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## ЗАСТОСУВАННЯ НАЛЕЖНОЇ ПРАВОВОЇ ПРОЦЕДУРИ ЯК ЗАВДАННЯ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ: ДО ПИТАННЯ ПРО СУТНІСТЬ ТА ПРАКТИЧНЕ ЗНАЧЕННЯ

**Анотація.** Актуальність дослідження полягає у тому, що концепт належної правової процедури хоча і є одним із найзагальніших і водночас фундаментальним явищем будь-якої демократичної правової держави сучасності, проте для правової системи України він є доволі новітнім та недостатньо дослідженим. Метою дослідження є з'ясування сутності та змісту застосування належної правової процедури як завдання кримінального провадження. Методологічну базу дослідження склали загальнонаукові та спеціальні методи, а саме діалектичний, герменевтичний, телеологічний, логічний, історичний, статистичний, формально-юридичний та порівняльно-правовий методи. Автором розглянуто генезис концепту «належної правової процедури», зокрема в правовій системі Англії та Сполучених Штатах Америки, а також на рівні чинних міжнародних договорів. Проаналізовано поняття «належна правова процедура», виведено авторське визначення, за яким це такий порядок здійснення юридично значущих дій, який втілює на практиці верховенство права шляхом застосування до кожної особи тих норм права, що цілком відповідають усім важливим об'єктивно існуючим обставинам та дозволяють недовідомо та заздалегідь спрогнозувати таке застосування і його результати. Надано короткий огляд нормативних положень, що складають зміст належної правової процедури. Визначено, що сутність належної правової процедури пов'язана із забезпеченням сталості суспільного договору. Належна правова процедура складає основну гарантію недопущення свавілля влади, протиправного примусу та тиску з боку останньої на населення держави. Проаналізовано відмінність «застосування належної правової процедури» від «забезпечення правильного застосування закону» як завдань кримінального процесу в різні історичні періоди. Запропоновано відносити застосування належної правової процедури до завдань-гарантій, яке спрямоване на лімітацію генерального завдання – забезпечення швидкого, повного та неупередженого розслідування і судового розгляду. Охарактеризовано значення застосування належної правової процедури у кримінальному провадженні, зокрема, при існуванні прогалін чи колізій норм права. Визначено, що Верховна Рада України, Конституційний Суд України, Європейський суд з прав людини, Верховний Суд є інституціями, що формалізують зміст належної правової процедури. Результати дослідження можуть використовуватись як у практичній діяльності задля забезпечення фактичної реалізації застосування належної правової процедури, так і в науково-навчальній діяльності.

**Ключові слова:** кримінально-процесуальний закон, due process, правильне застосування закону, запобіжник протиправності, кримінальна процесуальна форма.

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## DUE PROCESS IN CODE ENFORCEMENT AS CRIMINAL PROCEDURAL TASK: TO THE ISSUE ON ESSENCE AND PRACTICAL USE

**Abstract.** *The relevance of the study is that the concept of due process, although it is one of the most general and at the same time fundamental phenomena of any democratic state of law of the present, however, for the legal system of Ukraine, it is quite recent and under-researched. The aim of the study is to ascertain the essence and content of the application of due process as a task of criminal proceedings. The methodological basis of the research was general scientific and special methods, namely dialectical, hermeneutic, teleological, logical, historical, statistical, formal legal and comparative legal methods. The author examined the genesis of the concept of “due process”, in particular in the legal system of England and the United States of America, as well as at the level of current international treaties. The concept of “due process” was analysed, the author’s definition was derived, according to which this is an order of implementation of legally significant actions, which embodies in practice the rule of law by applying to each person those norms of law that completely correspond to all important objectively existing circumstances and allow and predict in advance such application and its results. A brief overview of the regulatory provisions that make up the content of due process was provided. It was determined that the essence of due process is related to ensuring the sustainability of the social contract. Due process of law is the basic guarantee of preventing the arbitrariness of power, unlawful coercion and pressure on the population of the state. The difference between the “application of due process” and “ensuring the correct application of the law” as a task of criminal proceedings in different historical periods was analysed. It was proposed to attribute the application of due process to assurance tasks, which is aimed at limiting the general task – to ensure prompt, complete and impartial investigation and trial. The importance of applying due process in criminal proceedings, in particular, when there were gaps or conflicts of law, was characterised. It was determined that the Verkhovna Rada of Ukraine, the Constitutional Court of Ukraine, the European Court of Human Rights, and the Supreme Court are institutions are the bodies, which formalise the content of due process. The results of the study can be used both in practical activities to ensure the effective implementation of due process of law and in scientific and educational activities.*

**Keywords:** criminal procedural law, due process, correct application of the law, fuse of wrongdoing, criminal procedural form.

### INTRODUCTION

Due process of law is a procedure for the implementation of legally significant actions that the rule of law embodies by applying to each person those rules of law that are fully consistent with all important objectively existing circumstances and allow for an unambiguous and advance prediction of such application and its results. The concept of due process originated in England and the due process (“the due Process

of the Law”) was first used in King Edward Palantagenet’s 1354 Statute of Liberty<sup>1</sup>. Due process of law has also transposed from the common law into the legal system of the United States (amendments 5 and 14 to the Constitution of the United States of America<sup>2</sup>). The key provisions of due process are embodied in the International Covenant on Civil and Political Rights of 1966<sup>3</sup> and the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950<sup>4</sup>.

