

# COUNTERACTION TO MISCARRIAGE OF JUSTICE IN UKRAINE

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Summary: 1. Introduction. – 2. Criminal Law Measures of Counteraction to Miscarriage of Justice. – 3. Criminal Procedure Measures of Counteraction to Miscarriage of Justice. – 4. Criminalistic Measures of Counteraction to Miscarriage of Justice. – 5. Conclusion

*Investigation of crimes against justice in Ukraine is among topical problems of miscarriage of justice. Hundreds of criminal cases are recorded as a crime in the Official Register in Ukraine but only a few have been brought to the court. In this article we try to approach this problem in three ways: from the point of view of criminal law, criminal procedure and criminalistic measures of counteraction to miscarriage of justice. Such an approach helps to demonstrate problems of investigator, prosecutor and judge at different stages of criminal proceeding.*

*Special attention is paid to specific regulation of the issues of criminal proceedings against a certain category of persons, including judges. Mistakes of representatives of law enforcement bodies become visible as a result of analyzing of real criminal cases. Such an analysis is aimed to disclose the problem of counteraction to miscarriage of justice in Ukraine.*

*Key words: Counteraction, Measures, Miscarriage of Justice, Influence of Justice, Crime Against Justice, Illegal Verdict, Judge, Fair Trial, Court.*

## 1. INTRODUCTION

A deliberately unjust verdict, judgment, order or ruling of a judge (or judges) in Ukraine according to Article 375 of the Criminal Code of Ukraine is punished by custodial restraint for up to five years, or imprisonment for a term of two to five years. It could be named as ‘a medium-gravity’ crime against justice. Aggravating circumstances such as causing serious consequences, a lucrative impulse or other personal interests of a judge (judges) can turn this crime into a serious one. Judge, who committed it, is punished by imprisonment of five to eight years.

A deliberately unjust verdict, judgment, order or ruling is a crime against justice (Chapter XVIII of the Criminal Code of Ukraine). In different countries responsibility for such acts is also envisaged as they are considered 'Crimes against Justice' or 'Crimes against Administration of Justice'. Different Criminal and Penal Codes of European countries include similar articles that provide punishment of deliberately unjust verdict, judgment, order or ruling of a judge (miscarriage of justice). For example, the Criminal Code of the Republic of Albania (Art. 315), the Criminal Code of the Republic of Armenia (Art. 352), the Penal Code of Estonia (§ 311), the Criminal Code of Germany (Sect. 339), the Criminal Code of Latvia (Art. 291), the Criminal Code of the Republic of Moldova (Art. 307), the Criminal Code of the Republic of Slovenia (Art. 288), the Criminal Code of Spain (Art. 446) provide for punishment for such illegal judge activities.

Specific position of a judge and his/her possibilities in legal sphere require specific criminal procedure and criminalistic measures of counteraction to miscarriage of justice. In 2012 the new Criminal Procedure Code was adopted in Ukraine, where special criminal proceedings for different categories of person, including judges are envisaged. In Ukraine, the problem of responsibility for miscarriage of justice (Art. 375 of the Criminal Code of Ukraine) became relevant only after 'the Euromaidan' (2013-2014) and 'The Revolution of Dignity' (2014), when persons who actively participated in these events were convicted for committing various offenses.

The research (2013-2017) of the sentences for miscarriage of justice (Art. 375 of the Criminal Code of Ukraine) has demonstrated, that 11 of them were guilty verdicts, and 2 – non-guilty verdicts. At present, the number of criminal cases is starting to grow (by the statistics of Prosecutor General's Office of Ukraine<sup>1</sup>). The Register of proceedings of crimes also demonstrates this trend: in 2016 – there were 174 offences; in 2017 – 285; in 2018 – 295. But only some of them have been brought to the court: 6 criminal cases during 2016, 3 – during 2017, and 1 – during 2018.

Criminal proceedings in regards to pre-trial investigation, judicial examination of miscarriage of justice indicate the need for theoretical justification of investigators', prosecutors' and judges' activities in this context. For this purpose, we should consider sources in criminal law, procedure and criminalistics. Experts in these spheres have already pointed out to this need.<sup>2</sup>

## 2. CRIMINAL LAW MEASURES OF COUNTERACTION TO MISCARRIAGE OF JUSTICE

We should pay attention to the objective evidence of miscarriage of justice in Ukraine. In this case we are talking about such activities of a judge, which are related to: a) drawing up a legal act (verdict, judgment, decision, ruling or order); b) its signing by a judge (judges); c) pronouncing (disclosing it to the trial participants).<sup>3</sup> Therefore, the

1 See: Prosecutor General's Office of Ukraine, 'Statistical Information' < <https://www.gp.gov.ua/ua/statinfo.html> > accessed 26 May 2019.

