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On the Possible Role and Status of the Defender in the Future Estonian Criminal Procedure

In view of the forthcoming reform in the Estonian criminal procedure, a principal discussion is necessary, amongst other things, on the role and status of the defender in the criminal procedure.

1. Choice of a New Model for Criminal Procedure in the Context of the Defending Function

An important aspect to be considered when establishing a new order for criminal procedure is the guaranteeing of subject status for the suspect, the defendant and the accused, and the strengthening of their subject status through the right of defence. Attention should also be paid to the fact that the reform acts and draft acts of European countries concerning criminal procedure are aimed at strengthening the defendant's subject status.[1]

It cannot be said that according to legal regulation of the inquisitorial criminal procedure currently in force in Estonia, the suspect, the defendant and the accused are in the status of an "object" in the procedure. It would also be a mistake to believe that the subject status of these persons couldn't and shouldn't be strengthened in the future.

A principal decision to the benefit of one or another model of procedure should be made from the premise that the specific weakness of our inquisitorial procedure is in the fact that the investigating court leading the procedure may be impartial to the disadvantage of the accused and the accused may be viewed as an "object", not a subject of the procedure.[2] The tendency to view the suspect or the defendant as an "object" rather than a subject may be clearly revealed already in the pre-court procedure stage.

Considering the above, solutions have to be found in choosing a procedural model and in its specific essential designing, which help to prevent the above shortcoming as much as possible.

When speaking about strengthening the subject status of the suspect, defendant and accused, it should naturally be taken into account that an optimum balance should be reached between public and private interests.

Criminal procedure law must, on the one hand, enable the guilt of the defendant to be established and implement the state's obligation to punish. On the other hand, legal regulation has to guarantee that an innocent person is not sentenced guilty and the rights of a person are limited as little as possible through the procedure.[3]

A certain conflict in the criminal procedure between public interests and the private interests of the suspect, defendant and accused is, and probably will be, inevitable. It is therefore all the more important that the order for criminal procedure provide good grounds for the realisation of fair procedure.

An inevitable element of a fair procedure is that the participants are not objects of the procedure, but have a

chance to defend their rights to influence the course and result of the procedure.[4]

According to the fairness principle, equal opportunities must be guaranteed for the prosecutor and the defendant in the criminal procedure (in German special literature, *Waffengleichheit*).[5] These opportunities, however, do not imply equal rights, but a balancing of these, taking into account the difference in procedural roles.[6] Since in the criminal procedure of a state governed by the rule of law, an accused is defined as a procedure subject "able for dialogue", he must have a clear understanding of the meaning of his behaviour in the context of substantive and procedure law. The accused (as well as the suspect and the defendant) must understand his procedural situation.[7]

The criminal procedure can be called a fair procedure only if the rights of the suspect, defendant and accused to essentially contribute to the procedure and prevent the misuse of state power are not merely laid down on paper, but if such persons are able to exercise them effectively.[8]

As a rule, the suspect, defendant and accused do not know their procedural rights and their exercise of these rights is difficult without the help of an expert (defender).

The suspect, defendant, and accused, who know their case only from their subjective viewpoints, can defend themselves only in a dilettantish way, and are not able to achieve a full subject status in the procedure.[9] Due to the defendant's lack of understanding of the procedure, and caused by his partiality, his inability to turn the weaknesses in the accusation to his benefit, it is necessary that the defender help him with advice so that the defendant (accused) may be a serious opponent to the prosecutor.[10]

The defender can perform his function the more effectively, the more the principle of guaranteeing equal opportunities for the prosecutor and the defender has been followed in establishing the order for procedure.

The principle of equal opportunities does not require that the procedure-specific differences in the role distribution of the prosecutor and defender be levelled off in all respects. The principle does, however, require that more or less equal rights be provided for all litigating parties to make their impact within the procedural framework.[11]

The actual degree of the prosecutor's and defender's equal opportunities much depends on the specific procedural structure.

Let us ask now against the background of the above, which is more preferred from the aspect of equal opportunities — the continental European inquisitorial model, or the Anglo-American accusatorial model of criminal procedure?

As we know, the defending of human rights in a criminal procedure much depends on whether each defendant (suspect, accused) in each criminal proceeding is equipped with a well-taught, effective and "equal-with-the-prosecutor" defender or not. In the case of accusatorial procedure, it is chiefly up to the suspect, defendant and accused to defend themselves.[12] Contradiction is essential to this type of procedure. The presentation and investigation of evidence is the duty of the parties. The parties govern the procedure and may dispose of the object of procedure by dropping the charge.[13]

Thus, when the defender, in an accusatorial procedure, is for some reason relatively ineffective, the suspect, defendant and accused are likely to remain without real protection.

The inquisitorial procedural structure suggests, at first glance, that the shortcomings in the defence are compensated for by the objectivity of the prosecutor and the active participation of the court in clarifying the truth. It should be said though that the effectiveness of the latter is limited in compensating for weaknesses in the defence.

Namely, the objectivity of the prosecutor, in its real form, cannot be of much help from the aspect of defending the defendant. This is supported by the experience that in the continental criminal procedure, the main question of the prosecutor's status is if and how one person can psychologically contain a prosecutor (as an inevitably one-sided performer) and an objective investigator.[14]

Help from the judge may also often prove to be questionable from the aspect of defending the accused. The joining of two procedural roles (investigator and adjudger) in one person — the judge — is another case of psychological overload, due to which his impartiality may suffer.[15]

The role of the court in compensating for shortcomings in defence may be effective only in the sense that the court has to stand for the exercise punishing power of the state in accordance with the provisions of law. This duty of the court, of course, may be viewed as a defence aspect for the accused.

