

FEATURES OF DIFFERENTIAL FORMS OF CRIMINAL PROCEEDINGS IN UKRAINE



Natalia Goldberg

*Ph.D. in Law,
Department of criminal law and procedure
Kyiv University of Law of NAS of Ukraine
Kyiv, Ukraine*

ORCID ID: <https://orcid.org/0000-0003-1624-1944>

Abstract. The effectiveness of criminal proceedings depends on their ability to achieve their goals and objectives. It is impossible to establish the essential circumstances of a criminal offence, to bring the perpetrator to criminal responsibility, or to compensate the victim for the harm caused without the activity being carried out in the procedural form prescribed by law, and is a way of implementing criminal law. The differentiation in criminal procedure determines the systemic and structural organization of modern criminal proceedings, which is complex, significantly different from the previous one and requires a thorough scientific analysis.

The purpose of the research is to develop conceptual provisions of differential forms of criminal procedure in the formal and structural aspect on the basis of a systematic analysis of the procedural form of criminal proceedings. The object of the research is the system of criminal procedure in Ukraine. The methodological basis of the research is a system of philosophical, general scientific and special methods of scientific knowledge which are typical for legal science. The application of these methods ensured that the findings were correct and that the objectives were achieved.

Keywords: *differential forms of criminal proceedings, criminal procedural form, differentiation, unification, differentiation criteria.*

Introduction

All criminal procedural activities are carried out continuously within the framework of the procedure provided for by law which is called the procedural form of criminal proceedings. The extent to which these activities are fully and thoroughly regulated largely determines success in achieving the objectives of criminal proceedings. The current criminal process is characterized not by a trend towards unification but rather by a differentiation of the criminal procedural form. In view of the above-mentioned problem of research into the differentiation forms of criminal procedure acquires particular urgency.

Analysis of recent studies and publications shows that consideration of the problem of criminal procedural form and its differentiation is impossible without a significant legacy left by prominent scientists of the past, namely: S. Viktor'skyi, M. Davydov, M. Dukhov'skyi, A. Koni, M. Korkunov, P. Lublinskyi, I. Mykhailov'skyi, S. Muromtsev, V. Riazanov'skyi, I. Foinytskyi, etc.

Clarification of the essence of differentiation of criminal procedure implies the need to refer to scientific works on general theoretical issues of legal process of D. Bakhraha, V. Beliaiev, I. Benedyk, V. Gorshenov, O. Lukianova, Ye. Mamai, M. Maksutin, P. Nedbailo, S. Oleinikov, A. Pavlushina, I. Pogribnyi, V. Protasov, V. Sorokina and others.

Presentation of the main research material. Among the problems that attract the attention of domestic scientists and practitioners a special place is given to the issue of ways of further development of the criminal process and the role of differential forms in it. In order to properly understand

the nature of the problem and find possible solutions it is necessary first to clarify the content and meaning of the procedural form.

V. Trofymenko emphasizes that "the problem of differentiation of criminal procedural form has a long research history. However, because of its complexity and

multidimensional nature despite the considerable period of its scientific development it refers to those who receive a diametrically opposite solution in different periods of the development of legal science – from categorical denial (in particular the simplification of certain procedural forms) before support and observation, feasibility and rationale for further expansion” (Trofymenko, 2012b, p. 74).

In general legal theory procedural form is understood as a set of homogeneous procedural requirements imposed on the parties to a process and directed towards a certain substantive result. In other words the procedural form is a special legal structure embodying the principles of the most appropriate procedure for the exercise of certain powers (Nedbailo, Gorshenev, 1976, p. 14). This definition may claim to be uniform for all types of legal process not just for the activities of jurisdictional bodies as it embodies the basic features of the concept. However, as to criminal proceedings it may be specified taking into account the specific features of this type of legal process which will make it possible to identify its specific features in this area of State activity (Trofymenko, 2012c, 202).

Attention should be drawn to the scientific views of M. Yakub who “identified the procedural form with the executive procedure of the case and characterized it as the procedure, principles and system of criminal procedure activity” (Yakub, 1981, p. 11).