Novelties of criminal procedural law often do not fully comply with the previously established system of the relevant field of law, sometimes the latest changes directly contradict previous amendments, and in some cases, provisions that directly and unambiguously contradict the imperative norms of the Constitution of Ukraine<sup>5</sup> come into force [1]. The non-systematic approach of the legislator to the regulation of criminal proceedings was manifested, for example, in changing the procedure for involving an expert in criminal proceedings with a subsequent (*in 2 years*) return to the previous state. It is also significant that, from December 2017 to the present, four provisions of the Criminal Procedure Code of Ukraine<sup>6</sup> (*hereinafter referred to as the CPC*) have been declared unconstitutional by the Constitutional Court of Ukraine, two of which (*concerning the non-alternative determination of a precaution in the form of detention in relation to certain serious and particularly serious crimes and the granting of pre-trial investigation authority to the State Criminal Enforcement Service of Ukraine*) were introduced relatively recently (in 2014 and 2016, respectively). That is, statistically every tenth decision of the Constitutional Court of Ukraine for the period from 2017 was one that declared the provisions of the CPC<sup>7</sup> unconstitutional (one decision out of three in 2017, one out of 13 in 2018 and two out of 16 in 2019) [2].

At the same time, the institutional component of the criminal process is subjected to repeated purification, filtration and alteration (*the staffing of the Judicial Corps, the Prosecutor’s Office and the pre-trial investigation bodies, their structures*), the effectiveness of which is to be evaluated. Against this background, the issue of applying the due procedure to every participant in criminal proceedings is never more urgent. This is the assurance task referred to in Article 2 of the CPC<sup>8</sup>. The disclosure of the content

<sup>1</sup> Liberty of Subject. (1354). Retrieved from <http://www.legislation.gov.uk/aep/Edw3/28/3>.

<sup>2</sup> Constitution of the United States. (1787). Retrieved from [https://www.senate.gov/civics/constitution\\_item/constitution.htm](https://www.senate.gov/civics/constitution_item/constitution.htm).

<sup>3</sup> The International Covenant on Civil and Political Rights. (1966). Retrieved from [http://zakon.rada.gov.ua/laws/show/995\\_043/](http://zakon.rada.gov.ua/laws/show/995_043/).

<sup>4</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from [http://zakon3.rada.gov.ua/laws/show/995\\_004](http://zakon3.rada.gov.ua/laws/show/995_004).

<sup>5</sup> Constitution of Ukraine. (1996). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>.

<sup>6</sup> Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <http://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>7</sup> Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <http://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>8</sup> *Ibidem*, 2012.

and legal nature of the application of due process will not only enhance the understanding of nature of the criminal process through a teleological (targeted) approach, but will also be useful for drafters and lawmakers.

With regard to the state of development, it should be noted that the topic is underdeveloped in the national context; since the adoption of the current edition of Art. 2 of the CPC<sup>1</sup>, only some attempts were made to investigate due process in criminal proceedings, namely: by V. V. Gorodovenko [3], S. O. Kasapoglu [4], O. A. Panasiuk [5], M. V. Savchyn [6], V. M. Trofymenko [7] and others. At the same time, the concept of due process was mentioned in the research of Ukrainian scholars in the fields of theory of law, constitutional law, civil process, international law, etc., namely: A. A. Andreichenko [8; 9], S. P. Pogrebnyak [10], N. Yu. Sakara [11], S. V. Shevchuk [12] and others.

Therefore, the concept of due process, although one of the most common and at the same time fundamental to any democratic rule of law of the present, is, for the Ukrainian legal system, rather recent and under-researched, particularly in the science of criminal law.

The aim of the study is to explain the essence and content of the application of due process as a task for criminal proceedings. The tasks are to generalise the use of the concept of due process in non-national legal systems (*in the legal systems of England, the United States of America, as well as in international law, in particular in international human rights law*); to analyse the concept of due process; to compare the analogues of the analysed problem of criminal proceedings with similar ones in the previous editions of the criminal procedural law, in particular with the task of the correct application of the law; to clear up the place of application of due process in the system of criminal proceedings; to determine the importance of applying due process as a task for criminal proceedings.

## 1. MATERIALS AND METHODS

The methodological basis of the research was general scientific and special methods, namely dialectical, hermeneutic, teleological, logical, historical, statistical, formal legal and comparative legal methods. The dialectical method was the basis for the work; it allowed the author to consider the due process of law as the abstract, while proceeding to study the specific manifestations of such; to assume that legal reality is in constant development characterised by the unity and struggle of opposites and the transition of quantitative changes into qualitative ones; to make the transition from simple (definition of legal procedure and due process) to complex (concept of due process).

The author, using the limited use of the hermeneutical approach in determining the nature of due process, analysed the textual consolidation of this phenomenon in the Ukrainian language – “due process” and attempted to interpret the literal understanding

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<sup>1</sup> *Ibidem*, 2012.

of the relevant English-speaking concept. Also, the hermeneutic method was manifested in the attempt to grasp the system of criminal proceedings and to identify the guarantees.

The teleological (target) method in the work was used in the analysis of approaches to the content of the rules of law with regard to the “legislator”, i.e. the creator of the relevant rules (both in the past, including the Soviet and present). At the same time, the analysis of the norm-problems (Article 2 of the CPC<sup>1</sup>) is extremely important, since the latter serve as the basis for the application of the teleological approach by the law-enforcers in interpreting all other norms of the relevant branch of law.