So, if one is to presume that the duty of the defender is merely to stand for the exercise of the punishing power of the state in accordance with the provisions of law, then, considering that this is also the duty of the court, it may indeed be concluded that the court can, through its activity, compensate for shortcomings in the defence.

We must, however, admit that such an approach to the defence duty would limit the defence to presenting only the evidence which lightens or relieves the defendant of guilt, and would therefore cover only one aspect of defence. As a result of such a limitation, the defence would be a mere control instance. Such an approach would deny defence as the institution of the criminal procedure in which the autonomy of the defendant is realised and in which his subject status is founded.[16]

While stressing the need to realise the autonomy of the suspect, defendant and accused in the criminal procedure and to strengthen their subject status, it is not essentially correct to view the judge as the performer of defence as an independent duty, especially if we proceed from the position that a judge might not be related to the investigation principle in the future Estonian procedure.

Taking into account the rather largely acceptable need to increase the accusatorial element in our criminal procedure, the activity of the court in collecting evidence should be considerably reduced when compared to the present situation.[17] The complete detachment of the judge from collecting evidence would, however, contradict our established legal tradition.[18]

The fact that the Estonian legal order has belonged and belongs now to the continental European legal system,[19] suggests that it would not be justified to reform the Estonian criminal procedure entirely based on the model of Anglo-American accusatorial criminal procedure. This does not imply, however, that the share of accusatorial elements should not be increased in reforming our criminal procedure.

For example, to improve the communication structure of the criminal procedure, cross-examination could be introduced, which would free the judge from the role of active examiner and provide for a better balance in the communication situation. It seems that such a balance might imply a certain increase in the defender's chances of being effective within the procedural structure framework.

2. The Defender as a Guarantor of the Subject Status and Autonomy of His Mandator and a Representative of Public Interest

From the aspect of increasing the defence of private interests and strengthening the subject status of the suspect, defendant and accused, it should be considered when determining the legal status of the defender, whether components of public interest should be taken into account, or should the defender only be a representative of the private interests of the defendant.

As an important prerequisite for subject status is the guaranteeing of a certain autonomy of decision for a person, the question here is mainly about which legal status to the defender's function is the most in line with the "autonomy principle". If the importance of the autonomy principle in the criminal procedure is basically recognised, then the content and scope of that autonomy should be determined. Different opinions about autonomy can be found in special literature. According to the usual approach, "autonomy principle" in the criminal procedure means that the defendant, who as a rule knows best how his defence should be carried out, must freely and without pressure from the state decide how he wishes himself to be defended.[20] In his autonomy studies, J. Welp speaks about the self-defined procedural interest of the defendant,[21] whereas the defender, who defends the particular (private) interests of the defendant, is not an institution of legal protection (*Organ der Rechtspflege*), but a representative of interests.[22] As regards the public function of the defender, then according to J. Welp, public interest for defence exists only insofar as this may reduce the risk of an incorrect proceeding result.[23] According to J. Welp, the conditions for a fair judgement should be placed outside of defence. The task of fair judgement should be achieved though the judge's being bound by the instruction maxim and the prosecutor's obligation to be objective. From the objective of procedure aspect, defence is not an essential function for achieving a fair judgement, but it is an additional guarantee for the defendant to handle his case himself as a procedure subject and exercise his right to interfere if the procedure threatens to ignore the requirements established for it.[24]

J. Welp's approach is based on the understanding that the mandator's trust is the factor that determines the effectiveness and quality of defence. The legal form in which the trust interest is realised is a free choice.[25] In this respect, J. Welp sees a certain danger to the defendant in the form of an obligatory defender. J. Welp believes that the obligation for defence is a partial ignoring of the defendant's autonomy.[26]

When looking at J. Welp's autonomy theory in the context of the future Estonian criminal procedure, it should be noted that the more accusatorial elements this procedure will include, the less J. Welp's approach can be used. It is not correct, in a criminal procedure with accusatorial elements, to proceed from the understanding that the prerequisites for a fair judgement be placed outside of defence. The accusatorial aspect of criminal procedure, by requiring a rather active role of the defender, provides an essential function for defence in reaching a fair judgement.

Although J. Welp's approach which stresses the autonomy of the defendant is remarkable and acceptable, one must also agree with the theoretical counterarguments found in specific literature, according to which the autonomy principle developed by J. Welp is "idealistic", i.e. autonomy seems to dominate where actually ignorance, overestimation of oneself, helplessness and fear, dependence and force prevail, which direct and block the seemingly autonomous decision making.[27] According to B. Haffke, a state governed by the rule of law should take into account the helplessness of the parties in a legal system which is increasingly complicated and of which they, as a rule, have no comprehensive understanding. Therefore, to empirically enable autonomous decisions at all, preconditions should be created for taking such autonomous decisions.[28] K.-H. Vehling has correctly noted that we cannot speak about equality of rights in a procedure where the defendant is ignorant in law. He is not autonomous in the procedure, but suffers an "autonomy deficit". According to K.-H. Vehling, the essence of the defendant's autonomy is actually in the social meaning of punishment regardless of the state's evaluation. As such evaluation is not possible due to the lack of the defendant's knowledge of law, he needs help, which he receives from a professional defend-

er. Criminal defence, including obligatory defence, thus serves to compensate for the above mentioned autonomy deficit, and stands for equal opportunities in the criminal procedure.[29]

The paradox that may arise here is that the defender, helping to guarantee the defendant's autonomy, may also limit that autonomy. Yet, it is that limitation to the autonomy which enables the defender to apply, for example, for a psychiatric examination of the defendant even if the defendant himself does not deem it necessary. Thus, by limiting the defendant's autonomy, the defender can achieve the declaring innocent of the defendant even if the latter has unfoundedly pleaded guilty.

