

## ЗАСАДИ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ ЯК ВИМОГИ, ЩО ПРЕД'ЯВЛЯЮТЬСЯ ДО ДІЯЛЬНОСТІ ДЕРЖАВНИХ ОРГАНІВ, ЇХ ПОСАДОВИХ І СЛУЖБОВИХ ОСІБ (ПРОБЛЕМИ НОРМАТИВНОГО РЕГУЛЮВАННЯ)

**Анотація.** Відсутність у кримінальному процесуальному законодавстві України визначення засад кримінального провадження зумовлює актуальність досліджуваної проблеми. Загальновідомо, що кримінальне процесуальне законодавство має розроблятися відповідно до конституційних засад судочинства, які обумовлюють регулювання кримінальних процесуальних відносин таким чином, що обов'язок забезпечення прав і законних інтересів людини покладається на органи досудового розслідування, прокурора, слідчого суддю та суд. Враховуючи публічну природу кримінальної процесуальної діяльності України, держава практично у всіх випадках здійснення кримінально караних діянь бере на себе обов'язок безпосередньо захищати права та законні інтереси учасників процесу, без узгодженості своєї діяльності з їх волею та бажанням. Тому у роботі проаналізовано засади кримінального провадження як вимоги, що пред'являються до діяльності державних органів, їх посадових і службових осіб. Розглянуто проблеми нормативного регулювання. Для досягнення поставленої мети в роботі були використані методи моделювання, абстрагування, проаналізовано різноманітні нормативні акти та літературні джерела. Встановлено, що публічність кримінального процесу ґрунтується на процесуально-посадовій активності суб'єктів, які здійснюють кримінальне провадження. Зазначено, що основні положення, виражені в засадах кримінальної процесуальної діяльності, мають неухильно дотримуватися усіма суб'єктами правозастосування у ході кримінальних процесуальних відносин. В роботі досліджена сутність кримінального процесу та його відмінність від інших галузей правової діяльності. Сформульовано окремі висновки та пропозиції, спрямовані на вдосконалення кримінального процесуального законодавства.

**Ключові слова:** публічна природа кримінального процесу, проблеми нормативного регулювання, кримінальні правопорушення, карні діяння.

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## PRINCIPLES OF CRIMINAL PROCEEDINGS AS REQUIREMENTS CONCERNING THE ACTIVITIES OF PUBLIC BODIES, THEIR CUSTOMS AND SERVICE PERSONS (PROBLEMS OF REGULATORY ADMINISTRATION)

**Abstract.** The lack of the definition of the criminal proceeding principles in the criminal procedural legislation of Ukraine determines the relevance of the investigated problem. It is well-known that criminal procedural law should be developed in accordance with the constitutional principles

*of legal proceedings, which stipulate the regulation of criminal procedural relations in such a way that the obligation to ensure the rights and legitimate interests of a person is entrusted to pre-trial investigation bodies, prosecutors, investigating judges and courts. Given the public nature of the criminal procedure of Ukraine, the state assumes the obligation to directly protect the rights and legitimate interests of the participants of the procedure in almost all cases of penal acts without coordinating its activities with their will and desire. In this context an analysis of the criminal proceeding principles as requirements for the activities of state bodies and their officials is carried out. This addresses some statutory regulation issues. The article provides the author's definition of the criminal proceeding principles. It has been established that the publicity of the criminal process is based on the procedural and official activity of subjects who carry out criminal proceedings. It has been noted that the basic provisions, expressed in the principles of criminal procedural activity, should be strictly observed by all subjects of law enforcement in the course of criminal procedural relations. The work has researched the essence of the criminal process and its distinction from other branches of legal activity. The conclusions and proposals aimed at improving the criminal procedure legislation are formulated.*

**Key words:** the public nature of the criminal process, the problem of regulatory regulation, criminal offences, criminal acts.