The most complete and accurate definition of the essence of criminal procedure is given by M. Strogovych. According to the scientist this form is the procedure established by the “law of criminal procedure for criminal proceedings, that is the sequence of stages and conditions for the transfer of a case from one stage to another; the general conditions governing proceedings at a particular stage; the grounds conditions and procedure for the conduct of investigative and judicial actions in which competent authorities and officials exercise their powers and citizens exercise their rights and duties; content and form of decisions that may be issued in a criminal case” (Strogovych, 1968, p. 51).

As S. Melnyk noted the “procedural form in criminal proceedings is defined by criminal procedural law and the statutory system of procedural institutions and rules, the sequence of stages of criminal procedure and

the essence of procedural requirements that are proposed to participants in criminal proceedings. The form establish: a) the basis of the most appropriate procedure for the exercise of their powers; b) the manner and duration of the proceedings relating to the collection, examination and evaluation of evidence; c) the procedure for making and processing decisions; r) the legal regime of the court, the investigative bodies of the procuratorial supervision and the conditions created for the conduct of a criminal case; d) the realization of the rights of all parties to the proceedings; e) the guarantee of the desired material and legal result” (Melnyk, 2001, pp. 6-7). There is also a scientific conclusion that the criminal procedure form is a legal regime of criminal procedural activity which includes the fulfilment of certain procedural conditions, legal procedures and safeguards in criminal proceedings (Hroshevyi, 2010, p. 11).

Supporting the opinion of V. Trofymenko it should be noted that “the criminal procedural form is a set of legal procedures, conditions and guarantees established by law that ensure the solution of the tasks of criminal proceedings. In this case the procedures shall be understood as the sequence provided by the law of carrying out both individual procedural actions and their aggregates which constitute the content of separate proceedings and stages of criminal proceedings” (Trofymenko, 2012c, p. 205).

It is known that criminal procedure is a type of cognitive activity differing in its content and objectives. The criminal procedural form which has accumulated many years of experience in combating crime is based primarily on general methodological patterns of this educational activity.

Complexity and detail of the criminal procedural form are due to the specific tasks of the criminal process in particular the complexity of the activities to establish the factual circumstances of the criminal proceedings, the need to ensure maximum guarantees of individual rights and freedoms in criminal proceedings and the legality and reasonableness of all criminal proceedings and decisions. Therefore, the procedure for the conduct of criminal proceedings provides for the movement of criminal proceedings in stages, each of which has its own form. This facilitates the task of a particular stage and provides an opportunity to verify the validity of the conclusions and decisions taken at the

previous stage. The procedural form ensures the so-called admissibility of evidence. The violation of the procedural form of obtaining evidence therefore renders the evidence void (Code of Criminal Procedure, art. 85, part 1).

The procedural form is a specific kind of State activity and its value is that it creates a detailed, stable, strictly mandatory, stable legal regime for the conduct of criminal proceedings, consistent with the objectives and principles of criminal procedure. It is therefore inadmissible to distinguish from the requirements of procedural law and strict observance of the procedural form is a prerequisite for the legality of actions and decisions taken in proceedings.

In summary it should be noted that the importance of the procedural form lies in the fact that it provides a regime of legality in criminal proceedings, creates conditions for the adoption of lawful, well-founded decisions in criminal proceedings, guarantees the protection of the rights and legitimate interests of persons involved in the proceedings.

The conducted analysis of scientific views of scientists allowed to determine the general content of the important subject of research of the term "criminal procedural form". So it is a set of legally established uniform procedural requirements (conditions) that determine the rules of behavior of participants in criminal proceedings, the grounds for conducting procedural actions aimed at achieving the objectives of the criminal-legal result.

