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RECUSAL OF AN INVESTIGATING JUDGE OR JUDGE IN CRIMINAL PROCEEDINGS: GENERAL PROVISIONS, PECULIARITIES, ISSUES

The article analyzes the general provisions of challenging an investigating judge and a judge in criminal proceedings. The author also addresses the peculiarities and issues of this institute. The author emphasizes the need to format the current regulatory framework of the institute of challenges. In every democratic state, the court must be independent and impartial, since this is one of the fundamental principles of the judiciary. These principles, such as independence and impartiality, include many elements, among which the institution of recusal of a judge from participation in a case takes a prominent place. However, the key issue remains the difficulty of proving the need to recuse an investigating judge or judge. The author emphasizes this because he is convinced that the legislator has not created sufficient guarantees to counteract judges' disregard for the relevant provisions of current legislation.

Key words: *institute of challenges, investigating judge, judge, other circumstances, grounds for challenges.*

The problem statement. The institute of recusal is one of the basic ones in the national judicial system, as it is regulated in any branch of the administration of justice. That is why it is important to improve the regulatory framework, refer to international standards in this regard and implement this practice during court proceedings and at the pre-trial investigation stage. At the same time, in the pursuit of compliance with existing international standards, the need to improve the legal framework for the functioning of the institution of recusal, which is a guarantee of Ukraine's existence as a state governed by the rule of law, is often neglected. Despite our country's great desire to get as close as possible to the standards of the rule of law, today there is a need to format not only the legislation, but also the way justice is administered by representatives of the Ukrainian Themis.

Analysis of recent research and publications covering the above-mentioned issues. This issue has been studied by modern scholars such as Y.P. Zeikan, O.M. Babych, D.D. Luspenyk, S.V. Senyk, Y.D. Prytyka, S.F. Demchenko, M.M. Yasynok and many other scholars who have studied the issue of judge's challenge.

The aim of the article is to highlight the peculiarities and issues of challenging an investigating judge and a judge in criminal proceedings, and to refer to the basic terminology given the need for a deeper review of this topic.

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Introducion of the main research material. It should be noted that the quality of recusal required improvement when the criminal justice system applied the provisions of Soviet legislation, but today there are still gaps and inaccuracies in the rules of the institution of recusal, which also requires the attention of the legislator. In addition, the improvement of this institution is actually a measure of the fairness of national justice and a confirmation that the Ukrainian Themis adheres to the generally recognized European principle of a fair trial.

When studying the issue of compliance with the rules of challenging by participants to criminal proceedings, it is necessary to start with an appeal to the fundamental principles of European law. It should be noted that such rules are defined by the Convention for the Protection of Human Rights and Fundamental Freedoms. In accordance with the provisions of this document, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall determine the rights and obligations of a civil nature or the validity of any criminal charge against him". We would like to draw attention to the following wording provided in Article 6 of the Convention on the right to a fair trial: "... by an independent and impartial tribunal..." [1]. In view of this, it should be noted that if the defense has sufficient grounds to believe that a judge does not have signs of independence and impartiality in a particular court case, it may refer to the rules of the institution of recusal and declare this. That is why we point out the quality of the set of rules of this institution. One cannot but pay attention to the Bangalore Principles of Judicial Conduct of 2006, which are permeated with standards of independence and impartiality [2]. It should be emphasized that the judiciary considers independence in performing certain actions and making decisions to be the main feature of its activities. Thus, independence is a prerequisite for ensuring law and order and the main guarantee of a fair trial. For a deeper research understanding, the principle of independence should be represented by the formula "law and judge", since a judge is not only entitled but obliged to execute and observe the law when making important decisions. The presumption of innocence should also be taken into account, as a person is innocent of a criminal offense until a court verdict is delivered. Being aware of his/her high responsibility, the judge, when rendering a final court decision, is guided exclusively by the current legislation of Ukraine and operates on the available evidence. As for the factual data, they must also be collected properly, and even if the person's guilt is confirmed by the factual data collected by the pre-trial investigation body, but they are obtained in violation of the requirements of the current Criminal Procedure Code of Ukraine (hereinafter - the CPC of Ukraine), such evidence will be considered inadmissible and will not be taken into account by the court [3].