2 V Tyutyuhin, O Kaplina, I Titko, 'A Deliberately Unjust Verdict, Judgment, Ruling or Order Passed by a Judge: Some Aspects of Applying Art. 375 of the Criminal Code of Ukraine' (2012) 2 (138) Bulletin of the Supreme Court of Ukraine 42-48.

3 V Tatsiy, V Borysov, V Tyutyuhin (eds), *Criminal Code of Ukraine. Scientific and Practical Commentary: in 2 Vols* (Pravo Publishing House 2015).

pronouncing of the act, in fact, means the end of the crime. This is important because using this approach, there is no need to cancel the decision in the court of appeal or court of cassation.

A sentence, judgment, ruling or order, that are drawn up, signed and pronounced by a judge (judges) are judicial acts. According to Articles 8 and 21 of the Criminal Procedure Code of Ukraine the right to a fair hearing and case judgment within a reasonable time by an independent and impartial court, established by law, is guaranteed to everyone. Criminal proceedings are carried out in compliance with the rule of law, according to which a person, his rights and freedoms are recognized as the highest values, and determine the content and direction of the state activity. The principle of legality in the CPC of Ukraine (Art. 9) is shown by the fact that in the course of criminal proceedings, an investigating judge, prosecutor, head of the pretrial investigation, investigator officers of other public authorities are obliged to strictly obey the Constitution of Ukraine, the Code, international treaties ratified by the Verkhovna Rada of Ukraine (Parliament), the requirements of other legal acts. These guidelines providing compliance with the rule of law and legality are set out in other procedural codes and laws.

The Convention for the Protection of Human Rights and Fundamental Freedoms also contains Article 6 (right to a fair trial) and Article 7 (no punishment without law). The content of these rules is consistent with the provisions of the procedural codes and laws of Ukraine. The practice of the European Court of Human Rights is also important to users, because courts in Ukraine apply the Convention and the case-law as a source of law (the Law of Ukraine 'On the Enforcement and Application of the Practice of the European Court of Human Rights' in 2006).

For holding judges criminally liable for a court decision it is crucial to prove that these acts have signs of 'unjust'. This means that the judge will be brought to criminal liability under Art. 375 of the Criminal Code of Ukraine if the judgment is not consistent with the principles of the rule of law and legality. Thus, an unjust (illegal) decision is not only unfair, but is also taken in violation of the law, beyond the framework of procedures provided for it.

For the criminal legal analysis of the crime, the circumstances of passing a deliberately unjust verdict, judgment, order or ruling by a judge are important. According to the Constitution of Ukraine, justice in Ukraine is carried out only by courts (Art. 124), and the court decides in the name of Ukraine (Art. 129-1). Thus, judicial bodies representing the state can make decisions on behalf of Ukraine. The analysis of the elements of the crime set out in Art. 375 of the Criminal Code of Ukraine indicate that it can be committed only by judicial acts of judges in the exercise of their powers in all forms of justice – criminal, civil, administrative, commercial and constitutional proceedings. Depending on the requirements of Procedural Codes of different forms of justice there is a correlation regarding the possibility of passing a certain judicial act.

The most controversial issue is the possibility of bringing judges of the Constitutional Court of Ukraine to criminal liability for passing a deliberately unjust judgment in the administration of constitutional justice. This issue arose in Ukraine following the adoption of a Resolution 'On Response to Oath Violations by Judges of the Constitutional Court of Ukraine' № 775-VII on 24 February 2014 by the Verkhovna Rada of Ukraine (Parliament), which suggested the Office of the Prosecutor General of Ukraine initiating criminal proceedings on the decision by the Constitutional Court of Ukraine № 20-rp of

30 September 2010 and bringing those guilty to justice. On the same day the press service of the Constitutional Court of Ukraine published the judges' address, which expressed their concern and pointed to the provisions of the Law of Ukraine 'On the Constitutional Court of Ukraine' regarding the impossibility of bringing judges to legal liability.<sup>4</sup>

The judges of the Constitutional Court of Ukraine are not legally liable for the results of voting or statements made in the Constitutional Court of Ukraine and its panels, with the exception of insult or defamation when trying cases, taking decisions and giving opinions by the Constitutional Court of Ukraine (Article 28 of the Law of Ukraine 'On the Constitutional Court of Ukraine'). This provision has exceptions and is associated with the possibility of bringing judges of the Constitutional Court of Ukraine to justice for passing a deliberately unjust judgment.

First, the judges of the Constitutional Court of Ukraine may be held criminally liable, in principle, but under a special procedure, as provided by the Constitution of Ukraine (Art. 126, p. 2, Art. 127, p. 149) and the Criminal Procedure Code of Ukraine (Chapter 37).

Second, legislative position of the Constitutional Court of Ukraine in the judiciary as a body with a special status that carries out its tasks within the justice system, is consistent with the court system (i.e. administers justice).<sup>5</sup> Therefore, the scope of constitutional justice and constitutional justice participants are protected, above all, by the rules of Section XVIII of the Criminal Code of Ukraine 'Crimes Against Justice'.

