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The unjust sentence as an offense matter, stipulated by the article 375 of the criminal code of Ukraine “Delivery of a knowingly unfair sentence, judgment, ruling or order by a judge (or judges)”

Abstract: It is made attempts to examine unjust verdict as a matter of crime under the Criminal Code of Ukraine. The scientific literature on the subject of crime in criminal law is analyzed. It is offered the essential features of the subject offense. On this basis, it is proposed a definition of “unjust verdict” and to recognize the form of the judgment containing the information with an open or restricted access, which is illegal, unjustified and (or) unmotivated, essentially violating the rules of criminal and criminal procedural law and in respect of which there is a decision of the court of appeal or cassation of change, annulment (fully or partially) and the termination of criminal proceedings or the appointment of a new trial in the trial, and (or) appeal.

Keywords: the subject of the offense; unjust verdict; illegality; groundlessness; unmotivated; decision; judgment.

The Criminal Code of Ukraine (hereinafter referred to as CCU) provides the liability for the knowingly unfair sentence, judgment, ruling or order (art. 375). Accordingly, one of the matters of crime is referred to the knowingly unfair sentence. Due to the fact that in 2012 the new Criminal Procedural Code of Ukraine (hereinafter referred to as CPCU) has come into force, the determining of the considerable elements of the matter of crime is specifically topical.

For a start, the criminal law theory refers the material world things [7, p. 106],

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things (physical) [6, p. 89], the external world objects [19, p. 137], as a rule, to the matter of crime. Some scholar criminalists state that these identifications do not correspond fully to the actual reality. For example, if one acts on the premise that the matter of an offense refers exclusively to the material world things, then the given feature of the matter of crime does not cover, for instance, the information, the property right, and the proprietary actions etc.

We consider that the more reasonable matter of crime definition approach refers to the point of view of A. Muzik and E. Laschuck. They state that the matter of crime is the optional element of an offense target, which develops in the material assets (that one either can perceive or record by the specific technical means), and in the reference to and by the virtue of the direct exposure to what (or without such an exposure) the criminal act is committed [9, p. 4-8; 12, p. 110].

By the matter of crime characterizing in whole, E. Laschuck marks out the different types of it. Particularly, the scientist singles out the information (data, documents), within its socio-economic characteristics features, and classifies it by the access mode as the information with the open, limited and confidential admission. Laschuck proposes to refer the first type of the aforementioned to the matter of crime stipulated by the article 375 of CCU that is the open admission information [9, p. 10]. We cannot fully agree with the present point of view. In accordance to the article 7 of the current CPCU, some of the common criminal procedure principles are publicity and openness. Under the 2 part of the article 27 of CPCU, the criminal proceedings are conducted openly in courts of all instances. Investigating judge may take a decision to conduct criminal proceedings in camera throughout the entire judicial proceedings or any part thereof in the following cases: when an underage person is the defendant; trial in respect of criminal offence against sexual freedom or security of person; with a view to preventing disclosure of information on private and family life of an individual or circumstances which degrade human dignity; when conducting proceedings in the open court session can lead to disclosure of a secret protected by law; when conducting proceedings in the open court session can lead to disclosure of a secret protected by law [8]. According to the part 7 of the article 27 of

CPCU, court decision made in open court session is pronounced publicly. Whenever trial was conducted in camera, the court decision is pronounced publicly omitting the information which was examined in camera if it continues to be subject to protection from disclosure at the time of pronouncement [8]. Therefore, the court's decision may contain information both with open (the criminal proceedings are conducted in the open court session) and the limited (the criminal proceedings are conducted in camera) admission. That is the feature that can be marked as the primary and considerable criteria in the unjust verdict defining.