The defendant should be left an independent and, to a certain extent, independent of the mandator, procedural role in the future Estonian criminal procedure. He must have the opportunity to sometimes go against the defendant's will, which does not mean ignoring the basic priority of the defendant's interest. But, when recognising the priority of the mandator's interest, it should be pointed out that the extensive recognition of the mandator's interest by the defender and also his autonomy may lead to the unfounded conviction of the mandator.

The unfounded conviction of a person, however, is a violation of human dignity. Thus, when the defendant threatens, by his decisions, to leave his dignity to his fate, the defender should be entitled and obliged to not regard the will of his client and take countermeasures. G. Heinicke has strikingly called it autonomy limited by human dignity.[30]

The defender's function should therefore be more than just defending the private interests of the mandator as defined by the mandator. The defender's function in a criminal procedure should be to defend, besides the mandator's private interests, his fundamental rights against violation by the state.

If we proceed from the premise that fundamental rights are not only individual rights (to be exercised privately) to defend against violation by the state, but also elements of an objective state order, then the defender, by standing for the mandator's fundamental rights, also guarantees state order.[31] Here the important public function of the defender is revealed.

3. The Defender's Obligation of Truth

The defining of the defender's procedural role and status is closely related to whether and to what extent the defender should be bound by the obligation of truth.

In these theoretical opinions, in which the defender is seen as a one-sided representative of interest, the defender is usually rendered so dependent on the mandator's orders that he is more or less granted the right to lie.[32]

It should, however, be mentioned that the most important counterargument against such theoretical opinions is that the advocates to such theories grant the defender a certain degree of the right to lie.[33] If we proceed from the principle that the defender as the defendant's adviser is not only entitled, but obliged to be one-sided to the defendant's benefit, one can indeed at first glance reach the conclusion that everything which the mandator objectively needs or which, according to the defender's understanding, improves the defendant's situation, is allowed. One may thus assume that the defender's helping and repeating of the mandator's false statements is allowable or even recommended. Such an approach could naturally only be considered if the defender is seen as merely standing for the defendant's private interests. But if we also consider the public law aspects of the defender's activity, then proceeding from procedure law and the principles of professional ethics, the defender's activity in defending the defendant's private rights should be somewhat more limited. Such limits should certainly include the defender's obligation of truth, which chiefly implies a prohibition to lie.

If the advocate's word is no longer trusted, justice will be at great loss.[34] If there is no trust, nobody will attribute the necessary meaning to an advocate's statements. Other litigating parties would try to see that the defender knows as little as possible and has as little impact as possible on the course of the procedure.[35] The effectiveness of defence would be significantly reduced.

At the same time, it is not correct to understand the defender's obligation of truth as absolute.[36] Everything that the defender says must be true, but he need not, and must not, say everything that is true.[37]

The defender may on no condition present false statements about factual circumstances. Neither may he present his mandator's false statements as his own or as true according to his knowledge.[38] As a counterargument to this opinion popular in special literature, it has been proposed to differentiate the defender's obligation of truth so that the defender be prohibited from including false circumstances on his own initiative, but allowed to repeat the mandator's lie.[39] The presumption that the defendant has no obligation of truth has been used to conclude that the defender may assist the defendant in presenting false statements.[40]

The argument to allow the defender to repeat the defendant's lies is supported by the opinion that a moral liability of truth is not essential in criminal law. The defendant's right to lie would be threatened if the defender were not allowed to exercise the same right. A lie would presumably be revealed at the moment when the defender accepts the defendant's statements and present them so to say neutrally.[41]

By doubting the above arguments, it should be said that the premise has not been chosen correctly, because even the defendant does not have the "right" to lie.[42] In the case of voluntary statements, the general moral obligation

to speak the truth also applies to the defendant. The bringing of a criminal action does not free the defendant from following moral norms.[43] A lie will remain unpunished only in view of the emergency situation of the defendant (suspect, accused). This is a situation which the defender may not use to his advantage.[44] Although the defendant may lie unpunished, this is not grounds for allowing the defender to lie.[45]

According to the obligation of truth, the defender may not present the mandator's false statements as his own or present evidence which contradicts the truth. The defender may not advise the defendant to lie or be secretive. The defender acts in an unallowable manner by developing, together with the defendant, a defence strategy based on lies.[46] Regardless of what the specific structure of the Estonian criminal procedure will be and which proportion of Anglo-American accusatorial elements will be included in it, the defender's obligation of truth should remain one of the characteristic traits of his position,[47] if only due to the fact that the defender's obligation of truth is an important prerequisite for the impact of his statements in the procedure. The defender's obligation of truth should be viewed as an important precondition for effective defence.

4. Defender in Summary Proceeding Based on Arrangement

In a sense, the proceeding based on arrangement[48] (summary proceeding) can be considered an expression of high recognition of the defendant's subject status. An arrangement on certain conditions grants the defendant quite a substantial opportunity to influence the course and result of the proceeding (especially from the aspect of punishment) in his desired direction sometimes even more effectively than in the case of a regular proceeding.

It is also important to note that the "orientation to consensus " is more in accordance with a "humane" criminal procedure and contributes to the readiness to accept the results.[49] An expression of recognition of the defendant's subject status in the case of a consensus-oriented and arrangement-based procedure is the fact that the defendant is given the opportunity to discuss the matter in a communication situation completely different from that of a regular procedure. It is a situation where the defendant is in the role of a negotiation partner though or aided by his defender.