In this connection, V. Trofymenko believes that "procedural conditions are normative provisions that establish the grounds for the conduct of procedural actions, the range of participants, the time frame, rights and obligations of the persons involved in them. Criminal procedural guarantees are special legal means to ensure the realization of the rights and legitimate interests of the participants of the proceedings as well as their performance of procedural obligations. These elements of procedural form in their abstract expression are inherent in any type of criminal process. However, their specific content differs significantly in different procedural systems allowing to determine the typology of the process, to give its characteristic features" (Trofymenko, 2012c, p. 205).

Criminal procedural form has two characteristics: unity and differentiation which

in their content are opposite but sometimes are in a dialectical correlation.

The rational achievement of the objectives of criminal proceedings is ensured by the differentiation of the criminal procedure form. It should be noted that differentiation must follow certain rules otherwise it may lead either to undue simplification of the procedural form by reducing the procedural guarantees of individual rights or to the complexity of the justice process which is unable to achieve the objectives of criminal proceedings within a reasonable time.

Scientific development of the problem of criminal procedural form implies the importance of substantiation of the most appropriate procedure of criminal proceedings, its differentiation in the light of the public and private interests it protects, the principles of proportionality, rationality and procedural economy which create optimal conditions to ensure the effective performance of its tasks together with the other pillars of criminal procedure.

If we look at the historical basis of this issue it should be noted that a heated discussion between the supporters of the unity of the procedural form on the one hand and the supporters of its differentiation on the other took place in the 1980s of the twentieth century in which won the advocates of differentiation.

Differentiation is a term borrowed from criminal procedure. In the theory of the system of differentiation – (fr. differentiation, from Lat. differentia – difference, difference) is the side of the process of development associated with division, dismemberment (Philosophical encyclopedic dictionary, 1983).

The idea of differentiation of the procedural form became widely implemented in the current Code of Criminal Procedure of Ukraine (Teteriannyk, 2017, p. 140). The following criteria set by the drafters of the draft law prior to the definition of the procedural forms may be noted in the summary of its provisions: public danger; specificity of the subject of a socially dangerous act; respect for the sovereignty of the foreign State; the need for speedy judicial protection of the rights, freedoms and legitimate interests of participants in criminal procedural relations; the balance in criminal proceedings between State authority and dispositive power. In accordance with these criteria, the new Code of Criminal Procedure of Ukraine provides for

such differentiation of criminal procedural forms as: criminal proceedings; special procedures for criminal proceedings; agreement between a procurator and a suspect who is accused of an offence; agreement on conciliation between the victim and the suspect, the accused; criminal proceedings in the form of private prosecution; criminal proceedings containing State secrets; judicial proceedings on the basis of the examination by the investigating judge of the investigator's submissions; the procurator on the conduct of investigative actions and the application of measures to ensure criminal proceedings, as well as the consideration of complaints by participants in criminal proceedings against the actions and decisions of the investigator and the procurator; reduced judicial investigation; International legal assistance in legal proceedings; trial by jury, etc.

M. Manova is convinced that differentiation of criminal procedure form is carried out at the level of separate procedural proceedings when there are significant differences in the degree of complexity of the procedural form of the same proceedings which leads to the design of a self-contained procedure. The differences that exist in modern investigative and judicial procedures in individual categories of criminal cases tend to be single features which cannot be considered as manifestations of a differentiation of the main form of the relevant proceeding (Manova, 2005, p. 14).

There is no need to argue that the problem of differentiation of criminal procedural form is rather complex and multifaceted and its solution should be carried out on the appropriate criteria (grounds) ensuring optimum, the temporality and efficiency of criminal proceedings. And therefore the accomplishment of its tasks which have a normative basis and with this in mind, determine the direction of activities of all participants (Trofymenko, 2017, p. 75).

Supporting the position of the proponents of differentiation of criminal procedure form, V. Trofymenko argued its grounds. Firstly the existence of various forms of criminal proceedings creates real prerequisites for the effective protection of the rights and legitimate interests of the parties to the proceedings; secondly it provides resource savings; thirdly it rationalizes and optimizes production; fourthly in rare cases contributes to the normalization of the psychological

situation the settlement of the criminal law conflict (Trofymenko, 2012a).