The logical method was to resort to methods of analysis and synthesis: thus, in constructing the notion of due process of analysis, both the lexical component of the concept of due process in the Ukrainian language and scientific doctrinal texts and national and foreign primary sources that mentioned due process were subjected; the synthesis allowed to propose the author’s determination of due process and to formulate conclusions and follow up causation; the scientific texts of Ukrainian scientists were analysed for their approaches to understanding the due process of law, as well as the normative regulation of criminal justice tasks in various editions of the procedural law; reception of induction allowed to distinguish perspective directions of positive influence of due process in practice: after having analysed various problems of enforcement of the rules of criminal procedural law in Ukraine by induction, it was determined that the concept of due process can be an effective means of overcoming existing contradictions.

Applying the historical method, the author gave a brief description of the chronology of formation of the concept of due process. To this end, some primary sources were addressed, namely the Grand Charter of Liberties of 1215<sup>2</sup>, the Statute of Liberty of the Subjects of 1354<sup>3</sup>, the French Declaration of Human and National Rights of 1789<sup>4</sup>, Amendment 5 of 1791 and Amendment 14 of 1868 to the United States Constitution of 1787<sup>5</sup>, the Code of Criminal Procedure of the Ukrainian Socialist Soviet Republic of 1927<sup>6</sup>, and the Code of Criminal Procedure of the Ukrainian Soviet Socialist Republic of 1960<sup>7</sup>. This made it possible to trace the genesis of the due legal procedure from the beginning of its inception in the 13th century and to the present time in order to know the essence of this phenomenon, the stages of its formation.

<sup>1</sup> *Ibidem*, 2012.

<sup>2</sup> Magna Carta. (1215). Retrieved from <http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/contents>.

<sup>3</sup> Liberty of Subject. (1354). Retrieved from <http://www.legislation.gov.uk/aep/Edw3/28/3>.

<sup>4</sup> Déclaration des Droits de l’Homme et du Citoyen. (1789). Retrieved from <https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789>.

<sup>5</sup> Constitution of the United States. (1787). Retrieved from [https://www.senate.gov/civics/constitution\\_item/constitution.htm](https://www.senate.gov/civics/constitution_item/constitution.htm).

<sup>6</sup> Code of Criminal Procedure of the Ukrainian Socialist Soviet Republic. (1927, October). Retrieved from [http://search.ligazakon.ua/l\\_doc2.nsf/link1/KP270014.html](http://search.ligazakon.ua/l_doc2.nsf/link1/KP270014.html).

<sup>7</sup> Code of Criminal Procedure of Ukraine: from Article 1 to Article 93-1. (1960, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1001-05>

The author used the statistical method to analyse the quantitative indicators of the activity of the Constitutional Court of Ukraine in establishing the proportion of decisions which have been declared unconstitutional by some provisions of the CPC<sup>1</sup> in respect of all decisions of this Court during the last three years. This made it possible to identify trends in the work of the body of constitutional jurisdiction, as well as certain correlations about the quality of the laws that amend the CPC<sup>2</sup> in present time.

The formal legal method was used in determining the place of application of due process in the system of criminal proceedings, the disclosure of the content of due process in criminal proceedings, which allowed to trace the link between the form of the phenomenon (the text of Article 2 of the CPC<sup>3</sup>) and its content; on the basis of legal techniques, with the assistance of logical techniques, the internal structure of the legislative fixing of the tasks of criminal proceedings was elaborated and the place of such a task as the application of the due procedure to each participant of criminal proceedings was identified. The formal legal method also played a key role in the study in identifying a number of practical problems of legal regulation or law enforcement, and provided an opportunity to propose possible solutions using the concept of due process. With this method, a systematic generalisation of institutions that formalise the substance of due process in the context of criminal proceedings was carried out.

The use of the comparative legal method in the work allowed to carry out a diachronic binary comparison in the formulation by the legislator of the tasks of criminal proceedings in different criminal procedural codes, namely, a comparison of the normative content of the tasks of criminal proceedings enshrined in Art. 2 of the CPC<sup>4</sup> of 2012, and the tasks of criminal justice enshrined in the Criminal Procedure Code of 1960<sup>5</sup> in the context of the concept of due process. Using this method, it was concluded that the task of correct law applying was the most similar in content to the task of applying of due process of law. At the same time, particular attention was paid to the significant differences that exist between them.

## 2. RESULTS AND DISCUSSION

### 2.1 *The concept of “due process” in non-national legal systems*

In the scientific literature, there is the established idea that for the first time the concept of “due process” originated in England [8; 9; 12]. Its formal embodiment is Article 39 of the Grand Charter of Liberties<sup>6</sup>, according to which “No free man shall

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<sup>1</sup> Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <http://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>2</sup> *Ibidem*, 2012.

<sup>3</sup> *Ibidem*, 2012.

<sup>4</sup> Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <http://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>5</sup> Code of Criminal Procedure of Ukraine: from Article 1 to Article 93-1. (1960, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1001-05>.