The actual degree of recognition of the subject status naturally depends on how the arrangement proceeding is legally regulated and on how factually the defendant (accused) is accepted in the negotiations. In Germany, the danger has been pointed out that in the case of an arrangement (*Absprache*), the defendant may, more or less, remain in the role of a helpless object of procedure.[50]

The danger that the defendant may become the object of procedure is undoubtedly great in the case of an arrangement-based proceeding.

In an arrangement, the defendant (accused) has to waive many rights, including the right to remain silent based on the *nemo tenetur se ipsum accusare* principle. The opportunity of taking the prosecutor to a position of difficulty in providing proof and achieving an innocent declaration in this way, must also be given up in this case. There is the danger that the presumption of innocence principle is ignored.[51]

The defendant must be able to decide which rights, when, and under which conditions he waives.

An important object of negotiation in a summary proceeding, besides the plea of guilt, is the degree of punishment. A fair "bargaining of punishment" requires equal partners.[52] As the basis for an arrangement is a prognosis of the proceeding result,[53] a negotiating party must be able to predict the proceeding result.

It is clear that the defendant alone is, as a rule, not able to be an equal negotiation partner to the prosecutor. Considering the above, it is therefore crucial that a defender's participation in a summary proceeding be obligatory by law. (According to § 38(2) of the Criminal Procedure Act currently in force in Estonia, the defender is obliged to participate in a summary proceeding from the commencement of negotiations).

Arrangement in a criminal proceeding offers an experienced and reliable defender an important chance to influence the procedure to the client's benefit.[54] In a summary proceeding, the defender influences not only the proceeding, but also its result.[55] To be more exact, the proceeding result forms in a mixture of opposition and cooperation between the defender and the prosecutor.[56] Through a summary proceeding, the defendant should try to strengthen his client's position. The positioning of the mandator's interests decides the rationality of arrangement.

To clarify the negotiating position, the defender and also the prosecutor have to assess the evidence situation and predict, to a certain extent, the chances for judgement (or rather, declaring innocent) based on the existing evidence.[57] Predicting the course and result of the proceeding requires excellent knowledge of the materials of the criminal case. Therefore the defendant has to have extensive rights to examine as many as possible of the materials collected on the case.[58]

To guarantee the defendant's subject status in a summary proceeding, the defendant must follow the principle that he is obliged to inform the mandator of the prosecutor's proposal for negotiations and the possible time of commencement of the negotiations. The defender may not imply in any way, behind the defendant's back and without the defendant's express consent, readiness to a possible conviction of the defendant.[59]

The timely and comprehensive informing of the mandator of the commencement of negotiations and of the

discussions held, is necessary not only because the mandator's consent is essential for holding negotiations, but also to give the mandator enough time to think about the proceeding results and develop proposals. To give the mandator enough time to consider the matter in depth, the defender must not let the court and prosecutor pressure him for time.[60]

The defendant's duty in guaranteeing the defendant's status subject in a summary proceeding certainly includes helping to protect the defendant's freedom of will.

As mentioned above, the defendant, when agreeing to a summary proceeding, has to waive many of his rights. Such waiver has to be strictly voluntary.

In accordance with the above principles, pursuant to § 364(2) 1), § 366(1), § 383(2) and (3) of the Criminal Procedure Act currently in force in Estonia, an obligatory prerequisite for a summary proceeding is the defendant's consent. The stressed importance of the freedom of will of the defendant in a summary proceeding is expressed in § 383(3) of the Criminal Procedure Act, which obliges the judge to clarify whether the defendant has expressed his actual will in reaching an arrangement in a summary proceeding. Such an obligation of the judge in a summary proceeding (or any other form of proceeding based on arrangement) should undoubtedly be provided in the future Estonian criminal procedure too.

But despite the establishment of the judge's obligation above, it should be kept in mind from the aspect of defence that in practice, clarification of the defendant's actual will may remain largely formal in court. Thus it is the defender's obligation to clarify the mandator's actual will through extensive advising both prior to and during negotiations.

Even if the defendant basically agrees to commence a summary proceeding, the defender should keep in mind that it is often more beneficial if the guilty plea is presented after a certain stage in the procedure.

It should always be kept in mind that as soon as the possibility of pleading guilty emerges, unlimited defence against accusation will lose credibility.[61]

An arrangement made too early contains the danger for the defendant that chances for declaring innocent are given up in the stage where no sufficient information exists on the defendant's guilt.

5. Court Control Over Defender and His Activities

While admitting a certain degree of public interest to be essential to the defender's function, the determining of the defender's legal status should also cover the issue of if and to what extent the future Estonian criminal procedure should provide for court control over the defender and his activity. The problem here is that the state should, on the one hand, avoid any excessive outside limitations to the defendant's autonomy and the defender's defence activities, while on the other hand, the state cannot remain indifferent if the defendant misuses his position.

5.1. A complicated case[62] which may cause court interference and removal of the defender,[63] but which is not regulated by the current Criminal Procedure Act, is the suspicion that the defender may be an accomplice in crime.

A defender who has been accomplice in the crime in question, lacks the distance from the crime which would be necessary for effective defence.

While being basically in favour of the removal of a defendant who may be an accomplice in the crime, it must be admitted that the resolving of such removal issues is related to the difficult problem of establishing suitable criteria. It is important to establish the degree of suspicion against the defender. The Criminal Procedure Act currently in force does not expressly distinguish different degrees of suspicion. This is, however, provided in the German penal code.