G. Vlasova believes that "the differentiation of criminal proceedings consists in the existence on the one hand of proceedings carried out in a shorter period of time on the other hand of proceedings in which there are additional guarantees for establishing the truth fully complies with the purpose of criminal proceedings. And the existence of summary proceedings is possible and does not contradict any essential basis of criminal proceedings" (Vlasova, 2015, p. 156).

Having analyzed the scientific views regarding the theoretical substantiation of the definition of "differentiation of criminal procedural form" we will try to give our own definition of this term. Thus, differentiation of the criminal procedural form should be understood to mean such a structure of criminal proceedings in which there are procedural forms in addition to the usual procedure. They provide both for the simplification of the procedure for criminal offences of minor social danger and for its complications in the most dangerous proceedings. Procedural protection of the rights and legitimate interests of suspects accused persons or other participants in criminal proceedings.

That is the differentiation of the criminal procedural form implies the existence in the system of criminal procedure of different types of independent proceedings which on various grounds (criteria of differentiation) are significantly different from ordinary criminal proceedings. The differentiation of criminal proceedings is a complex multi-faceted process involving different proceedings at different stages of the criminal process.

Differentiation must take into account certain grounds otherwise it may lead either to undue simplification of the procedural form by curtailing the procedural guarantees of individual rights or to making the administration of justice so complicated that it will not be able to realize the objectives of criminal proceedings within a reasonable time.

There is no doubt that the existing criminal procedural form should be differentiated, modernized towards the creation of special procedures ensuring the successful fulfilment of the tasks of the bodies of inquiry, pre-trial investigation, the Office of the Procurator-General and the court. And it have to ensure success development of the rights, freedoms

and lawful interests of participants in criminal proceedings that further develop. Of course it is possible to make only certain changes and additions to certain elements of the existing procedure of pre-trial investigation, trial which do not violate its foundations but take into account the special, exceptional conditions of proceedings that is at the level of the stages of the process and at the level of procedural actions. These procedures may be specific but not like specific proceeding.

The literature notes that the differentiation of the criminal procedural form of the main proceedings is due to a combination of objective criminal (material) and criminal procedural grounds.

G. Vlasova notes that "in the science of criminal procedure there is no clear concept regarding differentiation of criminal procedural form. The proponents of differentiation are of the view that while it is undoubtedly important to follow the same established procedure in all criminal proceedings this procedure should be specific to the nature of the criminal offence, the identity of the accused and other circumstances. This differentiation maximizes the usefulness of the executive procedures so

that they are efficient in order to solve criminal offences quickly and fully to expose the guilty participant, etc." (Vlasova, 2015, p. 156). We support the scientific point of view of G. Vlasova, which proposes "to differentiate criminal proceedings in such areas as: 1) general proceedings; 2) simplified proceedings. In turn, simplified proceedings under the current legislation include the following: simplified proceedings for criminal offences; simplified proceedings on the basis of agreements which are differentiated by: first, a conciliation agreement between the victim and the suspect or accused and, secondly, a simplified agreement between the prosecutor and the suspect or accused; 3) a differentiated procedure for criminal proceedings with strengthened procedural guarantees which include: private prosecution; juvenile proceedings; proceedings involving the use of coercive measures of a medical nature; criminal proceedings before a jury; proceedings containing information on State secrets; production on the territory of diplomatic representations" (Vlasova, 2015, p. 157).

Conclusions

Taking into account the analysis of scientific opinions we are convinced that the following types of criminal proceedings are distinguished according to the degree of complexity of the criminal procedural form, and indeed according to the degree of guaranteeing the rights provided by law of participants in criminal proceedings: ordinary (in which pre-trial investigation and criminal proceedings are conducted according to the general rule); simplified (for example in private prosecution proceedings, transaction proceedings); more complex procedural form in other words with many guarantees of subjective rights (proceedings in cases involving minors, proceedings for the application of coercive measures of a medical nature, proceedings containing information constituting a State secret).