<sup>6</sup> Magna Carta. (1215). Retrieved from <http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/contents>.

be arrested, or imprisoned, or deprived of his property, or outlawed, or exiled, or in any way destroyed, nor shall we go against him or send against him, unless by legal judgment of his peers, or by the law of the land (“*by the law of the land*”)” [13]. According to V. N. Safonov, judicial review “by the law of the country” allowed free people to defend their rights and freedoms in the royal courts using the necessary procedures [14].

According to clause 3 of the Statute of the twenty-eighth year of the reign of Edward III of the “Liberty of the Subjects” of 1354<sup>1</sup> it was found that “no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law (“*being brought in Answer by due Process of the Law*”)”. In medieval England, the terms “by the law of the land” and “due process of law” were regarded as synonymous [14].

For the first time the issue of consideration of due process arose in English law and not only in procedural but also in substantive aspects [15;16]. Thus Volodimir Safonov gives the views of the famous English lawyer E. Kock, who stated that in a substantive legal sense the proper legal procedure is connected with the right to livelihood, the right to free economic competition, to the free exchange of goods; in procedural terms, Kock linked the rule of due process to a jury, or more precisely, to the right to indictment by a grand jury and to hear by a petty jury [14].

S. V. Shevchuk identifies two aspects of substantive due process that are specific to the law of the Anglo-Saxon countries: first, it is an identification with the concept of the rule of law, including legal requirements for state legal acts. That is, the authorities must act not only in accordance with the law, but also in accordance with the criteria of natural law, morality, reasonableness, justice, as well as the general principles of law established by the bodies of justice. Second, another aspect of due process is seen as a proportionate remedy for the protection of constitutional rights and freedoms – state acts must be legitimate, optimal, effective, and the means they envisage should be proportionate to the pursued goals and minimally restrict the guaranteed constitutional rights and of freedom [12].

The foregoing understanding of the concept of “due process” is also characteristic of United States federal law. Under U. S. According to the amendment 5 of 1791<sup>2</sup>, no person should be compelled to testify against himself or be deprived of his life, liberty, or property without due process of law, and pursuant to paragraph 1 of amendment 14 of 1868 no state shall deprive any person of life, liberty or property without due process of law. V. N. Safonov states that the prohibition contained in amendment 5 is addressed to the federal government, and the relevant provision of the 14 amendment is interpreted as a prohibition for states [14].

<sup>1</sup> Liberty of Subject. (1354). Retrieved from <http://www.legislation.gov.uk/aep/Edw3/28/3>.

<sup>2</sup> Constitution of the United States. (1787). Retrieved from [https://www.senate.gov/civics/constitution\\_item/constitution.htm](https://www.senate.gov/civics/constitution_item/constitution.htm).

Most lawyers agree that if to consider the concept of due process as common law, it is only a procedural understanding to limit ourselves by mistake. Richard Fallon points out that “substantive due process reflects one simple but far-reaching principle: the state cannot be arbitrary. This intuitive idea is not mystical: public officials must protect public rather than self-interest under the influence of individual motivation for their actions, so there must be a rational or reasonable relationship between state goals and the means to achieve them” [17].

V. M. Trofimenko points out that the systematic analysis of the concept of “due process” shows that in its substantive content and functional purpose it approaches the category of “criminal procedural form” [18]. It is distinctive that the concept of due process has not only procedural (the existence of guarantees of human rights in criminal proceedings) but also the material aspect (ensuring the quality of the law governing relevant social relations) [7].

In one form or another, the principles and norms that make up due process have been characteristic of most states of today. S. V. Shevchuk notes that the first charters of free cities in Italy and other European countries were directed against, predominantly, royal arbitrariness, in particular against illegal detention indefinitely [12]. This is how a standard has emerged today that clearly limits the length of detention without the sanction of a competent impartial body (first used in the Habeas Corpus Act of 1679 in the UK). According to Article 7 of the French Declaration of Human and National Rights<sup>1</sup>, “no person may be charged, arrested or imprisoned in any other way than in the cases provided for by law and in the forms prescribed by it”.

Due to the spread of the relevant concept of due process, it has also been reflected in regulations of international law [19]. The norms that give birth to the principle of due process are primarily contained in the International Covenant on Civil and Political Rights of 1966<sup>2</sup>: p. 1-4 Art. 9, Art. 14, 15. At the pan-European regulatory level, due process of law is embodied in Art. 5, 6, 7, 8, 9, 10, 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>3</sup> – each of them, in addition to the positive obligation of the state, contains a reference to the “procedure” or other circumstances which must be established by law.

The norms that make up some of the content of the concept of “due process” (habeas corpus, ne bis in idem, nullum crimen sine lege, etc.) have long been characteristic of national forms of law – today they are all constitutional norms [20].

In Anglo-American legal doctrine, “due process” has the character of a systemic category. For example, in a fundamental article, “Two Criminal Procedure Models”

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<sup>1</sup> Déclaration des Droits de l’Homme et du Citoyen. (1789). Retrieved from <https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789>.

<sup>2</sup> The International Covenant on Civil and Political Rights. (1966). Retrieved from [http://zakon.rada.gov.ua/laws/show/995\\_043/](http://zakon.rada.gov.ua/laws/show/995_043/).

<sup>3</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from [http://zakon3.rada.gov.ua/laws/show/995\\_004](http://zakon3.rada.gov.ua/laws/show/995_004).

[21], Herbert Packer contrasts the first model – the crime control model (in the other interpretation, the crime control model) with the proper due process model. Moreover, the notion of “due process” is a novelty in Ukrainian criminal procedural legislation.