In accordance with the differentiation of suspicion in the paradigm of German criminal procedure, a defender is removed from procedure if there is strong suspicion (*dringende Verdacht*) about his participation in crime, and a regular proceeding is commenced if there is probability (*hinreichende Verdacht*) of same (§ 138a I No. 1. StPO).

As degrees of suspicion are rationally difficult to distinguish,[64] it is probably practical to avoid such differentiation of suspicion in developing the future Estonian criminal procedure. When suspicion is not differentiated, the removal of the defendant cannot be decided on the basis of the degree of suspicion about his participation in the crime. Therefore the legal regulation of the defender's removal has to be based on whether suspicion of the defender's participation in the crime is sufficient for his removal. If the answer is yes, we have to admit that the defender may also be removed if there is insufficient suspicion. Although it is advisable to avoid differentiation of suspicion by linguistic means, the need for measuring suspicion cannot be denied. It will probably be necessary in the future Estonian criminal procedure to distinguish sufficient suspicion and insufficient suspicion, regardless of the fact that such distinguishing is, and will remain, vague.

When considering the above, it is clear that even if the existence of sufficient suspicion is established as the unconditional prerequisite of removal of the defender, this does not exclude the possibility of his unjust removal.

Let us ask here, is it still possible to find a solution to reduce the risk of unjust removal of the defender? It seems that one such possibility is to relate the deciding of the defender's removal to the existence of the accusatory act drawn up by the prosecutor. This means that a defendant may be removed only when he is not suspicious of being involved in the crime, but accused of same.[65]

5.2. One possible ground for removal of the defender in the future Estonian criminal procedure could be the

defender's misuse of his procedural position in communication with the detained or arrested mandator. But not any misuse by the defendant should be a basis for his removal, but only behaviour which may facilitate the commitment of a new crime or create conditions for damaging the security of the detention establishment.

A defender who, by exercising his extensive rights established for preparing for defence, facilitates possible attacks against the legal order and the security of persons, is acting so dangerously in purposes not related to the proceeding, that this should result in the removal of the defender.

In this case, suspicion that the defender has misused his position for objectives not related to the proceeding, is not sufficient. However, such suspicion can be the trigger to commence a removal process. The result of the removal process may be the removal of the defender only if it is identified in the course of the process that the defender indeed misused communication with the mandator for objectives not serving the procedure and that this may have facilitated the commitment of a new crime or created conditions which damage the security of the detention establishment. Whether a crime was actually committed using the opportunity created by the misuse by the defendant is immaterial. Regardless of what the specific process for removal of the defendant will be in the future Estonian criminal procedure, the issue of removal of a defender who is an advocate should be subject to notification of the management board of the bar association.

The future law should naturally also enable removal of the defender if he has been expelled from the bar association or prohibited form working as an advocate by court order, as well as in case he has been punished for disciplinary offences by temporary prohibition to carry out professional activities following a decision of the court of honour of the bar association.

5.3. Regarding public interest in effective defence (which compensates for the defendant's autonomy deficit), one of the questions that may arise is if and to what extent the court should be empowered to check the quality of defence and if, proceeding from such a control function, the court should be able to remove a defender who apparently does not perform his function sufficiently.

According to the regulation of the Criminal Procedure Act currently in force in Estonia, the court cannot initiate the removal of the defender if the court is convinced that the defender does not perform his defence function adequately. It is thus not impossible, now, that if the defender is incompetent and lacks the skills or preparation to ask the necessary questions and requests in a procedure, the defendant may be left practically undefended.

It must be admitted that a defender unable to perform his defence function damages public interest regarding the equal opportunities of parties in a procedure.[66] Adherence to the fairness principle is rather questionable if the defendant only formally attends a proceeding without performing effective defence activities. Considering this, it may seem entirely justified that the court be granted certain powers to check fulfilment of the defender's minimum obligations.

Yet, when we speak about the court's possible control function over the quality of defence, we must not forget that any court control over the defender's activities would endanger the defender's independence.

In preparing the future Estonian criminal procedure, it has to be seriously considered whether such large-scale state intervention with the defender's and defendant's autonomy can be principally accepted.

It has to be kept in mind that quality control of the defender's activity by the court is largely evaluatory. Although in certain cases the defender may indeed be incompetent in performing his defence function, his incompetence is not easily verifiable. It is extremely hard to develop a convincing definition which is suitable for application to an essentially insufficient defence. It is difficult to find common criteria for distinguishing between sufficient and insufficient defence.

It is remarkable that despite these difficulties, attempts have been made in special literature to define insufficient defence. S. Barton proposed an interesting theory of the minimum standards of defence. Under these minimum standards, S. Barton means not the lawful maximum level of defence, but its minimum level. He focuses not on excellent defence, but on insufficient defence.[67] S. Barton has tried to find an answer to the question of whether binding legal obligations exist to guarantee the quality of defence,[68] and he has come to the conclusion that various minimum obligations can be defined not only depending on the context, but there are minimum obligations that have to be observed.[69]

Although S. Barton's theory of the minimum standards of defence can be basically agreed with, his suggested minimum standards cannot be viewed as a possible ground for the judge to decide on the sufficiency or insufficiency of defence. S. Barton himself has doubted whether his concept of minimum standards is applicable and allows relevant progress.[70]

Court control over the defender's activity poses the danger that external interference opportunities are used to disguise regulation of the competing defender.[71]

Even the smallest likelihood of that danger and any possibility that the judge is mistaken in evaluating the quality of the defender's activity due to the relative vagueness of the minimum standard line, should be a sufficient argument against empowering the judge to remove the defender from the procedure due to the insufficient quality of defence.