The aforementioned definition content differs within the criminal law theory. Particularly, under the point of view of V. Navrotzkiy, the current matter of crime is characterized by the two criteria: objective and subjective. The objective criteria refer such a verdict to those, which does not meet both the requirement of the law and the facts of case (legitimacy and reasonableness requirements). Beside it, the knowingly unfair sentence should be also characterized by the subjective criteria – the judge, who enacts such a decision should be for sure aware hereof [13, p. 543-544]. In accordance to A. Cartashov point of view, the verdict's unfairness refers to its contradiction (in any part) to the factual circumstances of the judicial conflict, which is subjected to the proceeding. The unfairness manifests itself in the wrongful application of the substantive and (or) procedural law [3, p. 3]. In accordance to the opinion of S. Didyk, the court's sentence is unjust in case if it does not meet the requirements of the law and is groundless. The point of view of this scholar refers the legitimate court decision to the one that is made in accordance with the substantial law regulations, simultaneously with the procedural regulations observance. The decision is reasonable if the court passes it on the ground of complete and thorough consideration of the factual background, which is confirmed by the evidence that is scrutinized in course of judicial session. The unjustness of the relevant court act is directly connected with the substantial infringements of personal rights and freedoms or justice aim in general [1, p. 124-125]. S. Rashkovskaya points that unjustness is unlawfulness and groundlessness court's act, which results from the knowingly incorrect law application by the judges and deliberately wrong factual background

assessment [15, p. 12]. O. Kvasha considers that the decision can be referred to unfair if it does not meet the legality and reasonableness requirements, what can be contained in the wrongful substantive law regulation application, the constitutional provisions breach, procedural law regulations or court's conclusion inconsistency to the factual background of the case [4, p. 208]. In accordance with P. Metelskiy opinion, the unjustness of verdict is in the fact that it is passed either regardless of the stated factual circumstances of the case or along with the considerable breaching of the substantive or procedural legislation [10, p. 44]. T. Kostareva considers that the unfairness of the court's act, which entails article 305 of CC RF application, can be conditioned by the considerable breach of substantive or procedural laws that affect the solving of the case in essence. The inessential (formal) infringements that does not have impact on the case solution and does not break personal rights or interests or public interests could not be recognized as unjust [5, p. 810]. The authors of "The crime against the justice" believe that the judicial act could be referred to unfair in case if it does not meet the legality and reasonableness requirements, which in turn could be related either to the infringement (incorrect application) of the regulations of the substantive or procedural laws made by the judge or factual background misrepresentation [2, p. 29].

In the criminal law doctrine it is stated that one court act can include at the same time several unjust indications. I. Malinovskiy proposes to be guided by the two criteria: 1) judicial – current legislation inconsistency; 2) factual – stated factual background inconsistency [17, p. 343]. In the first case, the court act is passed with the substantive or procedural law regulations infringement, and in the second, the conclusions in the act do not meet the factual background, stated in the case.

The current matter of crime is differently described in the post soviet countries criminal legislation: "the unjust sentence" (CC of Moldova, Armenia, Kirghizia, Turkmenistan, RF, Azerbaijan, Belarus, Kazakhstan, Uzbekistan and Estonia) or "unlawful sentence" (CC of Georgia, Latvia, and Tajikistan). The article 375 of CCU matter of crime reasonability of renaming the definition of "unjust sentence" to "unlawful sentence" was either advocated by the separate Ukrainian scholars, namely

V. Tuytyuhina, A. Kaplyna, I. Tytko. They ground such an alteration on the present necessity to unify the substantive and procedural law areas terms, which define the court sentence, passed with the law infringement [16, p. 45]. We consider that more suitable term is “unjust sentence” due to the fact that the verdict can be both unlawful and unreasonable. Therefore, the “unlawful sentence” definition bounds the defined conception content.

The consequent essential features of the unjust sentence exarticulation require the etymological analysis of the term’s component words. “The sentence” is interdisciplinary legal term, which is used in several law areas and has the judicial criminal procedure origin. Court verdict – is the decision of the court of the first or appeal instance, concerning both the culpability or innocence of the accused in respect to the crime committed and the usage or non-usage of the penalty. The sentence should be fair, legal and reasonable. The sentence may be accusatory or exculpatory [20, p. 406-408]. In accordance to the part 1 of the article 369 of CPCU, court decision in which the court decides on the substance of litigation is formulated in the form of a judgment. It means that legislative definition provides for one the conclusion that the sentence can be only accusatory. However, article 373 of CPCU provides both accusatory and exculpatory sentences. The presence of such a contradiction makes it necessary for us to propose the carrying out of the amendments within the legislative definition of the “sentence” concept. We suggest setting forth the 1 part of the article 369 of CPCU in the following redaction: “1. Court decision in which the court decides on the substance of litigation or exculpates the accused in the crime commitment is formulated in the form of a judgment”. Therefore, another one essential unjust sentence indication refers to the fact that a verdict in whole pertains to the courts’ decisions (the decision of court term covers sentence, judgment, ruling and order).

