby clearly conveying the expectation or requirement for its execution.

Moreover, the supervising prosecutor's management of the preliminary investigation is inevitable and derives from their other procedural functions. His functions of instituting criminal prosecution and defending the public accusation necessarily imply his authority to determine essential circumstances for their effective exercise and to clarify them. It is also natural for the prosecutor to

formulate in some way a requirement to carry out a specific action in the instruction concerning the clarification of those circumstances, since his responsibility for clarifying them organically also implies his ability to indicate the method of clarifying those circumstances. It is unjustified to hold the supervising prosecutor or any other subject responsible for any procedural outcome without providing them with effective means to ensure that outcome.

Conversely, it is unnatural and constitutes a duplication of the head of the investigative body's function of organizing the preliminary investigation to grant the supervising prosecutor unlimited authority to overturn the investigative body head's unfounded and unlawful decisions and instructions. The point is that the supervising prosecutor's authority to annul the procedural acts of the head of the investigative body is not limited by anything, including the principle of functional separation, and he is entitled to annul all such instructions and decisions of the investigative body head, including those exclusively related to the organization of the preliminary investigation, not only on grounds of illegality but also for being unfounded. As a result, the supervising prosecutor, who does not have the authority to instruct the head of the investigative body on matters related to the organization of the preliminary investigation, for example, assigning it to an investigative team, may nonetheless, paradoxically, annul all decisions of the head of the investigative body, including the decision to establish an investigative team. Similarly, despite not being expressly authorized to decide which evidentiary action the investigator must undertake to clarify a circumstance material to the proceedings, the supervising prosecutor has the authority to annul the investigative body head's instruction on the matter, including for any reason related not to the legality but to the expediency of the action. In other words, although the supervising prosecutor is officially vested solely with the function of supervising the legality of the preliminary investigation, in practice, they are also empowered not only to guide the investigation and direct it toward clarifying specific circumstances but also to determine issues related to its effective organization.

4. Conclusion

The functions of organizing, managing, supervising and overseeing the preliminary investigation are deeply interconnected, and there are no clear criteria for their delineation that would preclude overlap or the duplication of procedural authorities arising from them.

By disregarding this circumstance and grounding the relationship between the supervising prosecutor and the head of the investigative body in the principle that each is to be assigned a single function that does not in any way overlap with that

of the other, the Criminal Procedure Code of the Republic of Armenia formally assigns to the supervising prosecutor only the function of supervising the legality of the preliminary investigation, and to the head of the investigative body the function of organizing it, thus ensuring the separation of functions only at a formal level. In practice, the head of the investigative body is entrusted not only with the functions of organizing and directing the preliminary investigation, but also with the function of exercising supervision and oversight over its legality and effectiveness. Similarly, in exercising his traditional function of supervising the legality of the preliminary investigation, the supervising prosecutor has also been vested with the authority to direct it.

Such an overlap of powers between the head of the investigative body and the supervising prosecutor is, for the most part, natural. Due to the organic interrelation of these functions, the legislature has neither succeeded, nor could it have succeeded in vesting the supervising prosecutor and the head of the investigative body with fundamentally distinct or absolutely separable powers. At the same time, this circumstance should not serve as a basis for questioning the desirability of distinguishing between functions that may intersect, or between the subjects responsible for their execution. While acknowledging that the head of the investigative body cannot fail to exercise supervision and oversight over the preliminary investigation, just as the supervising prosecutor cannot in any way refrain from influencing the direction of the investigation, it must be accepted that the head of the investigative body cannot guarantee the legality of the preliminary investigation in the same manner as the supervising prosecutor, nor can the latter organize or direct the preliminary investigation in the same way as the head of the investigative body, who maintains direct hierarchical subordination over the investigator and exercises official supervision over them.

Therefore, the correlation of the powers of the head of the investigative body and the supervising prosecutor should not be formulated with the intention of formally assigning to each exclusively non-overlapping and absolutely separable functions, but rather on the basis that the supervising prosecutor's function may contain elements of the head of the investigative body's function and vice versa, while excluding the assignment of such powers to either that do not fundamentally and organically derive from their respective functions, that is, powers which not only include elements of another function or partially overlap with it, but are inherently aimed at exercising a function belonging not to that subject, but to another, as is the case with the previously criticized powers of the supervising prosecutor.

Conflict of Interests

The author declares no ethical issues or conflicts of interest in this research.

Ethical Standards

The author affirms this research did not involve human subjects.

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