On the other hand, if we deny the court's powers to

remove an irresponsible or incompetent defender from the procedure, we should discuss whether the necessary minimum level of defence could be guaranteed so that the court appoints another defender in addition to the defender who performs his defence function insufficiently. According to § 36 (4) of the Criminal Procedure Act in force, an accused may have more than one defender.

It is interesting to note that in the German court practice, the appointment of an additional defender is considered necessary in extensive criminal cases where there is a danger that the defender is unable or unwilling to perform his duties.[72] This practice, however, has not gone without criticism.

Special literature has drawn attention to the fact that insofar as the defendant (accused), his selected defender and the appointed defender are not able to agree on a single defence strategy, the appointed defender who is left without his client's trust and information, has little chance to effectively defend the fundamental rights of his client.[73] The appointment of a second defender besides the selected defender may lead to an unsolvable conflict if the appointed defender does not have the mandator's trust. It may happen that such a defender is not a help, but a burden, to the defendant (accused) in the proceeding.[74]

In view of the above arguments, it is rather questionable whether such initiative by the court indeed helps to guarantee the minimum quality of defence in compensation for the defendant's (accused's) autonomy deficit. Rather, such an action triggered by the need to guarantee effective defence, can be considered an unallowable interference with the autonomy of the defendant (accused) and his defender.

Conclusion

A cornerstone for the reformation of the Estonian criminal procedure should be the principle that the defendant (suspect, accused) should not be an object of procedure. He may have an actual opportunity to influence the course and result of the criminal proceeding through exercising his rights.

The status of the defendant (suspect, accused) in the criminal procedure can be substantially improved by strengthening the role of the "understanding guarantee" and the defender as a helper of the defendant (suspect, accused).[75]

To guarantee the subject status of the defendant (suspect, accused), he must be provided the means for effective defence by a defender who has opportunities approximately equal with those of the prosecutor under the procedural structure.

To create a better balance in the communication structure of the criminal procedure, and to also improve the procedural status of the defendant and his defender, the increasing of the share of accusatorial elements in the future Estonian criminal procedure should be seriously considered.

Defence can be guaranteed more effectively if the defender is seen as a representative of private interests and indirectly also the representative of public interest. The latter means that the state and the public are not indifferent to whether and how the defendant (suspect, accused) is defended. In a procedure that includes accusatorial elements, the defender should, thanks to his active role in the evidencing process, have a factually important function in achieving a fair judgement.

The defender's obligation of truth as a characteristic feature of his status should be recognised not so much due to public interest in clarifying the truth, but in order that the defender's statements may be seriously regarded in the proceeding. This opinion is based on the understanding that a defender who is entirely dependent on the mandator and has the right to lie, can often perform defence much less effectively than a defender who is relatively independent of the mandator and bound by the obligation of truth.

Concerning the defender's role in a consensus-oriented, arrangement-based procedure, it has to be mentioned that in this form of procedure too, the defender is the guarantor of the subject status of the defendant (accused). The entire activity of the defendant in an arrangement proceeding should be carried out recognising the priority of the mandator's free will.

While entirely accepting the defender's independence of the court, the future Estonian criminal procedure, when compared to the present one, should somewhat extend the bases for a defender's removal, while legalisation of court control over the quality of the defender's performance should be avoided.

Notes:

[1] T. Weigend. Die Reform des Strafverfahrens Europäische und deutsche Tendenzen und Probleme. — Zeitschrift für die gesamte Strafrechtswissenschaft, Band 104, 1992, p. 487.

[2] K.Tiedemann, Thesen zu einem modernen menschenrechtsorientierten Strafprozeß, Zeitschrift für Rechtspolitik, 1992, H. 3, p. 108.

[3] W. Siolek. Verständigung in der Hauptverhandlung, 1. Aufl. — Baden-Baden: Nomos Verl.-Ges., 1993, p. 95.

[4] T. Rönnau. Die Absprache im Strafprozeß. Kiel: Nomos-Recht, 1990, p. 208.

[5] W. Siolek. Verständigund im Strafverfahren — eine verfassungswidrige Praxis! — Deutsche Richterzeitung 1989, 9, p. 325; T. Rönnau, q.v. note 4 p. 209.

[6] T. Kleinknecht/L. Meyer-Gossner, Strafprozeßordnung, Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen, 43. neubearbeitete Auflage, München: Beck, 1997, Einl. 88.

[7] K. Vehling. Die Funktion des Verteidigers im Strafverfahren — Ein Beitrag zum Selbstverständnis der Strafverteidigung. — Strafverteidiger, 1992, 2, p. 89.

[8] G. Heinicke. Der Beschuldigte und sein Verteidiger in der Bundesrepublik Deutschland: d. Geschichte ihrer Beziehung u.d. Rechtsstellung d. Verteidigers heute. München : Florentz, 1984, p. 425.

[9] S. Barton. Mindeststandards der Strafverteidigung: Die strafprozessuale Fremdkontrolle der Verteidigung und weitere Aspekte der Gewährleistung von Verteidigungsqualität, 1. Aufl. — Baden-Baden: Nomos Verl.-Ges., 1994, p. 345.

[10] A. Jolmes. Der Verteidiger im deutschen und österreichischen Strafprozeß — Eine rechtsvergleichende Studie zur Stellung des Verteidigers im Strafverfahren. Padeborn; München; Wien; Zürich: Schöningh, 1982, p. 65.

[11] W. Siolek, q.v. note 3 p. 96.

