

Essential features of the foundations of the criminal procedure in Ukraine

Сутнісні ознаки засад кримінального провадження України

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ознаки засад кримінального провадження, завдання кримінального провадження, гарантії забезпечення прав і свобод людини, процесуальна форма, нормативність, моральність.

There is no unity in defining the notion of the foundations of the criminal procedure in legal literature up to this day. The definitions of the given legal category will not be found in the Criminal Procedure Code of Ukraine (here in after CPC) which has motivated a great number of lawyers to work on the given issue for a considerable time. The right use of a term often influences the recognition of the entire directive contained in the legal norm, and the numerous terminological items matching in their definitions in the effective laws confuse the law enforcement. Therefore, it is of major importance to define the “foundations (principles) of criminal proceedings” appearing a complex issue in the science of the criminal procedure. According to M.S. Strohovych, T.M. Dobrovolska, Y.P. Yanovych, O.P. Ryzhakov, M.O. Hromov, V.V. Nykolaichenko and M.L. Yakub the principles of the criminal procedure will be understood by the term of the legally arranged governing (legal) provisions establishing the most general and essential features of the criminal procedure which express its character and nature¹.

However, V.M. Tertyshnyk, L.B. Ismailova, H.V. Kudriavtseva, Y.D. Livshyts, V.V. Navhorotska, M.M. Mykheienko consider the principles of the criminal procedure as the basic concepts established by the constitutional and procedural legislation which determine the construction of the criminal procedure, its nature and democracy¹.

In our opinion it is essential to support the point of view of the scholars defining the foundations of criminal proceedings as principal fundamental provisions established in the rules of law and concerning the regularities and the most essential properties of criminal procedure which determine them as a means to protect the human and civil rights and liberties, as well as for regulation of the activities of bodies and officials conducting the process².

The explanation of such approach can be found through highlighting the main features of the foundations of the criminal procedure. First of all, the foundations are the background legally capturing the objective regularities of social development. Significant contribution to the consideration of this issue was made by I.V. Tyrichev who notes that the principles reflecting the regularities of social and public life are created by people and are objective in their content. At the same time, they constitute volition of the state, a product of a conscious legislative process and are subjective in the form of legal expression. The character of principles is mainly manifested in the given unity of their objective and subjective nature³. The objective dependence of foundations should be understood as their conformity with the nature of social relations, economic, political, ideological processes taking place in society. In spite of certain constancy the system of the foundations of the criminal procedure of Ukraine is in a state of development incorporating the state important legal positions and foundations into the legislative norms, which are defined in the international legal acts and decisions of the European Court of Human Rights.

¹ Stolitnii A. Formation and development of the foundations of the criminal procedure in Ukraine under the conditions of electronic criminal proceedings. Bulletin of the National Academy of Prosecution Service of Ukraine. 2016. № 3 (45). p. 95.

² Criminal procedure: textbook / Y.M. Hroshevyi, V.Y. Tatsii, A.R. Tumanians and others; edited by V.Y. Tatsii, Y.M. Hroshevyi, O.V. Kaplina, O.H. Shylo. – Kh.: Pravo, 2013. p. 62.

³ Tyrichev I.V. Principles of the Soviet criminal procedure: study guide. M.: Publishing house of All-Union Extra-Mural Law Institute, 1983. 240 p.

It is necessary to emphasize the inalienable connection between the realization of the foundations, the achievement of the tasks of criminal proceedings and the determining influence of the foundations on the formation of the type of criminal procedure. There is a need for their subjection to the tasks faced by the law enforcement agencies. Its foundations, as well as the entire process, are constantly evolving to ensure the effective solution of the tasks of the proceedings. According to Art. 2 of CPC of Ukraine the tasks of criminal proceedings are the protection of a person, society and the state from criminal violations, the protection of rights, freedoms and legitimate interests of participants in criminal proceedings, as well as ensuring prompt, complete and impartial investigation and judicial proceeding, so that anyone who committed a criminal act is to be brought to justice due to his or her guilt, no one is accused or convicted being innocent, no one is subjected to unreasonable procedural coercion and any participant of criminal proceedings is treated with the due course of law. We believe that the above tasks should be generalized more specifically. In our opinion, all stages of the criminal procedure of Ukraine are interconnected and aimed at achieving two main tasks which are the protection of the rights and freedoms of every person involved in the criminal proceedings and the protection of the interests of the entire society by establishing real circumstances in each specific proceeding. Therefore, the system of foundations is determined in accordance with the tasks. In our opinion, they stem from the tasks of criminal proceedings, however, the latter should be formed with due account for the foundations. That is why the emphasis should be placed on the need for agreement between foundations and tasks.