## INTRODUCTION

The process of building an independent, sovereign, democratic, law-based state in the modern period is impossible without the creation of a coherent system of reliable state protection of the rights and freedoms of citizens. To implement this task, it is very important to intensify the implementation of law-making in order to improve the criminal procedural law, its democratisation by bringing its provisions in line with provisions of the Constitution of Ukraine and international legal standards [1–3].

One of the important events for the whole state was the adoption in 2012 of the new Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC). This has become an important step towards reforming the criminal process. This legislative act incorporates the progressive achievements of the theory of criminal procedural law and significantly brought Ukraine closer to the European standards of criminal proceedings [4; 5]. The new CPC of Ukraine differs significantly from well-known perceptions of the criminal process in general. It contains a number of institutions that are a new trend in criminal proceedings, resulting in many procedural innovations and innovative procedures in the criminal procedural law.

Any activity by its nature is subject to certain laws, principles that define its orientation and character, that is, they are as if its guidance. The criminal procedural activity in Ukraine is not an exception. Regardless of subjects and stages of criminal proceedings it must comply with certain fundamental provisions, which in the field of criminal procedure are called “principles”.

For many years the issue on principles of criminal proceedings has been the subject of discussion by scientists. However, in the 1960 Criminal Procedure Code of Ukraine, the principles did not differ from the general mass of requirements that indicated significant disadvantages of legislative technique. In this regard, the CPC of Ukraine

adopted on April 13, 2012, eliminated this gap. It for the first time consolidated in a separate chapter the principles of criminal proceedings. Each principle had its own content in a separate article of the law. This position of the legislator shows how much he attaches great importance to these basic provisions. They form a peculiar basis on which the criminal process is built, penetrate the legal matter of criminal proceedings and all processes taking place in the criminal procedural sphere.

## 1. MATERIALS AND METHODS

For a detailed analysis of the legal nature of the principles of criminal proceedings, the author used a variety of theoretical methods, analysed literary sources and regulations. Methods of analysis led to determination of the principles of the criminal process, which are the basis of formation of the whole system of criminal procedural law; fixed in the current legislation in the form of legal provisions; express most fully the content of criminal procedural law; extend their effect at all stages of the criminal process; are closely interrelated with the state policy in the field of criminal procedural activities, taking into account the provisions of international acts; carry out a protective and regulatory action regarding all criminal procedural norms.

The methods of research are predetermined by the purpose of the work, which involves the general dialectical method of scientific cognition of reality that implies consideration of phenomena in their relationship, unity and development. This helped to imagine and comprehensively explore the nature of the principles of the criminal process as requirements imposed on the activities of state bodies and officials. Historical and legal method provided insight into the tendencies of development of normative provisions and scientific views in time. The methods of modelling and abstraction were used during the development of scientific and theoretical models of changes to the criminal procedural legislation of Ukraine in order to improve the legal regulation of issues related to filling the normative content of the principles of criminal proceedings. The method of generalisation contributed to the consistent construction of individual facts into a single whole as well as to the formation of substantiated conclusions aimed at improving the legislative regulation of the issues under investigation, overcoming its conflicts and gaps. These methods were used in the interconnection and interdependence, which ensured the comprehensiveness, completeness and objectivity of the scientific results obtained.

The theoretical methods of research made it possible to determine that the principles of the criminal process should be considered as the leading element of the whole system of criminal procedural guarantees, as a combination of methods and means that provide for all and at each level the legal opportunities for the acquisition and real exercise of rights and freedoms. The significance of the general principles of criminal proceedings as norms of a higher degree of normativity is that they serve as a guarantee of justice; are a guarantee of compliance with rights, freedoms and legitimate interests of participants in criminal proceedings.

## 2. RESULTS AND DISCUSSION

### *2.1. The problem of determining the basic principles of the criminal proceeding*

First of all, it should be noted that in the legal literature even until today, there is no unity in the views on the definition of the concept of the principles of the criminal process. In the CPC of Ukraine, there is not the definitions of this legal category, which has prompted many legal scholars to research this problem for a long time. Because the recognition of the entire directive contained in the legal norm often depends on correct use of one or another term, and numerous terminological units that coincide in their current laws, confuses the law enforcement.