There is no definition of the word “unjustness” in the wordbooks. It is not used in the CPCU as well. It creates the grounds for some scholars to suggest implementation in the CPCU of the unjust court’s pronouncement as a reason for the amendment or cancellation of the sentence. We consider that there is no such

necessity due to the fact that corresponding reasons for the court's decision cancellation or amendment (including sentence) are already stipulated in the CPCU despite the fact that it does not use the relevant term. According to our point of view, the unjustness unites all the stated by the legislator reasons for its cancellation or amendment (by the appeal, cassation instance, by the Supreme Court of Ukraine or in course of case reconsideration upon discovery of new circumstances) (articles 409, 438 CPCU). These are: incomplete character of the trial; inconsistency of court's findings as stated in the decision with factual circumstances of criminal proceedings; significant non-compliance with the requirements of criminal procedure; wrong application of the Law of Ukraine on criminal liability; significant non-compliance with the requirements of criminal procedural law; wrong application of the Law of Ukraine on criminal liability; inconsistency of imposed punishment with the gravity of criminal offense and the convict's personality [8].

The grounds for revision of valid judgments by the Supreme Court of Ukraine are the following: different application by the court of cassation of the same legal provisions of the Law of Ukraine on criminal liability in relation to similar socially dangerous acts (except for the issues related to the award of punishment, release from punishment and relief from criminal liability), which entailed passing different in content judgments; establishment by an international judicial agency, the jurisdiction of which is recognized by Ukraine, of Ukraine's violation of international commitments when passing court's judgment [8].

Court decisions which have taken legal effect may be reviewed upon discovery of new circumstances, which are: artificial manufacture or falsification of evidence, incorrect translation, finding and explanations of expert, deliberately untrue testimonies of a witness, victim, the suspect, accused on which the judgment was based; abuses of investigator, public prosecutor, investigating judge or court in the course of criminal proceedings; reversal of a court decision based on which the judgment or ruling to be reviewed were made; if the Constitutional Court of Ukraine ruled the law, other legal act or certain provision thereof which was applied by court unconstitutional; all other circumstances which were not known to the court at the

time of trial when the court decision was passed and which, per se or together with previously discovered circumstances, prove incorrectness of the judgment or ruling subject to review [8].

After the current CPCU analysis have been conducted, it is possible to make a conclusion that the legislator connects the verdict's justness with its legality, validness and reasonableness. In accordance to the article 370 CPCU a decision is legal when it is made by a competent court in accordance with the rules of substantive law and in observance of the requirements for criminal proceedings specified in the present Code (p. 2); a decision is valid when it is made by court based on objectively ascertained circumstances which are supported with evidence examined during trial and assessed by the court as prescribed in Article 94 of the present Code (p.3); a decision is reasonable when it sets forth appropriate and sufficient motives and grounds for passing thereof (p.4). It means that court's sentence may be treated as unjust in case, when it was illegal, invalid or (and) unreasonable [8].

Its own vision of justness (or rather reasonableness of court's decisions) is expressed by the Committee of Ministers of the Council of Europe in the Recommendation CM/Rec (2010)12 to member states on judges: independence, efficiency and responsibilities. It states that judgments should be reasoned and pronounced publicly, at the same time, judges should not be obliged to justify the reasons for their judgments (§15); decisions of judges should not be subject to any revision other than appellate or re-opening proceedings, as provided for by law (§16); if commenting on judges' decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal (§18); judges should act independently and impartially in all cases, ensuring that a fair hearing is given to all parties and, where necessary, explaining procedural matters. Judges should act and be seen to act without any improper external influence on the judicial proceedings (§60); the interpretation of the law, assessment of facts or

weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence (§66); the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice (§68); disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner (§69); judges should not be personally accountable where their decision is overruled or modified on appeal (§70).

