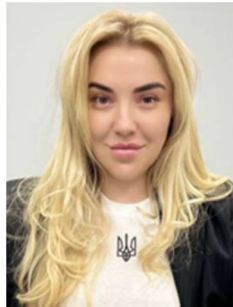


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PECULIARITIES OF INSTITUTION OF RECUSALS (SELF-RECUSALS) IN CRIMINAL PROCEDURE

Дарія Лазарева, Дмитро Карцигін. СОБЛИВОСТІ ІНСТИТУТУ ВІДВОДІВ (САМОВІДВОДІВ) У КРИМІНАЛЬНОМУ ПРОЦЕСІ. У науковій статті автори звертають увагу на ключові особливості інституту відводів (самовідводів) у кримінальному процесі. Він є досить дієвим та застосовуваним, зважаючи на можливість учасників кримінального провадження контролювати процеси судового розгляду та досудового розслідування. Однак наголошено, що в чинному кримінальному процесуальному законодавстві не зовсім чітко виписано понятійний апарат стосовно відводів та власне процедур їх здійснення. В межах цього дослідження звернуто увагу на слідчу та судову практику, що свідчать про відсутність на законодавчому рівні належного дієвого механізму врегулювання відводу слідчих, прокурорів та суддів і правових наслідків його розгляду компетентними органами.

Відсутність визначення поняття відводу, правового врегулювання механізму інших обставин, які викликають сумнів у неупередженості судді, є наслідком суддівського свавілля й ухвалення несправедливих рішень під час досудового розслідування і судового провадження. Крім того, серед важливих здобутків дослідження слід назвати спробу характеристики компонентів заяви про відвід, які автори пропонують закріпити в законодавчих положеннях.

Зокрема, зазначено на необхідності розкриття в КПК України вимоги до змісту та оформлення заяв про відвід для того, щоб спрямувати кримінальне процесуальне законодавство в напрямку уніфікованості. Адже процесуально відвід повинен оформлюватися заявою про його здійснення у випадку виявлення підстав, передбачених чинним кримінальним процесуальним законодавством. Водночас в межах кримінального процесуального законодавства не передбачено нормативних положень, які містять вимоги до форми та змісту заяви про відвід.

Ключові слова: інститут відводів, учасники кримінального провадження, відвід, самовідвід, заява про відвід.

Relevance of the study. The Institute of Appeals is a fairly common set of procedural norms, which indicate the possibility of a participant in criminal proceedings to influence the observance of the principles of legality and the rule of law in a specific proceeding, as well as to contribute to the implementation of an impartial review. Despite this, the analysis of investigative and judicial practice of Ukraine points to the absence of an appropriate effective mechanism at the legislative level to regulate the recusal of investigators, prosecutors and judges and the legal consequences of its consideration by competent authorities. The lack of definition of the concept of recusal, legal regulation of the mechanism of other circumstances that raise doubts about the judge's impartiality is a consequence of the judge's arbitrariness and the adoption of unfair decisions during the pre-trial investigation and court proceedings.

Recent publications review. In criminal procedural literature, the issue of recusals in the criminal process has been studied by multiple scholars such as: Yu. Azarov, V. Batiuk, Yu. Stetsenko, K. Chamlynskyi, V. Halunko and others who studied the features of impartiality

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of judges but did not raise the question of what a determining role the conflict of interest has when recusal is considered necessary, did not pay attention to the study of foreign legislative experience for the possibility of using it to improve domestic legislation; no attention was paid to the study of foreign legislative experience for the possibility of using it for the purpose of improving domestic legislation.

The research paper's objective is to highlight the peculiarities of the institution of recusals (self-recusals) in the criminal process.

Discussion. The institution of recusals plays a significant role in criminal proceedings, as it is a kind of guarantee of its full, impartial and comprehensive implementation. Within the framework of criminal proceedings, the institution of recusals may be defined as a guarantee that determines how effectively the inevitability principle of criminal prosecution is implemented. It should be noted that the current Code of Criminal Procedure of Ukraine does not establish the interpretation of the concept of "recusal" and "self-recusal", however it contains grounds for its implementation by officials of the prosecution, the investigating judge, and the court. All this exists for the purpose of documenting this guarantee at a legislative level, which is borrowed from international criminal procedural legislation and correlates with international standards in the field of human rights. Along with the fact that the legislator does not define the concept of "recusal", the corresponding norms of the Criminal Code of Ukraine establish the procedure for recusal, that is, the removal of participants in criminal proceedings due to the existence of a number of reasons, i.e. objective circumstances. It is mentioned above that the provisions of the institute of recusals may be referred to not only by the representatives of the prosecution, but also by the court whose key principle is impartiality when making a certain decision, which corresponds to the current legislation of Ukraine and correlates with the standards of the international legal community which is stated in separate provisions of the CPC of Ukraine. The subjects of recusal can roughly be divided into two categories: key (mandatory) participants in criminal proceedings, which should include a judge, an investigating judge, an interrogator, an investigator, a prosecutor, etc.; secondary (auxiliary) participants in criminal proceedings, including: an expert, a specialist, a secretary of the court session, a staff representative of a probation body, an interpreter, a defense attorney, a representative, etc.

