

## Concerning the understanding of article 375 of the Criminal Code of Ukraine „ordering a judge (judges) knowingly unjust sentence, decision, decree or ruling“



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**Abstract.** *The article deals with the problematic aspects of Article 375 of the Criminal Code of Ukraine (Judgment of a judge (judges) of a knowingly unjust sentence, decision, decree or ruling). Particular attention is paid to doctrinal approaches to understanding the essence „unjust court decision“. In particular, the article provides an analysis of different views on the understanding of this concept, determines its main features, presents the circumstances under which the decision can be considered „ knowingly unjust “. Also, the author makes his comparison with the notion of „ illegal decision “.*

**Keywords:** *justice, knowingly, unjust court decision, unlawful decision, criminal liability*

### Problem statement

**Statement of the problem in general outlook and its connection with important scientific and practical tasks.** In Ukraine, justice is the realization of the powers of the judicial authorities (judges) solely on the grounds, within the limits and in accordance with the procedure provided by the Constitution of Ukraine and laws. It is carried out in the form of civil, economic, administrative, criminal justice [С. С. Яценко 2006, с. 442].

Public relations that arise in the administration of justice are so significant that in the case of committing certain violations of the law, in the case of committing certain violations the law establishes even criminal liability, that provides the most stringent legal measures [В. І. Тютюгін, О. В. Капліна, І. А. Тітко 2012, с. 42]. However, despite the frequent use of legal science and the use of the concept of „unjust court decision“, in practice, its quintessence has still not found terminological certainty in domestic criminal law.

Unfair decisions in the context of Article 375 of the Criminal Code of Ukraine, according to the opinion of many scholars, in particular, M. Pogoretsky, undermine the authority of the judiciary, create distrust towards it in society, devalue in the public consciousness of law, legality and justice, discredit Ukraine as a state [М. А. Погорецький 2015, с. 223].

**Analysis of latest research where the solution of the problem was initiated.**

Contradictions in the views on the merits of „the judge’s decision to knowingly unjust sentence, decision, decree or ruling“ stimulated the conduct of research by many scholars. In particular, N. Glinskaya, M. Lemeshko, O. Kaplin, O. Ovcharenko, T. Pashkovskaya, M. Pogoretsky, I. Titko, V. Tyutyugin, A. Schasny, S. Yatsenko engaged in research of the relevant problem.

**Aims of paper.** The objectives of the article are to study the main points regarding the essence of Article 375 of the Criminal Code of Ukraine and expressing your own opinion on understanding „deliberately unlawful judicial decision“.

**Exposition of main material of research with complete substantiation of obtained scientific results.**

M. Lemeshko and O. Ovcharenko note that neither in the theory of criminal law nor in the current legislation there is no a definition of the notion „unjust court decision“; „unjust“ – category is purely evaluable. According to

these scientists, most scholars in the field of law recognize those decisions as unlawful, that taken with a gross violation of material or procedural law, which does not meet the requirements of legality and reasonableness, and its subsequent cancellation, change by a higher court, etc., is not a prerequisite [B. B. Асанова, електронний ресурс].

The uncertainty of this term in Ukrainian legislation and legal doctrine led to the fact that in the scientific discourse the notion „unjust“, which operates the criminal law of Ukraine, and „illegal“, which is used in criminal procedure law, are usually identified and bear the same regulatory and content load, i.e., are recognized as synonyms (such position is respected by such scholars as V. Tyutyugin, O. Kaplina, I. Titko and others.) [B. I. Тютюгін, О. В. Капліна, І. А. Тітко 2012, с. 44].

As for the stated position, let's note the following.

In Article 375 of the Criminal Code of Ukraine, the concept of „unjust court decision“ has been used, but not disclosed. This article stipulates that „the decision by a judge (judges) of a knowingly unjust sentence, decision, decree or ruling is punishable by restraint of liberty for a term up to five years or by imprisonment for a term of two to five years)“ [Кримінальний кодекс України від 5 квіт. 2001 р. № 2341-III]. The peculiarity of the term „unjust“ in this norm is that it is used in conjunction with the adverb „knowingly“ ((that is, it implies the direct intent of the judge) and applies to most court acts (judgment, decision, decree or ruling).