## 2.2 Analysis of the notion of “due process”

The notion of “due process” is mentioned in the current version of the CPC<sup>1</sup> only once – in Art. 2. Paragraph 1 of Art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>2</sup> mentions the “procedure established by law” (“in accordance with a procedure prescribed by law”) in the context of ensuring the right to liberty and security of person. However, no other act of criminal procedural legislation in Ukraine mentions “due process of law”.

To some extent, this state of affairs is understandable, since due process of law is a common law concept. Some constitutionalist scholars have attempted to determine due process. According to S. V. Shevchuk proper legal procedure is “the application of law by the bodies of justice (courts) in accordance with the established legal principles and procedures for guaranteeing and protection of constitutional and individual human and citizen rights, including legal entity” [12]. At the same time, the notion of “due process” is rather unexplored in the science of criminal procedural law.

The analysis of the concept should begin with a linguistic interpretation. In Ukrainian, the phrase “due process of law” literally sounds like “due legal procedure”. Therefore, it consists of three words: the generic “procedure” and two adjectives “due” and “legal”. A procedure is an officially established or customary order for the implementation, execution or exercise of anything; this is a series of actions, the course of doing anything [22]. Legal – one that relates to law. Due – necessary, needed or appropriate; in the sense of the adverb “due” – as it should be [23]. Apparently, linguistic methods alone cannot delineate the concept. Therefore, each of the following elements should be considered using a special legal interpretation.

V. P. Belyaev and V. V. Sorokin understand the procedure as an order (sequence) of actions enshrined in the rules of law to achieve the goals of the legal process [24]. However, there are also positions to identify the concepts of “procedure” and “process”. V. M. Trofimenko, generalising various approaches to understanding the concept of “procedure”, concluded that the more fruitful approach to understanding the concept of “procedure” is the one based on its formal side, because it is, in fact, an external, provided by law, a form of legal activity, whereas the activity itself constitutes the internal content of the process; unlike the procedure, both the process and the single procedural action or proceedings have at their core certain procedural actions or a combination of them, which proceed solely in the form of relevant legal relationships [7].

<sup>1</sup> Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <http://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>2</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from [http://zakon3.rada.gov.ua/laws/show/995\\_004](http://zakon3.rada.gov.ua/laws/show/995_004).

In author's opinion, the use in the analysed construct of the word "procedure" clearly indicates the following circumstances: first of all, it is about compliance with formalised rules, the appropriate stage, methodology, the order of action; secondly, the procedure should be seen not in the narrow sense (*only as procedures carried out in the framework of criminal proceedings*) but also in the broad: procedures of pre-procedural actions (*inspections or audits, which obtain relevant materials or acts, etc.*), procedure of adoption or legalisation of a relevant legal act, an act of individual action (*legislative novelties, appointment to the administrative position of a person authorized to take procedurally significant actions*).

However, the "procedure" is not limited to procedural rules or rules. To accomplish the tasks of criminal proceedings, it is tantamount to provide both the form of the relevant stages of the process and their essential (material) component. Procedural rules that impose duties on authorised officials to maintain impartiality, to examine evidence directly, to evaluate them in accordance with internal beliefs, etc. – by their very nature, cannot be properly implemented unless law enforcer in his or her own mind incorporates material with the process and synthesise them.

The adjective "due" in the characterisation of the procedure, in author's view, is responsible for accuracy, infallibility and uniformity in the process of enforcement – a requirement for a lasting form. The "legal" procedure is a reference to the essential content.

"Legal" procedure is a procedure that fully complies with and establishes in practice the principle of the rule of law. It is worth noting that this is not a law procedure, procedure occurred according to the law, but a legal procedure. In this respect, the linguistically Anglo-American "due process of law" principle less reflects this important substantive emphasis because it literally translates "in accordance with a process established by law" (continental law has historically had less potential for transformation, replenishing with new meaning of old constructs, which, by contrast, succeeds in the common law system, with its precedent and the role of the court, which in certain circumstances may act as a generator and translator of law). In this context, it is necessary to oppose the legal procedure to formal legality, which, if the laws of law do not comply, can lead to catastrophic consequences (for example, the laws of the Nazi regime). That is, a legal procedure is first and foremost a fair (morally and conscientiously justified) and proportionate (in accordance with the principle of proportionality) procedure.

A "due" procedure is, firstly, a procedure that must be applied to a person in a certain status. Secondly, due means "what is to be", that is, such a procedure must be permanent, uniform, and therefore embody the principle of legal certainty.

Synthesising what has been researched in the analysis, the author proposes the following definition: due process (due legal procedure in Ukrainian language) is an order

of legal action that embodies the rule of law in practice by applying to each person those rules of law that fully meet all important objectively existing circumstances and allow for unambiguous circumstances and predict in advance such application and its results.

### 2.3 *The essence of due process*

Philosophy understands essence as the main, defining in the subject, which is caused by deep connections and tendencies of development and is learned at the level of theoretical thinking [25].

The direct theoretical and legal in-depth substance of due process is to ensure the sustainability of the social contract. It is the proper legal procedure that constitutes the basic guarantee against the arbitrariness of power, unlawful coercion and pressure from the latter on the population of the state.