According to Art. 75 of the CPC of Ukraine, circumstances that exclude the participation of an investigating judge, judge or jury are as follow:

- 1) if he or she is an applicant, victim, civil plaintiff, civil defendant, close relative or family member of an investigator, prosecutor, suspect, accused, applicant, victim, civil plaintiff or civil defendant;
- 2) if he or she participated in this specific proceeding as a witness, expert, specialist, staff representative of a probation body, translator, investigator, prosecutor, defense attorney or representative;
- 3) if he or she, his close relatives or members of his family take personal interest in the results of the proceedings;
- 4) in the presence of other circumstances that raise doubts about his or her impartiality;
- 5) in the event of a violation of the established procedure for determining the investigating judge, the judge for consideration of the case.

"The court carrying out legal proceedings cannot include persons who are related to each other" [1].

As part of the analysis of the given circumstances, we came to the conclusion that they are quite logical, since the key aspect of this discussion is the presence of close relatives within the same process, duplication of status, as well as violation of the appointment procedure, which is inherently an unacceptable phenomenon in the framework of criminal proceedings.

Circumstances for recusal are provided on a par with other participants, such as: prosecutor, interrogator, investigator, whose recusal is carried out on the following grounds:

- 1) if he or she is the applicant, victim, civil plaintiff, civil defendant, family member or close relative of the party, applicant, victim, civil plaintiff or civil defendant;
- 2) if he or she participated in the same proceedings as an investigating judge, a judge, a defense attorney or a representative, a witness, an expert, a specialist, a staff representative of a probation body or an interpreter;
- 3) if he or she, his close relatives or members of his family take personal interest in the results of criminal proceedings or there are other circumstances that cause reasonable doubts about his or her impartiality [1].

Recusal can be considered and represented as a way for the defense to protect their

rights within the framework of criminal proceedings. That said, it is necessary to pay attention to the fact that any recusal must be motivated, which means that it is necessary to take into account the conditions under which its implementation is crucial [2].

We have previously drawn attention to the fact that certain norms of the current CPC of Ukraine, particularly Art. 75-79 of the CPC of Ukraine provide for the obligation to declare self-recusal in a long list of subjects, including the investigating judge, court, prosecutor, investigator, defense attorney, representative, expert, specialist, translator, secretary of the court session, etc. Accordingly, there is a list of grounds on which the named subjects are obliged to declare it [1].

Applications of recusal can be filed both during the pre-trial investigation and during the court proceedings. Applications for recusal during the pre-trial investigation are submitted immediately after establishing the grounds for such recusal. Applications for recusal during court proceedings are filed before the beginning of trial. Submission of an application for recusal after the commencement of the trial is allowed only in cases where the grounds for recusal became known after the commencement of the trial. The recusal must be well-grounded [3].

In the case of a recusal of an investigating judge or a judge who conducts court proceedings alone, it is considered by another judge of the same court, determined in accordance with the procedure established by Part 3 of Article 35 of the CPC of Ukraine. In the case of a recusal of one, several, or all judges who conduct court proceedings collectively, it is considered by the same group of court members. All other recusals are considered by the investigating judge during the pre-trial investigation, and by the court conducting it during the court proceedings. During consideration of a recusal, the person whom the recusal was filed against should be heard, if he or she wishes to give an explanation; as well as the opinion of the persons participating in the criminal proceedings. The decision regarding the recusal is made in the conference room by a reasoned resolution of the investigating judge, judge (court). An application for recusal, which is considered by the court collectively, is decided by a simple majority vote. If the repeated application for recusal shows signs of abusing the right of recusal for the purpose of delaying the criminal proceedings, the court conducting the proceedings has the right to leave such an application without consideration [4].

It is important to understand that the implementation of any recusal requires urgent replacement of a participant in criminal proceedings, which in a certain way may impact the conduct of an effective, quick and full pre-trial investigation. In practice, situations often arise when there is a lack of opportunity in a certain court to assemble a new group of employees of the court to replace the one that was there before. That's when the issue arises regarding the sufficient number of judges and other specialists who, according to the current criminal procedural legislation, can be replaced [5, p. 94].

In case of satisfaction of the application for recusal (self-recusal) of the investigating judge, the criminal proceedings are transferred to another investigating judge for consideration. If the application for a recusal (self-recusal) of a judge who conducts court proceedings alone is satisfied, the case is considered in the same court by another judge. In case of satisfaction of the request for recusal (self-recusal) of one or more judges from the composition of the court or the entire composition of the court, if the case is considered by a judicial panel, the case is considered in the same court by the same number of members of a judicial panel excluding the removed judges with the latter being replaced by other judges or a different composition of judges [6].