From the theoretical perspective the foundations of the criminal procedure are fairly considered as the leading element of the whole system of criminal procedural safeguards, as a combination of methods and means providing equal legal opportunities for all and each to acquire and properly exercise their rights and freedoms⁴. The foundations of the process are undoubtedly one of the legal means providing all subjects of criminal procedural activity with the ability to actually fulfill their duties and exercise the rights granted.

The next feature is that procedural foundations are imperious being rules of law. They contain mandatory requirements the implementation of which is ensured by a combination of legal means. A foundation is a mandatory requirement imposed on a certain type of activity. It is addressed exclusively to state bodies, since it is precisely their responsibility for the course and the result of the activity, they have the broadest powers including the ones dealing with the implementation of the principles.

The foundations of the criminal process are equal and universal but there is a certain hierarchy between them. Differing from each other in terms of the content and nature of legal requirements the principles form a system of coordinate structures with no connections and relations of subordination. It may be argued that subordinate connections are to be found in the general system of foundations operated in the legal field which is based on their differentiation into general legal, inspectorial, and sectorial ones. The given classification is based on the difference between the fields governing the foundations of law. It also reflects the connection between the general and specific. In our opinion all the foundations reflect the social conditions having developed in the given society. General legal ones are typical of all branches of law. Intersectional ones only operate in certain related branches. And the sectorial ones reflect the specifics of a particular branch of law and, accordingly, they only come through in it. The connection of general legal, intersectional and sectorial foundations is the ratio of general, specific and individual. The general legal foundations of law are embodied in its sectorial and intersectional foundations. And this is the case, given that the general legal foundations themselves are the most abstract expression of sectorial and intersectional foundations which are no less related to real life than the general legal ones but in a relatively limited legal area. Therefore, sectorial and intersectional foundations of law cannot be only considered as a supplement to the general legal ones. We believe that the hierarchy of the foundations of the criminal procedure does not at all indicate the higher legal force of some of them and its lower level of others. All basic requirements of the criminal procedure are equal and universal, exist in a coordinated fashion and have the same legal force. However, certain foundations are a reflection of the general orientation of the development and functioning of the whole criminal procedure, while others reflect this direction more specifically.

There is also a question about the equivalence of the foundations of the criminal procedure established in the law and the Constitution of Ukraine, since some of them have not found their establishment in the basic law. The foundations not established in the Constitution do not compete with the constitutional basic concepts, but, on the contrary, are with them in organic unity and complement them by acting in the system. Whatever source of the law the foundations have been established in, they stem from the essence and content of the basic law and the general legal foundations formed in it. They serve as initial provisions on which the sectorial foundations should be formed reflecting the specifics of a particular type of procedural activities. But this does not mean that the role of other prin-

⁴ Theory of state and law [text]: textbook for law university students / O.V. Petryshyn, S.P. Pohrebniak, V.S. Smorodynskyi and others, edited by O.V. Petryshyn. Kh.: Pravo, 2014. p. 23.

principles is less significant. There can be no difference in the imperative force between the foundations contained in the Constitution and other laws, since other normative legal acts specify the basic law. After all, laws are adopted in accordance with the Constitution of Ukraine and cannot contradict it.

Failure to comply with any of the foundations of criminal procedure involves a violation of others. All of them act within the framework of an integral system with the nature and the purpose of each foundation being determined not only by its own content, but also by the functioning of the whole system. For this very reason the principles form a certain system, they are equal and universal, since any system is primarily a set of elements that exist in the unity and interconnection with the failure of one of them, of course, causing a violation of others. The functional purpose of each separate foundation depends not only on its content, but also on the properties and content of all other foundations which are united into a single system⁵. Therefore, they complement each other ensuring the proper implementation of the whole system of principles.