Ukrainian and foreign processualists and criminologists devoted their studies to this problem: S. A. Alpert, M. M. Grodzinsky, Yu. M. Groshevoy, T. M. Dobrovolskaya, V. C. Zelenetsky, O. V. Kaplina, V. O. Konovalova, O. M. Larin, L. M. Loboyko, V. T. Malyarenko, V. I. Marinov, M. A. Markush, T. M. Miroshnichenko, M. M. Mikheenko, V. T. Nor, M. M. Polyansky, A. L. Rivlin, V. M. Savitsky, M. I. Siriy, M. S. Strogovich, V. M. Tertishnik, I. V. Tyrichev, A. R. Tumanians, I. Ya. Foynitsky, M. O. Cheltsov, V. Yu. Shepit'ko, O. G. Shilo, M. E. Shumylo, etc. Despite the importance of the conducted researches, it must be admitted that there is still not the unity of thought regarding the definition of the concept of the principles of the criminal process. So, according to M. S. Strogovich, T. M. Dobrovolskaya, Yu. P. Yanovich, O. P. Ryzhakov, M. O. Gromov, V. V. Nikolaychenko and M. L. Yakub, the principles of the criminal process are understood as the legally executed leading (legal) provisions, which establish the most general and essential properties of the criminal process, expressing its nature and essence [6].

At the same time, V. M. Tertyshnik, L. B. Ismailov, G. V. Kudryavtseva, Yu. D. Livshits, V. V. Navgorotska, M. M. Mikheenko describes the principles of the criminal process as the basic ideas enshrined in the constitutional and procedural legislation, which determine the construction of the criminal process, its essence and democracy [6].

In the opinion of the author, it is worth to support the opinion of the scholars who define the principles of criminal proceedings as fixed in the norms of law determinative fundamental provisions concerning the regularities and the most essential properties of the criminal proceedings, which determine their importance as a means to protect rights and freedoms of a human and a citizen, and also to regulate activities of bodies and officials conducting the process [7].

This definition, in the opinion of the author, reflects the legal nature of the principles of criminal proceedings, which underlie the whole system of norms of criminal procedural law, express the essence, tasks, construction of the criminal process as a special system of state activity. This definition of the concept of basic principles emphasises the understanding of them as imperative provisions, requirements for activities of state bodies and officials. They are aimed at achieving the objectives of criminal proceedings. Exactly this feature of the principles of the criminal proceeding is the subject of discussion in this paper.

## 2.2. *Public nature of the criminal proceeding*

Criminal procedural activity is defined by its purpose and tasks, the essence of which, in turn, definitely depends on specific economic, social and political, ideological conditions. Adoption of the new CPC of Ukraine has contributed to a change in the state policy vector on the issue of prioritising the state interests and the interests of the individual in favour of the latter. However, the attribution of criminal procedural law to public sectors can be considered an axiom.

The criminal process is a kind of state activity. The state using its specially created bodies that counteract crime, protects the constitutional system, socio-economic, political and personal rights and freedoms of citizens, rights and legitimate interests of legal entities from criminal offences. Criminal proceedings can be carried out only by state bodies authorised by law: operational units, investigative bodies of pre-trial investigation, heads of pre-trial investigation bodies, prosecutors, investigating judges and courts. They are endowed with the necessary authority and, if there are legitimate reasons, they may resort to measures of state coercion. Decisions taken by them within the limits of their authority are obligatory for all institutions, organisations, officials and citizens [7].

In addition, it is worth noting that the whole criminal proceeding is public in its essence, since it is aimed at protecting the rights and legitimate interests of citizens who are violated by the most socially dangerous type of legal delinquency – a criminal act. Given this, the state virtually in all cases takes the responsibility to directly protect rights and legitimate interests of individuals without coordinating their own activities with will and desire of citizens, since satisfying the interest of society in overcoming crime is a condition and a guarantee of its normal functioning and development. The state, in the person of its bodies, undertakes to protect citizens, society from criminal manifestations, undertakes to be active in ensuring their protection. Due to publicity, public authorities should recreate the event in the fullest extent, establish and protect the legitimate interests of all participants in criminal proceedings.