In terms of procedure, the recusal must be formalized with a statement about its implementation in case of discovery of the grounds provided for by the current criminal procedural legislation. Having said that, we emphasize that within the framework of the criminal procedural legislation there are no regulatory provisions that contain requirements for the form and content of the application for recusal. We have analyzed the normative component of the institution of recusal in the current CPC of Ukraine and concluded that the application as a key element of the procedure for recusal is not properly regulated in the CPC of Ukraine. Consequently, text of the draft application is yet to be created and open for editing; it could also be said that this authority belongs mainly to the side of defense, who are able to detect the fact of possible bias and prevent it by filing an application for recusal [7]. Meanwhile, we remain convinced that the current CPC of Ukraine needs to supplement the provisions of the institute of recusal with regulations on the structure and form of the statement. Thus, we could ensure the flexibility and transparency of legislation for everyone who will become the subject of criminal proceedings. In the process of writing this scientific article, we tried to draft the outline of the application for recusal with the formation of the appropriate form [3; 8]. However, given the fact

that this article is more theoretical in nature, we are more inclined to analyze the points that must be contained in the application for recusal of the participant within the framework of criminal proceedings:

1. Among the main details of any application, the key is the addressee and the addresser, which ought to be correctly written in accordance with the official name. For this specific reason, before making an application, it is crucial to pay attention to the correctness of the name of the body to which this application is submitted. After that, it is also important to specify the person who submits the application, and if this application is submitted by the defender of a specific person within the framework of criminal proceedings or at the stage of the trial, then there is a need to specify in whose interests this document is provided.

2. The name of the document is of no significance, as it is set forth in the relevant provisions of the CPC of Ukraine, the vast majority of which specify the procedures for filing a recusal application. In addition, it would be beneficial if after the name of the document "Declaration of recusal" a separate norm is defined, on the basis of which the recusal is applied for and in relation to which participant of the criminal proceedings. This way, the application will look more legally competent and will have specifics.

3. After indicating the name of the document, it is necessary to briefly state the details of the criminal proceeding or court case in which the appeal is filed, as well as provide a brief description of circumstances of the case so that the given application has a certain target direction and a certain subject belonging to a specific proceeding.

4. The statement of circumstances also requires an explanation of the status of the person who applies for a recusal, which is important when resolving this procedural issue, as stating the status within the framework of a specific proceeding is a confirmation of the participation and interest taken in it by the subject of the application for recusal.

5. When a number of necessary introductory details are fixed in the document, the applicant proceeds to highlight the most important aspects, that is, the circumstances that became the grounds for submitting an application for recusal regarding a specific participant in criminal proceedings. That is why there is a need for a detailed and substantive justification of this fact in order to prove the need for a recusal.

6. It would be useful to state the legal provisions before the final part of the application, in which it is also necessary to summarize all the details mentioned above and clearly formulate the request, put forward within the framework of a specific criminal proceeding or court case [3; 9, pp. 92-93].

Taking into consideration all the information mentioned above, it is necessary to emphasize the need for the CPC of Ukraine to contain the requirements for the content and preparation of application for recusal in order to achieve certain uniformity in the criminal procedural legislation.

Conclusions. The institution of recusals in the criminal process of Ukraine is quite effective and applied, considering the possibility of participants in criminal proceedings to control the processes of trial and pre-trial investigation. It should be noted that in the CPC of Ukraine, the provisions on recusal are not thoroughly detailed, but they are meaningful, because they contain all the necessary information so that the initiator of the recusal has the opportunity to familiarize himself with the grounds for its implementation and generally analyze the situation. However, within the framework of this scientific article, we came to the conclusion that there is a need for regulatory provisions on objections to have an outline of the requirements for the content and form of the application for recusal, which should contain certain structural elements and be consistent with the peculiarities of criminal procedural record keeping.

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ABSTRACT

In the scientific article the authors draw attention to the key features of the institution of recusals (self-recusals) in the criminal process. It should be emphasized that they lies in the fact that the current criminal procedural legislation does not quite clearly spell out the conceptual apparatus that concerns objections and the actual procedures for their implementation. Within the framework of this study, the author draws attention to investigative and judicial practice, which indicate the absence of an appropriate effective mechanism at the legislative level to regulate the recusal of investigators, prosecutors and judges and the legal consequences of its consideration by competent authorities. The lack of definition of the concept of recusal, legal regulation of the mechanism of other circumstances that raise doubts about the judge's impartiality is a consequence of the judge's arbitrariness and the adoption of unfair decisions during the pre-trial investigation and court proceedings. In addition, among the important achievements of the research, one should mention the attempt to characterize the components of the recusal statement, which the author proposes to enshrine in the legislative provisions.

Keywords: *institute of recusals, participants in criminal proceedings, recusal, self-recusal, application for recusal.*