The issue of the existence of the foundations inherent in certain stages in the criminal procedure remains the subject of discussion in science. The interdependence of the stages of the criminal procedure is ensured by their basis being the general foundations which are organically interconnected and interdependent, and therefore form a certain system as the basis of various procedural actions and decisions. From our point of view it is not necessary to distinguish the principles of separate stages of the procedure. It would be more correct to point out that at different stages of the proceedings the procedural foundations are operated, expressed and implemented in different ways. V.M. Savitskyi believes that the principles of the criminal procedure are the provisions operating at all stages of the procedure, but necessarily at its central stage – judicial proceeding⁶. Drawing on the given point of view we can conclude that in case of the particular proceedings not being heard in court the foundations of the procedure did not operate. However, from our point of view the foundations are the requirements for criminal procedural activities, they necessarily operate in every criminal proceeding. This is due to the fact that not every proceeding can include the stage of the judicial proceeding. Criminal proceedings can be completed even during the pre-trial investigation which does not mean that the foundations of the procedure have not functioned. Not all of them have probably been implemented, but those who got their manifestation are also the elements of a unified system and reflect the general orientation of the criminal procedure. Since any decision in the case will be legitimate and justified, if it is taken on the basis of the proper implementation of the foundations established in the law, and, therefore, it is the requirements for criminal procedure in each individual case whether the proceedings were heard in court. That is why it makes sense to emphasize the foundations of the criminal procedure being, to a greater or lesser extent, reflected in any stage of the criminal proceedings. The influence of each individual foundation within a given stage necessarily leads to the specific variations in the application of fundamental norms which, of course, raises a scientific interest⁷. We should agree with the opinion of O.M. Drozdov who thinks the significance of the foundations as the norms of the governing and fundamental type determines their imperative and obligatory nature in relation to all stages, proceedings and institutes of the criminal procedure. However, the methods and limits of the principles will be determined by the individual characteristics and properties of the specific stages and proceedings⁸.

According to the above definition the foundations of the criminal procedure are the legal ideas dominant in the state. That is, this refers to normativity as one of their most important features. They only then have a sense when they necessarily get established in the legal norm. This becomes possible only subject to their generally binding nature which can only be implemented by establishing in the norm of the law. Foundations cannot exist beyond the law. The foundations not being established in the norms of law can only be the ideas of legal consciousness, scientific conclusions. Their establishment in the law is consequently the most important condition for the real life of the foundations. Any ideas, scientific provisions, whatever they may have been useful for criminal proceedings, cannot be the foundations until established in the law.

S. Pohribniak notes that there is a certain idea at the heart of every principle of law: at first it arises only sporadically as the dreams of individual reflections or the slight shade of other forms of spirituality; it is slowly being implemented in social practices gradually gaining recognition and demanding reforms of the current order. General ideas are the impelling force leading a society from one state to another. Principles aimed at the establishment, maintenance

⁵ Kuchynska O.P. Systemacity of the principles of criminal proceedings as a determining factor of their effective regulatory influence on criminal procedural relations. *Advokat*. 2017. № 1 (36). P. 7.

⁶ Savitskii V.M. Assumption of innocence: monograph. M.: Norma, 1997. P. 46

⁷ The legal doctrine of Ukraine: 5 volumes. Kh. : Pravo, 2013. Volume 5: Criminal science in Ukraine: state, problems and ways of development [text] / V.Y. Tatsii, V.I. Borysov, V.S. Batyrharyev and others; under the general editorship of V.Y. Tatsii, V.I. Borysov. p. 615.