The stated purpose is the specific, clearly defined procedures and constitutions in the Constitution<sup>1</sup> and laws that constitute the content of due process [26–28]. These are the procedures of formation of power, the procedures for the implementation of direct people's will, the procedures for staffing state bodies, procedures for the introduction of special legal regimes of martial law or state of emergency, legislative procedure, etc. With regard to the fundamental personal rights and freedoms of persons, such rights may legitimately be restricted or temporarily deprived, mainly only during and after the consequences of criminal proceedings. The Constitution of Ukraine clearly defines a number of criminal procedural procedures (See: Part 2, 3, 4, 5, 6 Article 29, Part 2, 3 Article 30, Article 31, Part 2 Article 55 1, Article 59, Articles 62, 63 of the Basic Law of Ukraine)<sup>2</sup>. Rules such as *nullum crimen sine lege* (Part 2 of Article 58) and *ne bis in idem* (Part 1 of Article 61) form the basis for due process in criminal proceedings [29; 30]. The procedure of application and enforcement of all the above norms is detailed in the CPC<sup>3</sup> and other acts of criminal procedural legislation of Ukraine.

Also, the basis of due process in the domestic legal system is not only the provisions of Art. 1, Part 1, Art. 8 of the Constitution of Ukraine<sup>4</sup>, but first and foremost part 2 of Art. 19 of the Basic Law, “State authorities and local self-government bodies, their officials are obliged to act only on the basis, within the powers and in the manner provided by the Constitution and laws of Ukraine”. At the same time, there is a special rule of Part 1 of Art. 129 of the Basic Law of Ukraine for a judge, according to which a judge must be guided by the rule of law.

<sup>1</sup> Constitution of Ukraine. (1996). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>.

<sup>2</sup> *Ibidem*, 1996.

<sup>3</sup> Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <http://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>4</sup> Constitution of Ukraine. (1996). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>.

#### 2.4 Similar concepts of due process under previous criminal procedural law

According to Article 2 of the CPC<sup>1</sup>, one of the tasks of criminal proceedings is to ensure prompt, complete and impartial investigation and trial so that each party to criminal proceedings is subject to due process of law. The corresponding task was formulated in the text of the new CPC of Ukraine in 2012<sup>2</sup>. Prior to that, national criminal procedural legislation had not known the concept of “due process” and, of course, had not identified it as a task. But by analysing previous versions of criminal procedural law, it is possible to find similar concepts.

The Criminal Procedure Code of the Ukrainian SSR in 1927<sup>3</sup> did not single out either the aim or tasks of the criminal process. The 1960 Code<sup>4</sup> already contained Article 2 of the Criminal Procedure Task, which in each of its versions (*the author has counted three: the original of 1960<sup>5</sup>, of 1984<sup>6</sup>, and of 1992<sup>7</sup>*) designated “ensuring the correct application of the law” as a task criminal proceedings (*hereinafter – the old version*). It was the change in the wording that came with the application of due process as the task of criminal proceedings. It is worth comparing their content.

First of all, the old version points to the application of the law, that is, to the right implementation of a specific source of law, which is exclusively formalised and may not always be legitimate. The current reference to the concept of due process, first, applies to any procedure (not only criminal procedural, but also administrative, constitutional, etc., as well as its derivative procedures) and is more procedural in nature, secondly, to the sources of law, which can determine the procedure is not defined in the formulation of the task.

Another difference is that, in the context of the old version, application of, first and foremost, criminal law should be considered the task of the criminal justice. This is indirectly evidenced by the mention of the correct application, which is more characteristic of the material component of the criminal industry (proper qualification, correct analysis of the crime, etc.). On the other hand, the current version, as mentioned above, has a more procedural focus, pointing to a “procedure”. Secondly, due process involves one and only one clearly defined order of action, which alone can be considered legitimate. In this approach, it is unacceptable to use valuation terms “true”/“false”. The latter can only be used when there is an objective inability for the average law en-

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<sup>1</sup> Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <http://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>2</sup> *Ibidem*, 2012.

<sup>3</sup> Code of Criminal Procedure of the Ukrainian Socialist Soviet Republic. (1927, October). Retrieved from [http://search.ligazakon.ua/1\\_doc2.nsf/link1/KP270014.html](http://search.ligazakon.ua/1_doc2.nsf/link1/KP270014.html).

<sup>4</sup> Code of Criminal Procedure of Ukraine: from Article 1 to Article 93-1. (1960, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1001-05>.

<sup>5</sup> Code of Criminal Procedure of the Ukrainian SSR. (1961). Retrieved from <http://pravoved.in.ua/section-kodeks/79-upku.html>.

<sup>6</sup> Code of Criminal Procedure of the Ukrainian SSR. (1984). Retrieved from <http://lawlibrary.ru/iz-danie2985.html>.

<sup>7</sup> Code of Criminal Procedure of Ukraine: from Article 1 to Article 93-1, op. cit.

forcer to determine a comparative approach of several that is rarely inherent in formalised criminal procedural law.

### *2.5 Place of application of due process in the system of criminal proceedings*

Applying due process to every participant in criminal proceedings is a task-guarantee, a kind of safeguard for unlawfulness. It seeks to limit (within the rule of law) the other, overarching task – to ensure prompt, full and impartial investigation and trial. This is clearly evidenced by the grammatical construction that is used after the general task – “in order to”.