It is also worth noting that publicity of the criminal procedural form can be considered as its essential feature, given the prevalence in the criminal process of publicity as its general principle and its direct impact on the construction of a criminal procedure, which primarily manifests itself in the process of official activity of individuals, who carry out criminal proceedings to solve its tasks [8].

Again, public law subjects are strictly bound by the law, their field of their activity is outlined in the legal framework. In the public sphere legal regulation is characteristic of a positive obligation, that is, subjects of public law are obliged to act in a certain way in order to achieve one or another purpose. Legislation defines clear conditions for the exercise of power. In the presence of certain circumstances, the subject of authority is obliged to implement it, otherwise it can be accused of inaction. The publicity of the criminal process is manifested in the procedural and official activity of the subjects who carry out the criminal proceedings, with the solution of his tasks. It is aimed at identify-

ing crimes and those who committed them, prosecuting such persons, bringing them to criminal responsibility, and taking criminal procedural decisions at their own discretion. This manifests itself in activities through the principles, the implementation of which guarantees the achievement of the tasks of the process, the establishment of all circumstances that are subject to proof. That is, the principles among other concepts of the process occupy one of the highest places in hierarchy as a manifestation of the essence of the process outside, in activity.

### *2.3 Obligatory nature of the grounds of criminal proceedings*

The specifics of the principles of criminal proceedings are that they are of imperious (mandatory) character. It is necessary to emphasise the inalienable connection between the implementation of the principles and the achievement of the tasks of criminal justice. The tasks of the criminal proceedings, which were fixed in Art. 2 of the CPC of Ukraine can be divided into two groups. The first is stipulated by the provisions of the Constitution of Ukraine (Articles 3, 28–30, 62, 63, etc.) and is connected with the necessity: to provide protection of the person, the society and the state from criminal offenses; the need to protect rights, freedoms and legitimate interests of participants of criminal proceedings. The second group is defined by the public nature of the criminal process and imposes on its persons the duty to carry out a prompt, complete and unprejudiced investigation and judicial review, so that anyone who committed a criminal offence has been prosecuted for the fault of his/her own, no innocent person was punished, no person was subjected to unwarranted coercion and that every participant in the criminal proceedings had applied proper legal procedures [9].

In order to be a means to achieve the objectives of criminal proceedings, the principles must have the character of general liability. They have the meaning, only when they necessarily receive their consolidation in the norm of law. This ensures that they are rigorously enforced under the threat of adverse consequences for violators or under the threat of the abolition of decisions taken with such violations. Because of the normative sign, the main provisions expressed in the principles of criminal procedural activities must be rigorously observed by all actors of law enforcement in the course of criminal procedural relations.

As already noted earlier, the principles are the basis for building the entire criminal procedural law. In other words, they should be considered as a tool of criminal procedural form that is understood as the set of legal procedures, conditions and guarantees established by the law, which form the order of criminal proceedings and ensure the solution of its tasks [8]. The criminal procedural form provides the solution of the tasks of the criminal process. The principles of criminal proceedings form the basis of the criminal procedural form at all stages of criminal procedural activities.