⁸ Kuchynska O.P. Systemacity of the principles of criminal proceedings as a determining factor of their effective regulatory influence on criminal procedural relations. *Advokat*. 2017. № 1 (36). P. 9.

and protection of public values are often based on “natural justice, and therefore traditionally associated with the concept of natural law and symbolize the spirit of law. They have the most general, abstract nature. They determine the content of the system of law and its structural elements, as well as the directions of their further development. They are a kind of a core, flavor of legal constructions. They seem dissolved in the law and penetrate its norms and institutions. They have priority over other norms of law and greater stability”. The principles of law are consequently “the most general and stable requirements promoting the establishment and protection of public values, determine the nature of law and directions for its further development”⁹. As emphasized by S.A. Alpert: “the principles, as the norms of law, function as the basic, initial provisions determining the nature of all other procedural norms”¹⁰. A.L. Ryvlin particularly noted that the first sign characterizing the principles of legal proceedings should be considered their legal character, that is, they constitute separate legal provisions established in legal norms¹¹. According to M.S. Strohovych “the principles of the criminal procedure are criminal procedural norms of the general nature specified and detailed in separate procedural rules”¹². If the criminal proceedings has the conditional presentation of a system of decisions aimed at achieving the purpose of judicial proceedings, then the role of the foundations is seen in all other norms being compared to them. Those norms only get the opportunity of positive realization under full compliance with the requirements of the foundations. It is worth supporting V.M. Savytskyi’s point of view who recognizes the possibility of interpretation through the principles of all other criminal procedural norms, since the former essentially are the provisions expressing a generalized description of the content of criminal procedural law¹³. It is this connection of the general and specific norms that ensures the unity of procedural order and the due course of law in criminal proceedings. They additionally are the norms of direct immediate action which allows to refer to them in case of need, that is, in decisions taken by the judicial bodies.

We cannot agree with the position of understanding the foundations of criminal proceedings through the category of “ideas”. Although they are formed by the human mind and therefore have a sign of subjective reality, this does not serve as the basis for concluding that these only are the guiding ideas which are not compulsorily established in the norms of law. The idea is an element of legal consciousness which, of course, can reflect the essence of the phenomenon but this will not make it be only an idea. The foundations cannot be disputed over at the level of legal awareness. Despite the fact that they are developed by scientists, the latter only obtain the mandatory force after being established in the law. Normativity can consequently be called one of the most important qualities of the foundations of the criminal procedure.

R. Dvorkin rightly considers the principle as the standard which should be observed not because it promotes the change or the preservation of the economic, political or social situation, but because it expresses some moral requirements, such as the requirements of justice, honesty¹⁴. We join the thought of V.O. Konovalova who believes that the requirements of law and morality are so close that it is often very difficult to determine the difference between them. For example, illegal methods of conducting investigation or trial are often a violation of moral requirements¹⁵. A.L. Ryvlin emphasized that the norms of law are always the norms of morality which is also manifested in the case of expressing the legal principles in them, in particular, the principles of criminal proceedings¹⁶. Principles of law are directed at the establishment, maintenance and protection of public values, allow them to be taken into account when forming and exercising the law. The principles of law symbolize the spirit of law, link the law with politics, economics, morals, interpret into language of legal categories and represent social intellectually value-based guidelines and trends.

Moral (Latin “moralis” means “moral”, “mores” means “custom, behavior”) is spirituality, form of social consciousness; one of the ways of regulating human behavior in society¹⁷. The law has a moral basis, a certain ethical orientation. Therefore, it is necessary to understand and realize their moral meaning correctly for the exact observance and enforcement of laws. The interaction of legal and moral norms is a transformation of moral duties in law. M.A. Markush rightly sees the legal foundations in the doctrine of the criminal procedure as constitutional values ensuring the task

⁹ Pohrebniak S. Principles of law: doctrinal issues. The law of Ukraine. 2013. № 9. P. 217.

¹⁰ Alpert S.A. Principles of Soviet criminal proceedings and their role in the formation of the legal status of participants in the process. Problems of socialist legality. Edition 7. Kh.: Vyshcha shkola, 1986. P. 67.

¹¹ Rivlin A.L. The concept and system of principles of Soviet justice. Issues of criminal law, criminal procedure and criminalistics. Scholarly notes of Kharkiv juridical institute. Kh., 1962. P. 32.