Another question that requires the additional explanation refers to the question on what part of sentence does the corresponding conception concern. A judgment comprises of introduction, reasoning part and operative part (art. 374 CPCU). The introduction states: date and place of delivery; name and composition of the court, and secretary of court session; designation (number) of criminal proceedings; last name, name and patronymic of the defendant, year, month and date of his birth, place of birth and place of residence; occupation, education, family status and other information on the defendant's person that is important for the case; Law of Ukraine on criminal liability which provides for the criminal offense in the commission of which the person concerned is accused; parties to criminal proceedings and other participants in court proceedings [8].

The reasoning part of a judgment states: 1) if a person has been acquitted, statement of charges brought against the person and found by court to not be proved, as well as grounds for acquittal of the defendant stating motives for repudiating evidence of accusation; motives for taking other decisions in respect of issues disposed by court when rendering a judgment, and statutory provisions the court was guided by; 2) if a person has been found guilty: statement of charges found by court to be proved, with indication of place, time, and the way of commission and implications of the criminal offense, form of guilt, and motives of the criminal offense; articles (paragraphs of Article) of Law of Ukraine on criminal liability which establishes liability for the criminal offense guilty of committing which the defendant is found; evidence in support of circumstances established by court, as well as motives for not taking into account particular evidence; motives for changing

charges, grounds for finding a part of charges unsubstantiated, if such decisions have been taken by the court; circumstances which aggravate or mitigate punishment; motives for imposition of punishment; for releasing from service of punishment; for application of compulsory medical measures where a state of limited criminal capacity of the defendant has been established; for application of compulsory medical treatment as specified in Article 96 of the Criminal Code of Ukraine; motives of appointing a public tutor for the underage person; grounds for granting, dismissing or leaving undecided the civil action; motives for taking other decisions in respect of issues disposed by court when rendering a judgment, and statutory provisions the court was guided by (p.3 art. 374 CPCU) [8].

The operative part of a judgment states: 1) if a person has been acquitted: last name, first name and patronymic of the defendant, decision on finding him innocent of charges brought against him and on his acquittal; decision to restore rights restricted during criminal proceedings; decision regarding measures to ensure criminal proceedings including decision on a restraint measure prior to taking legal effect by the judgment; decision regarding exhibits and documents; decision regarding procedural expenses; time limit and procedure for the judgment to take legal effect and to be appealed against; procedure for obtaining copies of the judgment and other information; 2) if a person has been found guilty: last name, first name and patronymic of the defendant, decision on finding him guilty of charges brought against him and the relevant Article (paragraph of Article) of the Law of Ukraine on criminal liability; punishment for each charge which the court found proved, and the final sentence imposed by court; beginning of the term of serving the punishment; decision to apply compulsory medical treatment or compulsory medical measures in respect of a defendant with limited criminal capacity, if any; decision to appoint public tutor for the underage person; decision as to the civil action; decision on other executions on property and grounds for such; decision regarding exhibits and documents; decision on reimbursement of procedural expenses; decision regarding measures to ensure criminal proceedings; decision on the credit of detention pending trial; time limit and procedure for the judgment to take legal effect

and to be appealed against; procedure for obtaining copies of the judgment and other information (p.4 art. 374 CPCU) [8].

The parts of sentence are correlated and compile in an indissoluble unit. Therefore, the court's verdict is recognized as entirely unjust, independently of the part of the sentence, where its illegality, invalidity and (or) unreasonableness would be detected.

Hence, another considerable indication of the unjust sentence, as a matter of crime under article 375 of CPCU, refers its illegality, invalidity and (or) unreasonableness.