References

1. Vlasova, H. P. (2015) Correlation of criminal procedural proceedings and differentiation of criminal procedural forms. [Spivvidnoshennia kryriminalnykh protsesualnykh provadzhn ta dyferentsiatsii kryriminalnykh protsesualnykh form]. Science and information bulletin of the Ivano-Frankivsk University of Law named after King Danylo Halytskyi. 2015. № 11. pp. 153-158
2. Hroshevyi, Yu. M. (2010) Criminal process [Kryriminalnyi protses]. Kh. Pravo, 608 p.
3. Manova, N. S. (2005) Theoretical problems of criminal proceedings and differentiation of their forms [Teoretycheskye problemy uholovno-protsessualnykh proyzvodstv y dyfferentsyatsyia ykh form]: diss. Dr. of Legal Sciences,. M.
4. Melnyk, S. M. (2001) Procedural form in the criminal justice system of Ukraine [Protseualna forma u kryriminalnomu sudochynstvi Ukrainy]: autoref. thesis on of science stupa Ph.D. law Sciences: 12.00.09 / S. M. Melnyk. K., 2001. 17 p.
5. Nedbailo, P. E., Gorshenev, V. M. (1976) Legal procedural form: theory and practice: monograph [Yurydycheskaia protsessualnaia forma: teoriya y praktyka: monohr] M.: Jurid. lit., 1976. 280 p.

6. Strohovych, M. S. (1968) The course of the Soviet criminal process. [Kurs sovetskoho uholovnoho protsessa]. T.1. M.
7. Teteriannyk, H. K. (2017) Unification and differentiation procedure form: synergetic approach. [Unifikatsiia ta dyferentsiatsiia protsesualnoi formy: synerhetychnyi pidkhid]. International scientific journal "Rule of Law", №1, pp. 136-142.
8. Trofymenko, V. M. Differentiation of the procedural form as a priority direction of reforming the criminal justice system of Ukraine. Bulletin of the Academy of Legal Sciences of Ukraine: Coll. of science pr. / Acad. rights of Sciences of Ukraine. - Kh.: Pravo, 2012. - No. 3(70). - P. 242-250. [Dyferentsiatsiia protsesualnoi formy yak priorytetnyi napriamok reformuvannia kryminalnoho sudochynstva Ukrainy]. Available at: <https://dspace.nlu.edu.ua/handle/123456789/3933> [27.02.2023].
9. Trofymenko, V. M. Regarding the issue of differentiation of the criminal procedural form. Actual problems of the improvement of the criminal procedural legislation: material. All-Ukrainian science and practice confer., dedicate. to the 70th anniversary of D. Yu. Ph.D., Professor Yu. P. Alenin (April 21, 2017, Odesa) / edited by G. O. Ulyanova, I. V. Glowyyuk; resp. for issue I. V. Glowyyuk; structure. V. A. Zavtur; National Odesa University law Acad." Odesa: Jurid. I-ra, 2017. S. 74-77. [Shchodo pytannia dyferentsiatsii kryminalnoi protsesualnoi formy]. Available at: <http://dspace.onua.edu.ua/bitstream/handle/11300/7683/Trofimenko%20Act%20probl%20udo sk%20krym%20proc2017.pdf?sequence=1>. [27.02.2023].
10. Trofymenko, V. M. (2012) To the question regarding the concept and meaning of the differentiation of the criminal procedural form. [Do pytannia shchodo poniattia ta znachennia dyferentsiatsii kryminalno-protsesualnoi formyseriia]. «Pravo», № 18, pp. 139-142.
11. Trofymenko, V. M. (2012) Procedural form: essence and meaning in criminal proceedings [Protsesualna forma: sutnist i znachennia u kryminalnomu sudochynstvi]. Problems of legality. Vyp.120 pp.202-209.
12. Philosophical encyclopedic dictionary [Fylocofkyi Entsyklopedychecky Slovar].(1983), M.
13. Yakub, L. M. (1981) Procedural form in Soviet criminal proceedings [Protsessualnaia forma v sovetskom uholovnom sudoproyzvodstve]. M.