¹² The course of the Soviet criminal procedure: [textbook] / Strohovych M.S. M: Nauka, 1968. Volume 1. p. 86

¹³ Savitskii V.M. Language of the procedural law: issues of terminology: monograph. M.: Nauka, 1987. 76 p.

¹⁴ Dvorkin R. Giving thought to the rights: translated from English by M.D. Lakhuti, L.B. Makeeva. M.: Rosspen, 2004. p. 80.

¹⁵ Konovalova V.E. Moral principles of Soviet judicial proceedings. Socialist legality. 1985. № 5. p. 34.

¹⁶ Rivlin A.L. Moral principles in criminal proceedings. The Soviet state and law. 1971. № 7. p. 111.

¹⁷ Great encyclopedic legal dictionary [text] / Edited by the academician of NAS of Ukraine Y.S. Shemshuchenko. Second edition, revised and enlarged. K.: Publishing house «Yurydychna dumka», 2012. p. 483.

of the criminal procedure, the protection of the rights and legitimate interests of the subjects of criminal proceedings participating in it. The state is primarily obliged to proceed from the priority of human dignity, justice¹⁸.

Legal norms express the moral aspect of the development of society, but the norms of morality are not always the rules of law, since morality is predominantly fixed in the consciousness of the individual and only partially receives the normative establishment. As Y.M. Hroshevyi correctly notes morality is a form of social consciousness. The basic category of morality is justice characterizing the situation which should be considered as a proper one, as well as corresponding to a certain understanding of the human nature and his or her rights. The scientist defines a certain mechanism of moral ground of judicial activity, namely humanism and systematic legislation; the availability of justice and the freedom to appeal against a court's unlawful acts restricting the rights and freedoms of citizens; normative provision of citizens' equality before the law and the court; adversariality and publicity of court procedures; independence of judges¹⁹. An individual, his or her interests are indeed placed on the first place by the state at the moment of the development of national criminal procedure. This provision should be clearly reflected in the foundations which are the guiding provisions and reflect the focus of all criminal proceedings. Such humanistic direction undoubtedly is a manifestation of morality reflected in the foundations of the criminal procedure. But the moralities should be contained in the norms of law in order to be realized. There accordingly is an urgent need to enrich the moral content of the foundations established in the criminal procedural law. We believe that morality is one of the most important features of the foundations of the criminal procedure.

Having regard to the above we can conclude that the criteria for determining the legal character of the foundations of the criminal procedure should include the provisions and requirements which: most generally fix the objective regularities of social life, are fundamental to the criminal procedure; constitute the leading part of the whole system of the criminal procedural safeguards and are aimed at the real provision of human rights and freedoms; are really related to the state policy in the criminal procedure with account of the provisions of international human rights instruments; are equal, universal, constitute a certain hierarchy, operate within a unified system with the violation of a single foundation entailing a violation of the others; are obligatory for the actors conducting the process; determine the construction of procedural forms, stages and institutions of the criminal procedure, that is, characterize its type; direct the activities to achieve the tasks set by the state before the criminal procedure; are established in the norms of law, have the meaning of the norms of the highest legal force and direct action; necessarily appear in each criminal proceeding, operate at all stages of the criminal procedure, but to varying degrees; act as the rules of law expressing, realizing the ground of morality.

Анотація

У статті розглядаються ознаки засад кримінального провадження. Висловлюється пропозиція закріпити у Кримінальному процесуальному кодексі України визначення цих засад у представленому автором варіанті.

Summary

The article presents the features of the foundations of the criminal procedure. It is offered to establish the definition of the given foundations the Criminal Procedure Code of Ukraine in the version submitted by the author.

¹⁸ Markush M. Constitutional values as the basic foundations in the criminal procedure of Ukraine. Bulletin of the Constitutional Court of Ukraine. № 6/2013. p. 81.

¹⁹ Hroshevyi Y.M. International standards for protecting an individual in the criminal proceedings. The right of the accused to qualified protection and its security: Materials of the international scientific and practical seminar, 1-2 December 2005. Kh.: K.: CFA «Горак», 2006. P. 13-20.

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