[12] K.Tiedemann, q.v. note 2 p.108.

[13] C. Roxin. Strafverfahrensrecht. Ein Studienbuch. 22., völlig neubearb. Aufl., München: Beck, 1991, § 17, B. 2.

[14] E. Kergandberg. Kümme märkust seoses prokuröri funktsionaalse rolliga Eesti tänases ja tulevases kriminaalmenetluses. (Ten Remarks Concerning the Functional Role of the Prosecutor in the Present and Future Estonian Criminal Procedure.) Juridica 1999, No. 2, p. 64.

[15] Q.v. Roxin, q.v. note 13, §17 B. 1.

[16] Q.v. E. Müller. Strafverteidigung. — Neue Juristische Wochenschrift, 1981, 34, pp. 1803-1804; E. Müller. Über die sog. gerichtliche Fürsorgepflicht im Strafverfahren. in Recht und Gesetz im Dialog II. Saarbrücker Vorträge. Hrsg. von Prof. Dr. Wolfgang Rütner. Carl Heymanns Verlag KG Köln; Berlin; Bonn; München, 1984, p. 127.

[17] E. Kergandberg. Kohtuotsus kriminaalasjas, selle kujunemine ja kriitika. (Adjucation in a Criminal Case, its Formation and Critique.) Tallinn, 1999, p. 72.

[18] It is interesting to note that for example an Italian judge, despite the accusatory nature of procedure, has the right to be unsatisfied with the evidence presented by the parties and may organise the collection of additional evidence (§ 507 of Codice di procedura penale). In the preliminary procedure (udienza preliminare), the court may show to the parties new issues for evidence (§ 422 of Codice di procedura penale).— Italienische Strafprozeßordnung mit Nebengesetzen. Zweisprachige Ausgabe. Verlagsanstalt Athesia-Bozen 1991. That is the extent to which the Italian procedure is a mixture of purely accusatorial and inquisitorial procedure. [Q.v. G. Müller. Rechtsprechung im Vergleich der Länder Europas. - Deutsche Richterzeitung, 1993, 10, p. 383].

[19] R. Narits. Õigusteaduse metodoloogia I. (Methodology of Law I) Tallinn, 1997, p. 5.

[20] K.Vehling, q.v. note 7 p. 88.

[21] J. Welp. Der Verteidiger als Anwalt des Vertrauens. Zeitschrift für die gesamte Strafrechtswissenschaft, 1978, p. 117.

[22] G. Heinicke, q.v. note 8 p. 317.

[23] J. Welp, q.v. note 21 p. 119.

[24] J.Welp, q.v. note 21 p. 119.

[25] J. Welp, q.v. note 21 pp. 102-103.

[26] J. Welp, q.v. note 21 p. 116.

[27] B. Haffke. Zwangsverteidigung — notwendige Verteidigung — Pflichtverteidigung — Ersatzverteidigung. — Strafverteidiger, 1981, 9/10, pp. 480-481.

[28] Ibid. p. 481.

[29] K.Vehling, q.v. note 7 p. 89.

[30] G. Heinicke, q.v. note 8 p. 380.

[31] G. Heinicke, q.v. note 8 p. 373.

[32] Q.v. e.g. H. Ostendorf. Strafvereitelung durch Strafverteidigung. - Neue Juristische Wochenschrift,1978, 28, p. 1349; K. Lüderssen. in "Die Strafprozessordnung und das Gerichtsverfassungsgesetz: Grosskommentar / Löwe-Rosenberg. Hrsg. von Peter Riess. — Berlin; New York : de Gruyter, Rn. 141 vor § 137.

[33] C. Roxin, q.v. note 13, §19 A II, 3, b.

[34] H. Dachs. Hanbuch des Strafverteidigers / begr. von Hans Dachs. — 5., neubearb. aufl. / von Hans Dachs. — Köln: O. Schmidt, 1983, Rdnr. 39.

35 G. Brei. Grenzen zulässigen Verteidigerhandelns: ein Beitrag zur Wahrheitspflicht des Verteidigers unter besonderer Berücksichtigung des französischen, englischen und nordamerikanischen Strafverfahrens — München : VVF, 1991, p. 335.

[36] G. Pfeiffer. Zulässiges und unzulässiges Verteidigerhandeln. — Deutsche Richterzeitung, 1984, 9, p. 343.

[37] H. Dachs, q.v. note 34, Rdnr. 44.

[38] G. Pfeiffer, q.v. note 36 p. 344.

[39] H. Ostendorf, q.v. note 32 p. 1349.

[40] K. Lüderssen, q.v. note 32, vor § 137, Rz 141.

[41] H. Ostendorf, q.v. note 32 p. 1349.

[42] G. Brei, q.v. note 35 p. 330.

[43] J. Wessels. Schweigen und Leugnen im Strafverfahren. — Juristische Schulung 1966, 5, p. 173.

[44] J. Seier, Die Trennlinie zwischen zulässiger Verteidigungstätigkeit und Strafvereitelung — OLG Frankfurt, NStZ 1981, 144. — Juristische Schulung, 1981, 11, p. 808.

[45] W. Bottke. Wahrheitspflicht des Verteidigers. — Zeitschrift für die gesamte Strafrechtswissenschaft 96, 1984, 3, p. 758.

[46] T. Liemersdorf. Grenzziehung zwischen zulässigem und unzulässigem Verhalten eines Strafverteidigers im Umgang mit seinem Mandanten. — Monatschrift für Deutsches Recht, 1989, 3, p. 206.