One of the key principles of the judiciary is the impartiality of judges, which is identified with the proper performance of their duties. The Bangalore Principles formed the basis of national legislation in terms of enshrining the above principles – independence, impartiality and impartiality [2]. Justice is administered on behalf of the state, so judges' compliance with these principles is a direct characteristic of the state, since in a state governed by the rule of law, provided that a person uses a human-centered approach, he or she has appropriate guarantees of protection of his or her rights and freedoms. This also applies to those persons who are subject to criminal prosecution. It should be noted that in respect of the latter, the rights and freedoms should be ensured to a greater extent, as their opportunities are significantly limited due to certain sanctions.

Domestic legislation also pays considerable attention to the independence and impartiality of judges. To this end, a whole range of measures and instruments are envisaged to enable a judge "to consider a case fairly and impartially on the basis of the law and evidence, without external pressure or influence and without fear of any interference". The existing mechanisms for appointing a judge, paying him/her, hearing cases, bringing him/her to disciplinary responsibility, and dismissing him/her are designed to ensure that a judge remains objective and free from any influence in the administration of justice [4].

At the same time, implementing the principles of independence and impartiality, the judge must, if necessary, refer to the provisions of the institute of recusal at any stage of the trial.

According to Articles 75 and 76 of the CPC of Ukraine, "an investigating judge, judge or juror may not participate in criminal proceedings:

1) if he/she is an applicant, victim, civil plaintiff, civil defendant, close relative or family member of an investigator, prosecutor, suspect, accused, applicant, victim, civil plaintiff, civil defendant;

2) if he/she participated in the proceedings as a witness, expert, specialist, representative of the probation staff, interpreter, investigator, prosecutor, defense counsel or representative;

3) if he or she, his or her close relatives or family members are interested in the outcome of the proceedings;

4) in the presence of other circumstances that cast doubt on his/her impartiality;

5) in case of violation of the procedure established by the relevant norms of the CPC of Ukraine for determining the investigating judge, judge to consider the case" [3].

It should be noted at the outset that, based on the results of the review of the grounds for challenging provided for by the CPC of Ukraine, we drew attention to the ground provided for in clause 4 of part 1 of Article 75 of the CPC of Ukraine, which refers to the existence of other circumstances that make it impossible for the investigating judge or judge to conduct an objective and impartial consideration. However, the legislator does not provide a clear interpretation of this ground for recusal, since it will be unclear to any objective observer what is meant by the definition of "other circumstances" [3]. According to the case law available at the time of the study, "the concept of "other circumstances that cast doubt on his or her impartiality" is an evaluative one, the use of which depends on the legal awareness of the person who applies it and clarifies its essence based on his or her inner conviction". In addition, it should be noted that the law imposes a procedural obligation on the investigating judge or judge to recuse himself or herself if there are grounds provided for in Articles 75–76 of the CPC. On the same grounds, they may be recused by persons participating in criminal proceedings. It should be understood that the legislator enshrines the generalized ground, to which we drew attention earlier, among the grounds, since in matters of recusal, the judge himself or herself and the participants of the trial who may challenge the judge, arguing their own position on the recusal, should take into account the evaluative factor in their actions and decisions. Continuing the analysis of the rule on recusal by the investigating judge or court, we would like to draw attention to the rather obvious rule that "the court conducting the trial may not include persons who are related to each other". This provision itself excludes an objective and impartial factor in the administration of justice.

According to part one of Article 21 of the CPC of Ukraine, everyone is guaranteed the right to a fair hearing and resolution of the case within a reasonable time by an independent and impartial court established by law [3].