In addition, it is necessary to pay attention to the consideration of the issue, concerning the sentence's unjustness recognition in respect to the influence of it on the case resolving in essence. As mentioned above, the current CPCU states that the violations shall be substantial, i.e. they shall significantly impact on the court's decision correctness. The scientists as well pay attention to the given fact and point out that the unjustness of the court act shall be conditioned by the considerable violation of substantive or procedural law, which impacts on the case solution in essential. Insignificant (formal) breach of the procedural legislation does not infringe and deprive of the right and legitimate interests of the citizens and public interests, and does not give the grounds for the consideration of such acts as unjust [5, p. 770]. Single scholars as well point out that gross procedural violations (right of defense infringement and others) although they has the sufficient basis for the decision cancellation due to its illegality, and which did not entail innocent condemnation are not covered in general by the corpus delicti that provides the responsibility for the unjust act delivery [18, p. 702]. We entirely support the point of view and consider that unjust sentence recognition cause entails the considerable criminal and criminal procedural regulations violation. It is the next essential unjust sentence feature as a matter of crime that is stipulated by the article 375 of CPCU.

S. Didyk considers that the criminal liability for the knowingly unfair sentence passing is possible to apply only in case, when there is a relevant decision of the court of appeal or cassation, concerning the cancellation or alteration of the unjust decision

or the criminal proceeding termination (30, 31 chapters of CPCU) [1, p. 129]. We support the expressed point of view, and, in addition, it is proved by the 10 clause of No. 8 Resolution of the Plenum of the Supreme Court of Ukraine from July 13, 2008 “On the judicial authority independence” [14] and by the article 124 of the Constitution of Ukraine. In accordance to these acts, the decisions of the court are obligatory for the fulfillment throughout the territory of Ukraine and, therefore, are considered as legitimate till the time, when the cancellation through the appealation or cassation procedure is accomplished or when they are reviewed by the relevant court within the other procedure and within the frames of the made case proceedings. Under the procedural legislation, the exclusive right of the court’s decisions legitimacy and reasonableness checking has the relevant court. Hence, before the case initiation, it is necessary to receive the appellate or cassational courts’ decision concerning the sentence, judgment, order or ruling cancellation, which are the matter of the crime. It is preferably that the decision will include the direct conclusion, concerning the unjust character of the cancelled court act [11, p. 2].

This point of view requires a defined correction in the light of the new Criminal Procedural Code of Ukraine adoption. Thus, under the article 407, upon results of appeals trial on a complaint against judgment or ruling of a court of first instance, the court of appellate instance may: uphold the judgment or ruling challenged; change the judgment or ruling; set aside the judgment in full or in part and pass a new judgment; set aside the ruling in full or in part and pass a new ruling; set aside the judgment or ruling and close criminal proceedings. The court of cassation instance’s review of a cassation complaint may: uphold the court decision; reverse the court decision and assign a new trial in the court of first or appellate instance; reverse the court decision and close criminal proceedings; change the court decision (article 436 of CPCU) [8]. In course of the relevant legislative provisions interpretation, it is possible to conclude that the sentence could be admitted as unjust in case if there is an appellate or cassational court’s ruling, which amends the relevant verdict, abolishes it partly or completely and consequently the criminal proceeding is terminated or a new proceeding is appointed in the first instance or (and) appellate

court. Thus, it is a fifth unjust sentence feature as a matter of crime, stipulated by the article 375 of CPCU.

In consideration of the foregoing, it is possible to mark out the following considerable features of the “unjust sentence” conception:

1) it contains the open (if the criminal proceedings were conducted openly) and limited (if the criminal proceedings were undertaken in camera) admission information;

2) it is the form of the court’s decision;

3) the sentence is illegal, invalidate and (or) unreasonable;

4) it includes a considerable violation of the criminal and criminal procedural legislation of Ukraine.

5) there is an appellate or cassational ruling in respect to the sentence, concerning its alteration, cancellation (entirely or partially) and criminal proceeding termination or a new judicial proceedings appointment in the court of the first and (or) appellate instance.

In accordance to the above-stated features, it is necessary to point out that a matter of crime of unjust sentence, under the article 375 of CPCU, is the form of a court decision, which contains the open and limited admission information, which is illegal, invalidate and (or) unreasonable, which considerably infringes the criminal and criminal procedure legislation regulations and, in relation to what, there is an appellate or cassational court’s ruling, concerning the alteration, cancellation of the verdict (entirely or partially) and criminal proceedings termination or a new judicial proceedings appointment in the court of the first and (or) appellate instance.

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