In the old version, ensuring the correct application of the law referred to the general tasks of criminal justice. This is another argument to understand “the application of the law” in the old version as above all the application of substantive criminal law. This task was subject to limitation by other tasks-principles of procedural direction using the above-mentioned grammatical formula.

As for the due process of law, as stated above, the latter is a common legal concept inherent in most modern states. Due process of law is a combination of the procedural aspects of the rule of law, fairness, proportionality and legal certainty. Due process is a requirement that applies to all enforcement activities carried out by a person with authority or authority.

In author’s opinion, the legislator distinguishes the application of due process as a separate task of criminal proceedings in connection with the following:

1) as a fuse, a general limit (limit) for the general task. That is, to ensure that authorised persons, when necessary to conduct criminal proceedings quickly, impartially and fully, must respect the general principles of law without which a rule of law cannot exist – due process of law;

2) in order to assert that, if the due process is not followed, criminal proceedings lose any meaning. The purpose of its existence becomes unattainable;

3) having enshrined that every participant in criminal proceedings has the right to apply to him only due process of law, the legislator appealed to a wide range of persons, confirming anthropocentrism in the process, the importance of ensuring human rights and freedoms in its implementation.

### *2.6 The importance of applying due process of law*

In essence, criminal procedural rules are primarily aimed at preventing the arbitrariness of the authorities, the arbitrariness of the state in relation to society or individuals. In the course of criminal proceedings, serious restrictions on its participants may be lawfully applied; the most severe procedural coercion is experienced by a suspect/defendant.

Also, the current criminal process is not balanced: the prosecution party has certain preferences for taking evidence, initiating and conducting pre-trial investigations rather than the defence side. In author’s opinion, the most disadvantaged in the present

circumstances is the victim, who is limited to the maximum in the positive and effective mechanisms of protection of his violated right or freedom.

To cite one example from author's own experience: an unidentified person broke a window in the ground floor apartment at night from Friday to Saturday, using a heavy 8x10 cm stone. Of course, neighbours heard the sound of broken glass. But the greatest shock and emotional stress was experienced by an elderly woman living alone in this apartment. There is no doubt that there is a grave breach of public order. Therefore, an application for hooliganism was filed (part 1 of Article 296 of the Criminal Code of Ukraine<sup>1</sup>). Investigators entered into the Unified Register of Pre-trial Investigations information on their previous legal qualifications – Part 1 of Art. 194 of the Criminal Code of Ukraine<sup>2</sup> – the destruction or damage to someone else's property in large amounts (*for an amount exceeding UAH 200 thousand*). The foregoing can be assessed as a clearly inappropriate legal qualification. However, neither the applicant nor the victim has any procedural rights to challenge such unlawfulness in connection with the closed list of Part 1 of Art. 303 of the CPC of Ukraine<sup>3</sup>. The procedural supervisor, being part of the prosecution, also does not respond to the objections raised. And to challenge such a cynical inappropriate legal qualification at a preparatory court hearing is obviously impracticable, since with such a qualification the indictment cannot be drawn up in the proceedings.

Unfortunately, there are many such examples in practice. At the same time, they not only prove the lack of balance in regulatory regulation, proper competition in all actually represented stakeholders, but, first of all, in reality they are always caused by the fact that the proper legal procedure was not followed by specific legal enforcers.

In the example above, it is also convenient to explain the two sides of the procedure:

1. Due procedure is to apply the provisions of Part 1 of Art. 214 of the CPC of Ukraine<sup>4</sup>, namely the submission of information to the ERDR about the crime committed within 24 hours from the receipt of the relevant statement. And from a formalistic point of view, the procedure was followed.

2. The legal procedure involves performing the appropriate procedural action taking into account and investigating the merits of the case, the circumstances of committing the unlawful act and determining the appropriate, most probable in a particular situation, previous legal qualification. It is in this aspect that a clear violation of the victim's right to the due process of law has manifested itself.

The attention should be paid to the most critical point – casuistry, which arises in any process of law enforcement. N. Yu. Sakara states that, despite the importance of legislative regulation of the content of due (fair) court procedures, their general prin-

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<sup>1</sup> Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <http://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>2</sup> *Ibidem*, 2012.

<sup>3</sup> *Ibidem*, 2012.

<sup>4</sup> *Ibidem*, 2012.

ciples are not defined in national laws [11]. In a sense, any provision of regulatory acts defines the procedure for the actions of the enforcers. But the text of a regulatory act itself will never be perfect: gaps or competition (conflict of law) will arise.

In the case of a challenge to a previous legal qualification, there is a clear gap in the jurisdiction of such a challenge, the absence of an effective mechanism to protect the interests of the victim or the applicant.