The Bangalore Principles of Judicial Conduct of May 19, 2006, approved by the UN Economic and Social Council Resolution No. 2006/23 of July 27, 2006, state that the objectivity of a judge is a prerequisite for the proper performance of his or her duties. It is manifested not only in the content of the decision, but also in all procedural actions accompanying its adoption [2; 5].

The European Court of Human Rights in its judgments in the cases of Myronenko and Martenko v. Ukraine, Bilukha v. Ukraine, and Rudnichenko v. Ukraine stated that the presence of impartiality (impartiality) of a court should be determined by subjective and objective criteria. The subjective criterion assesses the personal beliefs and behavior of a particular judge, i.e. whether the judge showed bias or impartiality in the case. According to the objective criterion, it is determined, among other aspects, whether the court and its composition ensured the absence of any doubts about its impartiality [4].

The personal impartiality of the court is presumed until evidence to the contrary is provided (decision in Wettstein v. Switzerland) [4; 6].

In the course of this study, we have reviewed the case law, in particular, the rulings of the First Disciplinary Chamber of the High Council of Justice. In this ruling, the panel of judges considers a citizen's disciplinary complaint against the actions of a judge who refuses to satisfy

his motions for recusal, arguing that the motions filed by the suspect are groundless and made with the aim of delaying the case. Let us turn to the argumentation of the First Disciplinary Chamber's own position within the framework of the said decision. Thus, the decision states the following: "Impartiality is a key characteristic of a judge, the main feature of the judiciary and the basis of the judicial process and is considered an obvious fact. The presumption of impartiality carries considerable weight. The person claiming bias must be able to prove the judge's real or apparent lack of impartiality. But a mere statement is not enough; reliable evidence must be provided. A personal opinion or disagreement with a judge's decisions is not evidence of bias. In any case, the allegation of bias is a legal question that must be submitted to the court. Except in extraordinary circumstances, an allegation of actual or possible bias is not a question of a judge's conduct". Thus, the analyzed ruling repeatedly refers to the study of the existence of a legal basis for the challenge. That is why it is necessary for everyone who files a motion to properly argue their position, as there are often cases when parties abuse their rights in this sense to deliberately delay the case. This leads to the destruction of the fundamental principles of the administration of justice. We also take into account that the conclusion of the Disciplinary Chamber states that the arguments of the disciplinary complaint regarding the existence of grounds for the recusal of Judge Klepka L.I. from the consideration of this criminal proceeding were the subject of consideration by the Dimitrovsky City Court of PERSON_1's applications for the recusal of Judge Klepka L.I. from the consideration of case No. 226/1162/17. These arguments were verified by the court and, according to the court, were not confirmed, since, after considering these applications, the court concluded that the exhaustive grounds for recusal of a judge, as defined by Articles 75, 76 of the CPC of Ukraine, do not include the circumstances referred to by the accused PERSON_1 in his applications for recusal. Once again, we return to the fact that the party filing a motion for recusal must rely on the regulatory framework and clearly argue the position of the need for the requested recusal. However, the issue of judicial impartiality remains relevant, since the existing legal practice shows that there is a significant number of appeals against verdicts of various instances, complaints and motions from the defense, which indicates that certain shortcomings in judicial activity remain. We would not make a rather bold remark about the national justice system, but we should not lose sight of the fact that the revised verdicts often differ from the decisions of the first instance court. It is impossible to state unequivocally what factors influence the improper assessment of the legal situation by judges, but, unfortunately, this negative trend exists [7].

It should also be noted that recusal can be made not only at the request of a party to the trial that has this right, but also by the investigating judge or judge himself. At the same time, the judge cannot refuse to consider the case assigned to him or her at will, since the assessment of risk factors and grounds determined by law is also assigned to him or her as part of the recusal. According to the current national legislation, the administration of justice is a constitutional duty of a judge. However, one of the main principles of the administration of justice is to maintain public confidence in the decision and the judicial system as a whole. That is why the institution of recusal is one of the most important institutions in the administration of justice [8].