According to the European Charter on the Status of Judges of 10 July 1998 „the only valid reason for imposing sanctions is the failure to perform one of the duties explicitly defined in the Judges' Statute and that the scale of applicable sanctions must be set out in the judges' statute. Moreover, the Charter lays down guarantees on disciplinary hearings: disciplinary sanctions can only be imposed on the basis of a decision taken following a proposal or recommendation or with the agreement of a tribunal or authority, at least one half of whose members must be elected judges. The judge must be given a full hearing and be entitled to representation. If the sanction is actually imposed, it must be chosen from the scale of sanctions, having due regard to the principle of proportionality. Lastly, the Charter provides for a right of appeal to a

higher judicial authority against any decision to impose a sanction taken by an executive authority, tribunal or body, at least half of whose membership are elected judges“. The same legal act contains a provision according to which „State compensation shall be paid for damage sustained as a result of a judge's wrongful conduct or unlawful exercise of his or her functions whilst acting as a judge. This means that it is the State which is in every case the guarantor of compensation to the victim for such damage“ [European Charter on the statute for judges 8–10 July, 1998, Strasbourg.].

In the Decision of the Chamber of Criminal Cases of the Supreme Court of Ukraine of November 20, 2014, No. 5-24x14 states that: „notion „unjust court decision“ together with an indication „knowingly“ in his resolution emphasizes the purposeful nature of criminal actions of a judge, his aspirations and desires, contrary to the material or procedural law and (or) the factual circumstances established in the case, to make a judicial decision which, by its very nature, can not be and is not an act of justice“ [Ухвала Судової палати у кримінальних справах Верховного Суду України від 20 лист. 2014 р. № 5-24к14]. T. Pashkovskaya holds that opinion, which considers that a court decision is unjust, in which the rule of substantive law, which is rendered gross violation of the procedural law norms, or which is knowingly the discrepancy of the findings of the court with the factual circumstances of the case, is deliberately misused. The serious consequences of such a crime, in her opinion, include the conviction of the victim to imprisonment, his suicide or assassination, serious illness, etc. [Т. Пашковська, електронний ресурс].

S. Yatsenko, without being bound by the „knowingly“ of such a decision, believes that the judgment, decision or ruling in a criminal case would be unjust if: condemned innocent or acquitted guilty or unjustly released from punishment, unequivocally imposed too severe or too soft punishment, misdiagnosis of a crime that resulted in an unjust punishment, arbitrarily chosen or refused to choose a preventive measure in the form of taking into custody, etc. In similar cases, an unlawful decision in an administrative offense case will be considered. The judgment, order or decree in civil or commercial matters will be unjust if, granted unsubstantiated claim or arbitrarily

denied the claim, the claim is satisfied with a lesser or greater extent than is required by law. In the opinion of the scientist, the judge (judges) accepting a knowingly incorrect decision on a matter which does not resolve the matter on the merits (for example, an unjustified refusal to summon a witness) does not entail liability under Article 375 [C. C. Яценко 2006, с. 443].

One of the most developed is the position of A. Schasny, who draws attention to the fact that in the theory of criminal law it is noted that in a single judicial act there can be several signs of injustice at the same time. Referring to the confirmation of I. Malinovsky's position, he proposes to be guided by two criteria: 1) legal – inconsistency with the current legislation; 2) actual – inconsistency with established actual data. In the first case, a judicial act was issued in violation of the rules of procedural or substantive law, the second conclusion contained in the judicial act does not correspond to the facts established in the case of actual data. According to A. Schasny, the correct definition of the unjust sentence as the subject of a crime provided for by Article 375 of the Criminal Code of Ukraine, can contribute (together with other measures) to counteracting so-called „judicial tyranny“ [A. B. Щасний 2010, с. 511]. However, O. Kostenko notes that „the procedure for checking judicial acts in force in Ukraine does not contribute to counteracting the relevant phenomenon. In particular, the inspection authority is not empowered (obligation and right) to reveal signs of a decision to knowingly commit an unjust act to inform the prosecutor's office about the prosecution of the perpetrators“ [O. M. Костенко, В. П. Нагребельний, О. О. Кваша та ін. 2008, с. 10].