[47] It should be mentioned here that the need to limit the defender's freedom of defence activities with the obligation of truth has been basically recognised in both continental European legal orders and in those of the UK and USA — Q.v. G. Brei. Grenzen zulässigen Verteidigerhandelns: ein Beitrag zur Wahrheitspflicht des Verteidigers unter besonderer Berücksichtigung des französischen, englischen und nordamerikanischen Strafverfahrens — München : VVF, 1991, pp. 353, 175.

[48] A form of procedure similar to the Anglo-American plea bargaining, the Italian *patteggiamento*, and the *Absprache common* in the German ciminal procedure practice.

[49] W. Hassemer. Pacta sunt servanda — auch im Strafprozeß? — Juristische Schulung 1989, 11, p. 893.

[50] R. Möhlmann. Vereinbarungen im Strafverfahren — Rechtliche Möglichkeiten kooperativer Verfahrensbewältigung. — Deutsche Richterzeitung, 1990, 6, p. 204.

[51] Q.v. M. Sillaots. Arrangement — Form of Procedure Based on Guilty Plea and Presumption of Guilt? — Juridica International. Law Review University of Tartu 1998 III, pp. 76-83.

[52] T. Rönnau, q.v. note 4 p. 280.

[53] W. Schmidt-Hieber. Absprachen im Strafprozeß — Rechtsbeugung und Klassenjustiz? — Deutsche Richterzeitung, 1990, 9, p. 326.

[54] H. Dachs. Absprachen im Strafprozess — Chancen und Risiken. Neue Zeitschrift für Strafrecht, 1988, 4, p. 159.

[55] T. Weigend. Abgesprochene Gerechtigkeit — Effizienz durch Kooperation im Strafverfahren? Juristenzeitung, 1990, 17, p. 775.

[56] Q.v. K. F.Schumann. Der Handel mit Gerechtigkeit: Funktionsprobleme der Strafjustiz und ihre Lösungen — am Beispiel des amerikanischen plea bargaining — Frankfurt am Main: Frankfurt am Main: Suhrkamp, 1977, S. 179.

[57] H.J. Dielmann. "Guilty Plea" und "Plea Bargaining" im amerikanischen Strafverfahren — Möglichkeiten für deutschen Strafprozeß? — Goldammers`s Archiv für Strafrecht, 1981, p. 564.

[58] Although one should agree, to a certain extent, with the opinion voiced in

special literature that the advocate's prognosis of the procedure is often an insolvable task for the defendant, even if materials can be examined — V. Mehle. Anmerkungen zum Alternativ-Entwurf aus anwaltlicher Sicht. — Neue Zeitschrift für Strafrecht, 1982, 8, p. 309.

[59] R. Hamm. Absprachen im Strafverfahren? — Zeitschrift für Rechtspolitik, 1990, 9, p. 339.

[60] D. Deal. Der strafprozessuale Vergleich. — Strafverteidiger, 1982, 11, p. 551.

[61] Q.v. H. Dachs, q.v. note 54 p. 156.

[62] This article does not cover cases where the defender is removed by court, which is provided in the currently effective Criminal Procedure Act. Those bases which are, so-to-say, traditional to us for the removal of a defender, should also be prescribed in the future criminal procedure. Thus, a defender who has been or is another subject of criminal procedure; who has or does provide assistance in the criminal case to persons whose interests conflict the interests of the defendant; or who is personally related to officials conducting preliminary or court investigation, should also be removed according to the new criminal procedure.

[63] Removal is one of the most serious methods of court intereference with defence.

[64] One can agree with the opinion of E. Kergandberg that the possibility to rationally differentiate suspicion is rather doubtful — Q.v. E. Kergandberg. Sissejuhatus kohtumenetluse õpetusse. (Introduction to court procedure) Tartu 1996, p. 75. Q.v. also E. Kergandberg. Kümme märkust seoses prokuröri funktsionaalse rolliga Eesti tänases ja tulevases kriminaalmenetluses. (Ten Remarks on the Prosecutor's Functional Role in the Present and Future Criminal Procedure of Estonia) — Juridica 1999, 2, pp. 68-69.

[65] Approach to the issue of drawing up an accusatory act should be based on the opinion of E. Kergandberg, which in brief is the following: only in the final stage of pre-trial investgation, i.e. after the investigator has concluded work, should the prosecutor decide, on the basis of the materials collected, whether there is sufficient grounds to exercise the accusatory function. If the prosecutor is convinced that the defendant has committed the crime under certain circumstances, he formulates his conviction in an accusatory act. — E. Kergandberg. Kümme märkust seoses prokuröri funktsionaalse rolliga Eesti tänases ja tulevases kriminaalmenetluses. (Ten Remarks on the Prosecutor's Functional Role in the Present and Future Criminal Procedure of Estonia.) — Juridica 1999, 2, pp. 67-68.

[66] W. Hassemer. Reform der Strafverteidigung. — Zeitschrift für Rechtspolitik, 1980, 12, p. 332.

[67] S. Barton, q.v. note 9 p. 36.

[68] Ibid. p. 361.

[69] Ibid. p. 365.

[70] Ibid. p. 367.

[71] Ibid. p. 31.

[72] J. Welp, q.v. note 21 p. 122; C. Roxin, q.v. note 13, §19 C 6.

[73] C.Roxin, q.v. note 13, §19 C 6.

[74] W. Hassemer, q.v. note 66 p. 327.

[75] R. Wassermann. Der Verminderung des Machtgefälles in der Strafgerichtsverhandlung als rechtspraktisches und rechtspolitisches Problem. - Zeitschrift für Rechtspolitik 1986, 6, p. 137.