To continue the above-mentioned, it is needed to recall that in the theory of state and law, principles are the most general and stable requirements that promote the es-

establishment and protection of public values, determine the nature of law and directions for its further development [10]. The principles of law, notes S. P. Pogrebnyak, are the most basic and stable requirements that promote the establishment and protection of public values, determine the nature of law and directions for its further development [11]. In the science of criminal proceeding the position on understanding the principles as a requirement for this type of activity has been repeatedly expressed. So M. M. Polyansky understood the principle as one of the basic general requirements, which should correspond to the activities [12]. Principles are not just the “basic legal provisions”, but the requirements, without which it is impossible to achieve the objectives of a particular activity [13]. Only a single understanding of these two parts – requirements and tasks – can reveal the essence of the principles of criminal proceedings. V. T. Nor defines the principles of criminal proceedings as requirements to the rules and methods of activity, primarily for the bodies and officials who conduct criminal proceedings, and guarantees the observance of rights, freedoms, and the legitimate interests of those who involved in proceedings [14]. L. M. Loboyko speaks of the principles of procedural criminal law as the initial provisions enshrined in legal norms, reflecting the political and legal ideas prevailing in the state, and determine the essence of the organisation and activities of the competent state bodies that conduct criminal proceedings [15].

A. S. Barabash determines that the principle is a requirement for activity, without which it is impossible to achieve the purpose of this activity, and which is addressed to authorities of the state; it is fixed in the norm of the criminal procedural law, and the nature of this requirement must be directly related to the purpose of criminal procedural activities, and, therefore, its implementation must guarantee the achievement of such a purpose [16]. Yu. M. Groshevy notes, “For individuals who apply the law, principles are not only a guide to action, but also a requirement to follow the prescribed direction in accordance with the idea that is currently leading in this society and the state [17].

The above does not allow us to agree with M. A. Gromovy and V. V. Nikolaychenko, who believe that the principle of criminal proceedings are addressed to citizens and relevant state bodies [18]. Perhaps such a position is inherent in the civil process, which attracts a dispositive method of legal regulation that gives a high level of individual freedom, but not for a criminal regulation, within which public interest is first and foremost implemented.

The abovementioned understanding of the principles of criminal proceedings corresponds to the proposal to use in the text of the articles, which fix the content of the principle, the word “obliged” that addressed to the state authorities. In some of the norms of the CPC of Ukraine, which contain substantial content of the principles of the criminal process, this provision has been consolidated (Article 9, Article 20, Article 23, Article 25, Article 28, Article 29). However, in the majority, every norm duplicates the rights of individuals, which are enshrined in the Constitution of Ukraine. It is clear that any law (including the CPC of Ukraine) must be based on the Basic Law

of our state. However, it is necessary to take into account the specifics of a certain sphere of activity.

In this regard, we propose to make some changes to the CPC of Ukraine in the following wording:

P. 1 art. 8. Rule of law “During a criminal proceeding, a court, an investigating judge, a prosecutor, a head of a pre-trial investigation body, an investigator, and other officials of public authorities are obliged to adhere strictly to the requirements of the rule of law, according to which an individual, his rights and freedoms are recognised as the highest values and define the content and direction of state activity”.

P. 1 art. 10. Equality before the law and the court “During a criminal proceeding, a court, an investigating judge, a prosecutor, a head of a pre-trial investigation body, an investigator, and other officials of public authorities are obliged to ensure equality before the law and the court”.

P. 1 art. 11. Respect for human dignity “During a criminal proceeding, a court, an investigating judge, a prosecutor, a head of a pre-trial investigation body, an investigator, and other officials of public authorities are obliged to ensure respect for human dignity, rights and freedoms of each person”.

P. 1 art. 12. Ensuring the right to freedom and security of person “During a criminal proceeding, a court, an investigating judge, a prosecutor, a head of a pre-trial investigation body, an investigator, and other officials of public authorities are obliged to provide the person with the right to freedom and security of person”.

P. 1 art. 13. Inviolability of a home or other property of a person “During a criminal proceeding, a court, an investigating judge, a prosecutor, a head of a pre-trial investigation body, an investigator, and other officials of state authorities are obliged to ensure the inviolability of a home or other property of a person”.

P. 1 art. 14. Secret of communication “During a criminal proceeding, a court, an investigating judge, a prosecutor, a leader of a pre-trial investigation body, an investigator, and other officials of state authorities are obliged to ensure the secret of communication”.