In addition, A. Schasnyi notes that „an unjust sentence as a crime subject to Article 375 of the Criminal Code of Ukraine is a decision of the court of the first or appellate instance on the guilty or innocence of the defendant in the crime and application or non-imposition of a punishment which includes open access information, which significantly influenced the correctness of a court decision and on the merits of a case, in connection with which it is unlawful, unreasonable and unfair (consists in one-sidedness, incompleteness of inquiry, pre-trial or judicial investigation, inconsistency of court findings with the actual circumstances of the case, the imposition of a

punishment that does not correspond to the gravity of the crime and the person of the convicted person, incorrect application of criminal, criminal-procedural norms, and also the Constitution of Ukraine), regarding which is the decision of the appellate or cassation instance to annul or change the unlawful sentence or to close a criminal case“ [A. B. Щасний 2010, с. 511]. Thus, the author excludes the unjustness of the decision of the court of cassation.

Most scholars in the field of law find that decisions that are taken with gross violation of material or procedural law that do not meet the requirements of legality and validity, and its subsequent cancellation, the change by the court of the higher court, etc., is not a prerequisite [B. B. Асанова, електронний ресурс].

In our opinion, illegality and groundlessness may be separate grounds for the recognition of a decision to be unjust. The above can be argued that in the theory of law, legitimacy, validity, and motivation are considered by some scholars as signs of a justice solution. M. Pogoretsky emphasizes that the position of those lawyers (N. Glinskaya et al.), who, while investigating the issue of ensuring the standards of benchmarking criminal procedural decisions, reasonably believe that legitimacy, reasonableness, and motivation are not signs of criminal procedural decisions that are significant, since they are only statutory requirements for such acts. Signs of criminal procedural decisions, according to these scientists, are: 1) legal nature; 2) state-power character; 3) power-administrative nature; 4) compulsory nature; 5) cognitive-certifying character; 6) motivating, initiating character; 7) adopted by law in the manner and form prescribed by law; 8) orientation to solving general problems of criminal proceedings. At the same time, legality, reasonableness and reasonableness should be considered as standards of procedural decisions. M. Pogoretsky notes that N. Glinskaya, among the standards of legality, reasonableness and motivation, also emphasizes justice, reasonableness and timeliness, which is well founded and deserves support because it has both scientific and practical value [M. A. Погорецький 2015, с. 225].

Such scholars as O. Kaplina, V. Tyutyugin, I. Titko conclude that there are three

components that characterize the judge's decision to knowingly make an unjust decision:

- 1) the decision must be unwarranted;
- 2) an unjust judge's decision must be made;
- 3) the decision of an unjust decision must be known [В. І. Тютюгін, О. В. Капліна, І. А. Тітко 2012, с. 48].

According to L. Vinogradova „unjust sentence (decision, decree, ruling) of the court“ is an illegal or unjustified legal act, deliberate intentionally or as a result of negligence, which caused or could entail a significant harm to the rights or interests of citizens or the interests of the state“ [Л. Є. Виногорова 2004, с. 5].

Injustice may consist in misapplication of the rules of material or procedural law or in the inconsistency of the findings of the court with the factual circumstances of the case. Injustice of a judicial act may be expressed, for example, in the conviction of the innocent, the acquittal of the guilty, the appointment of an unjustly mild or, conversely, too severe punishment, unlawful detention, arrest and

detention, unreasonable imposition of an administrative penalty or refusal to satisfy justified claims, etc. [П. П. Андрушко 2015, с. 77].

„Injustice“ can not „arise“ after committing an act, which is recognized as a crime, in particular, as a result of the cancellation of a court decision. After all, then one would have to admit that the „injustice“ and the legal qualification of an act as an offense do not depend on the actions of a judge, but determined by actions of the third parties – the party who appealed the court decision and the judges who revoked the court decision. Then you can guess, that in case if the parties did not appeal the court decision, it can under no circumstances acquire the quality of „unjust“. Therefore, an act of a judge can not be classified as a crime. Such a violation does not comply with the principles of criminal law. A sign of „injustice“ should arise not later than a court decision is made. And this in turn means, that the cancellation of a court decision can not affect the criminal-legal qualification of an act as a crime [Г. Ю. Корольова, О. М. Черних, електронний ресурс].

## Conclusion

Based on the above, in the context of Article 375 of the Criminal Code of Ukraine, we consider that unjust is an act deliberately taken by a judge during a judicial proceeding, which does not take into account all the circumstances of the case and the rules of law that should have been guided (is unfair) and does not provide (does not contribute to) the real protection or restoration of the violated right, on the fact of which the proceedings were opened, provided that the judge knew all the circumstances of the case and clearly understood what norms of law needed to be applied.

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