Concerning the competition of law regulations, there are the most exemplary current matches:

– part 2 of Art. 29 of the Constitution of Ukraine<sup>1</sup> establishes the exclusive jurisdiction of the court to arrest or detain a person. At the same time, Art. 615 the CPC<sup>2</sup> legalised the delegation of the relevant powers of an investigating judge to a prosecutor [31];

– according to the case-law of the European Court of Human Rights, the seriousness of the charge is not the basis of long detention itself. At the same time, part 8 of Art. 194 of the CPC<sup>3</sup> establishes a binary alternative to the election of a preventive measure (bail or detention) to persons suspected or accused of committing a crime for which a basic penalty of more than three thousand non-taxable minimum incomes is imposed. As is known, a recent norm (Part 5 of Article 176 of the CPC<sup>4</sup>) was declared unconstitutional;

– part 3 of Art. 29 of the Constitution of Ukraine<sup>5</sup> stipulates that the authorities empowered by law may use the detention of a person in custody as a temporary preventive measure, the validity of which within 72 hours must be verified by a court. However, Part 3 of Art. 14 of the Law of Ukraine “On Combating Terrorism”<sup>6</sup> stipulates that preventive detention of persons involved in terrorist activity can be carried out for a period of more than 72 hours, but not more than 30 days;

– part 5 of Art. 387 of the CPC of Ukraine<sup>7</sup> provides that all issues related to the release of jurors from participation in criminal proceedings, as well as the recusal and removal of jurors, are resolved by court order [32–34]. At the same time, in practice there are cases when the judges, determined by the automated system of document circulation of judges, release a judge from the performance of their duties in accordance with Part 1 of Art. 66 of the Law of Ukraine “On the Judicial System and Status of Judges”<sup>8</sup>.

<sup>1</sup> Constitution of Ukraine. (1996). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>.

<sup>2</sup> Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <http://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>3</sup> *Ibidem*, 2012.

<sup>4</sup> *Ibidem*, 2012.

<sup>5</sup> Constitution of Ukraine. (1996). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>.

<sup>6</sup> Law of Ukraine “On Combating Terrorism”. (2003, March). Retrieved from <http://zakon3.rada.gov.ua/laws/show/638-15/>.

<sup>7</sup> Criminal Procedural Code of Ukraine, *op. cit.*

<sup>8</sup> Law of Ukraine “On the Judicial System and Status of Judges”. (2016, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1402-19>.

On November 28, 2018, paragraph 20 of Section 11 “Transitional Provisions”, of the CPC of Ukraine<sup>1</sup>, which laid down simplified conditions for applying a special pre-trial investigation (in absentia) to a suspect in the temporarily occupied territory of Ukraine, was terminated. At the same time, Part 3 of Art. 12 of the Law of Ukraine No. 1207-VII of April 15, 2014 “On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporary Occupied Territory of Ukraine”<sup>2</sup> contains a provision similar to the one mentioned above, which simplifies the list of grounds provided for by the CPC<sup>3</sup>, which are necessary for a decision to exercise a special pre-trial investigation (in absentia).

The above conflicts must necessarily be overcome in reality. The procedure that is applied in practice must be due and legal. The actual conformity of the content of law enforcement activities with the proper legal procedure is a true rule of law in the state. But for this it is necessary to have ways of official formalisation, harmonisation of the content of due process.

The issue of the application of due process is of great importance when ignored in practice by the principle of the rule of law, legal certainty and justice. This may be facilitated by either the technical and legal defects of the legislation (loopholes or conflicts of law), the failure of law enforcers to impose new compulsory sources of law, or the overly conservative corporate position of a group of certain institutions (unconscious sabotage of innovations). National law empowers a number of authorities to carry out the official (compulsory) interpretation of conflicting rules of law or of such provisions, the legitimacy of which is called into question. In exercising their respective powers, these institutions formalise the substance of due process. Such bodies are: The Verkhovna Rada of Ukraine, the Constitutional Court of Ukraine, the European Court of Human Rights, the Supreme Court. It is these authorities that create the due process of law, that is, fill the general legal concept with specific casual content.

## CONCLUSIONS

The scientific novelty of the research is that the author provided his own definition of the concept of due process, performed a comparative legal analysis of the formulations of the tasks of criminal proceedings in the context of ensuring the due process of law, proposed the division of tasks of criminal proceedings enshrined in Art. 2 of the CPC into general tasks and tasks-guarantees, the importance of the application of due process and the list of institutions, which are intended to formalise the content of the due process in criminal proceedings, were indicated. The relevant provisions can be summarised as follows:

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<sup>1</sup> Criminal Procedural Code of Ukraine. (2012, April). Retrieved from <http://zakon.rada.gov.ua/laws/show/4651-17>.

<sup>2</sup> Law of Ukraine “On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine”. (2014, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/1207-18>.

<sup>3</sup> Criminal Procedural Code of Ukraine, op. cit.

– it was found that the application of due process as a task of criminal proceedings in 2012 replaced the previous wording, which had been in force since 1961 – to ensure the correct application of the law as a task of criminal justice;

– the application of due process is a safety-barrier that limits the general purpose of criminal proceedings – to ensure prompt, complete and impartial investigation and trial;

– the application of due process contributes to overcoming the gaps and conflicts of law. Compliance with the actual content of law enforcement activities with due process of law is a genuine rule of law in the state.

Determining the practical significance of this study, the author considers it necessary to point out that the science of jurisprudence is always aimed at asserting the rule of law, justice in reality; moreover, the most general concepts – categories – of the theory of law are those pillars of the universe of law, which underpin all the activity of law enforcement. Such effectiveness is most desirable in the field of criminal procedural law, since it depends on it as an effective guarantee of the inevitability of punishment for a criminal offence, compensation for harm to victims and society, as well as non-exceedance, proportionality and validity of the rights or freedoms of any person in the course of criminal proceedings. At the same time, the concept of due process is the primary basis from which criminal proceedings should begin and be continuously carried out. In the framework of this study, an attempt was made to determine the essence of the due process of law, which should assist Ukrainian law enforcers in ensuring the effectiveness of criminal proceedings.

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