P. 1 art. 15. Non-interference in private life “During a criminal proceeding, a court, an investigating judge, a prosecutor, a head of a pre-trial investigation body, an investigator, and other officials of public authorities are obliged to ensure non-interference in each individual’s private (personal and family) life”.

P. 1 art. 16. Inviolability of property rights “During a criminal proceeding, a court, an investigating judge, a prosecutor, a head of a pre-trial investigation body, an investigator, and other officials of public authorities are obliged to provide each person with the inviolability of property rights”.

P. 1 art. 17. Presumption of innocence and ensuring the proof of guilt “During a criminal proceeding, a court, an investigating judge, a prosecutor, a leader of a pre-trial investigation, an investigator, and other officials of public authorities are obliged to adhere to the requirements of the principle of presumption of innocence and to ensure the proof of guilt”.

P. 1 art. 18. Freedom from self-disclosure and the right not to testify against close relatives and family members “During a criminal proceeding, a court, an investigating judge, a prosecutor, a head of a pre-trial investigation body, an investigator, and other officials of public authorities are obliged to explain to each person the right to freedom from self-disclosure and not to testify against close relatives and family members”.

P. 1 art. 19. Prohibition to twice prosecute for a same offence. “During a criminal proceeding, a court, an investigating judge, a prosecutor, a head of a pre-trial investigation body, an investigator, and other officials of public authorities are obliged to adhere to the prohibition to prosecute twice one and the same offense”.

P. 1 art. 21. Access to justice and the binding nature of court decisions “During a criminal proceeding, a court, an investigating judge, a prosecutor, a head of a pre-trial investigation body, an investigator, and other officials of public authorities are obliged to provide access to justice and binding judgments”.

P. 1 art. 22. Competitiveness of parties and the freedom to submit their evidence to the court and bring to the court their conviction “A court, investigating judge, prosecutor, head of the pre-trial investigation body, investigator, other officials of the state authorities are obliged to ensure the conduct of criminal proceedings on the basis of competition, which provides for independent uphold by a prosecution and a defense of their legal positions, rights and legitimate interests by means provided by this Code”.

P. 1 art. 24. Ensuring the right to appeal against procedural decisions, actions or inactivity “During a criminal proceeding, a court, an investigating judge, a prosecutor, a head of a pre-trial investigation body, an investigator, and other officials of public authorities are obliged to provide each person with the right to appeal procedural decisions, actions or inaction of the court, investigator of a judge, prosecutor, investigator in the manner prescribed by this Code”.

P. 1 art. 26. Discretionary nature “During a criminal proceeding, a court, an investigating judge, a prosecutor, a head of a pre-trial investigation body, an investigator, and other officials of public authorities are obliged to provide each person with an opportunity to freely choose ways to exercise their rights implied by this Code”.

P. 1 art. 27. Publicity and openness of court proceedings and its complete fixing by technical means “During a criminal proceeding, an investigating judge is required to ensure the transparency and openness of court proceedings and its full fixation by technical means”.

Given the importance of the principles for the proper functioning of criminal procedural activities, it would be advisable, in our opinion, to add the definition of their concept to the CPC of Ukraine.

## CONCLUSIONS

The generalisation of the foregoing makes it possible to conclude that the principles of criminal proceedings should be considered as requirements for state bodies and officials. As rules of law, the principles are of imperious nature. They contain mandatory requirements, the implementation of which is ensured by a combination of

legal means. The implementation of these requirements should ensure the achievement of the objectives of criminal procedural activities. The basic principles of the criminal process exist in the system, which should be understood as a collection of predominantly imperative requirements that are interconnected and create integral unity.

The specifics of the principles of the criminal process are that they are not just requirements, but the requirement that is imperative and imposed to activities of state bodies. This reflects the essence of the criminal process, its distinction from other branches of legal activity. In the criminal process the state bodies execute the principles. This is due to the fact that only they are responsible for the course and the result of the activity, only they have the most extensive powers, including the implementation of the principles.

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