We have analyzed the practice of courts regarding the application of the normative provisions of the institute of recusal, in particular, in the generalization of the Kharkiv Court of Appeal, we can see the negative dynamics of the application of the provisions of this institute, as the documents state the following: "given that the number of complaints received by the Kharkiv Court of Appeal regarding the unreasonableness of satisfying judges' challenges (recusal) in civil cases and criminal proceedings has increased, it is relevant and necessary to generalize on the above-mentioned topic" [9].

The procedural law provides for the right of a judge to recuse himself or herself or to be removed at the initiative of a party to the case (recusal). The grounds for (self)recusal of a judge are, for example, family ties to the parties to the case, previous participation in the same case in a different procedural status (e.g., as a witness, representative of a party), interest in the outcome of the case, violation of the procedure for determining a judge to hear the case. The list of grounds for (self)recusal defined in the laws is not exhaustive, as it always ends with a clause stipulating

that (self)recusal may be made in the presence of other circumstances that cast doubt on the impartiality or objectivity of the judge. It should also be emphasized that defense counsels often raise the issue of judicial impunity in terms of ignoring the provisions of the institution of recusal, but it should be noted that such ignoring, if the complainant's position is sufficiently substantiated, is grounds for bringing the judge to disciplinary responsibility and, accordingly, reversal of the previous decision [10].

Conclusions. Challenges may be made not only at the request of a party to the trial who is vested with this right, but also by the investigating judge or judge himself. At the same time, the judge cannot refuse to consider the case assigned to him or her at will, since the assessment of risk factors and grounds determined by law is also assigned to him or her as part of the recusal. According to the current national legislation, the administration of justice is a constitutional duty of a judge. However, one of the main principles of the administration of justice is to maintain public confidence in the decision and the judicial system as a whole. That is why the institution of recusal is one of the most important institutions in the administration of justice.

We have analyzed the practice of courts regarding the application of the statutory provisions of the institute of recusal, and in particular, the generalization of the Kharkiv Court of Appeal shows a negative trend in the application of the provisions of this institute.

We emphasize that the party filing a motion for recusal must rely on the regulatory framework and clearly argue the position of the need for the requested recusal. However, the issue of judicial impartiality remains relevant, since the existing legal practice shows that there is a significant number of appeals against verdicts of various instances, complaints and motions from the defense, which indicates that certain shortcomings of judicial activity remain.

The legislator did not provide a clear interpretation of this ground for recusal, since it would be unclear to any objective observer what is meant by the definition of "other circumstances". According to the case law available at the time of the study, "the concept of "other circumstances that cast doubt on his or her impartiality" is an evaluative one, the use of which depends on the legal consciousness of the person who applies it and clarifies its essence based on his or her inner conviction". In addition, it should be noted that the law imposes a procedural obligation on the investigating judge or judge to recuse himself or herself if there are grounds provided for in Articles 75–76 of the CPC. On the same grounds, they may be recused by persons participating in criminal proceedings.

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АНОТАЦІЯ

Дарія Лазарева, Андрій Мельниченко. Відвід слідчого судді, судді в кримінальному провадженні: загальні положення, особливості, проблематика.

У науковій статті досліджено загальні положення здійснення відводу слідчого судді, судді в кримінальному провадженні. Також автор звертається до особливостей і проблематики цього інституту. Акцентовано увагу на необхідності форматування чинної нормативно-правової основи інституту відводів. У кожній демократичній державі суд повинен бути незалежним і неупередженим, оскільки це є одним із фундаментальних принципів діяльності судових органів. Указані принципи, зокрема незалежності й неупередженості, включають чимало елементів, серед яких визначне місце посідає інститут відводу судді від участі в розгляді справи. Однак ключовим залишається питання складності доведення необхідності відводу слідчого судді, судді. Автор наголошує на цьому, оскільки переконаний, що сьогодні законодавець не створив достатніх гарантій у протидії ігноруванню суддями відповідних положень чинного законодавства.

Ключові слова: *інститут відводів, слідчий суддя, суддя, інші обставини, підстави для здійснення відводів.*