Third, the provision of the Law of Ukraine 'On the Constitutional Court of Ukraine' (Art. 28), which discharges judges from legal liability, has limited effect, which is outlined by its content. This approach is consistent with the principle of judicial immunity as part of the system of checks and balances, and provides an important guarantee of the rule of law (O. Ovcharenko).<sup>6</sup> However, some criminal law experts believe that the Constitutional Court of Ukraine does not administer justice (P. Andrushko<sup>7</sup>, R. Melnik<sup>8</sup>). However, it is not clear, as which body they qualify the Constitutional Court of Ukraine. Taking his approach, the judges of the Constitutional Court of Ukraine cannot be brought to justice for passing a deliberately unjust judgment, because judges who do not administer justice cannot commit any crime against justice, including passing a deliberately unjust judgment.

Other experts in criminal law point out that the Constitutional Court of Ukraine not only administers justice, but also is a body of judicial power. Therefore, judges of the Constitutional Court of Ukraine should be held criminally liable for passing deliberately unjust decisions, taken after considering Cases of unconstitutionality of laws and regulations of the Verkhovna Rada (Parliament), the President, the Cabinet of

4 The official Site of the Constitutional Court of Ukraine <<http://www.ccu.gov.ua/uk/publish/article/239150>> accessed 27 May 2019.

5 M Shepitko, 'Criminal Law Approach to Understanding the Concept of Justice' (2015) 3 (82) Bulletin of the National Academy of Sciences of Ukraine 126.

6 O Ovcharenko, 'On the Responsibility of the Constitutional Court of Ukraine' (2013) 26 (65), 2-1 (Part 1) Scholarly notes of V. Vernadsky Tavria National University. Series 'Legal science' 195.

7 P Andrushko, 'Some Issues of Qualifying Deliberately Unjust Decisions Taken by a Judge (Judges) in Criminal Proceedings in Terms of Criminal Law (Art. 375 CC)' (2014) 8 (168) Bulletin of the Supreme Court of Ukraine 37.

8 R Melnik, 'The Responsibility of the Constitutional Court of Ukraine Judges for Passing a Deliberately Unjust Act: the Problem in Terms of De Lege Ferenda' in *On Crimes and Punishment: the Evolution of criminal Law Doctrine* (Materials of International Scientific-Practical Conference Dedicated to 250th Anniversary of Treatise by Cesare Beccaria, Yurydychna Literatura 2014).

Ministers of Ukraine (Government), legal acts of the Crimean Parliament (N. Halevykh, L. Palyuh<sup>9</sup>). We agree that 'the constitutional jurisdiction is implemented on the principles of constitutional justice, and its goal is aimed at achieving the inviolability of the constitutional order, establishing the principle of separation of powers and the rule of law, which the society aspires to' (A. Selivanov).<sup>10</sup> This conclusion is confirmed by the decision making process of the Constitutional Court of Ukraine and the purpose of its activities.

The purpose of the judiciary is not bringing to legal responsibility, but a dispute resolution, establishment of the objective truth and justice. The Law of Ukraine 'On the Constitutional Court of Ukraine' stipulates that the powers of the Constitutional Court of Ukraine do not include the issues of legality of acts of state authorities, authorities of the Autonomous Republic of Crimea and local governments, and other matters within the jurisdiction of the courts of general jurisdiction (Art. 14). The grounds for the Constitutional Court of Ukraine's decision on the unconstitutionality of acts on the whole or in parts include: inconsistency with the Constitution of Ukraine; violation of the proceedings set out in the Constitution of Ukraine in terms of their review, adoption or their entry into force; exceeding constitutional authority in the course of passing them (Art. 15). Therefore, the Constitutional Court has not only the function of applying the law, but also enforcing it. The function of applying the law is fulfilled by the Constitutional Court of Ukraine through the direct application of the Constitution of Ukraine and the recognition of laws, other legal acts or certain provisions unconstitutional and null and void<sup>11</sup> from the day the Constitutional Court of Ukraine takes decision on their unconstitutionality (p. 2, Art. 152 of the Constitution of Ukraine). The law enforcement function of the Constitutional Court of Ukraine is fulfilled through the fact that this judicial authority using its powers, the legal status of judges, protects the rights, freedoms and legitimate interests of man and citizen through the implementation of tasks of the Constitutional Court of Ukraine – to guarantee the supremacy of the Constitution of Ukraine as the Fundamental Law of the state in Ukraine (Art. 2 of the Law of Ukraine 'On the Constitutional Court of Ukraine'). It is important that a person can make a constitutional appeal to the Constitutional Court of Ukraine 'to ensure the exercise or protection of constitutional rights and freedoms of man and citizen and legal entity' (p. 1 Art. 42 of the Law of Ukraine 'On the Constitutional Court of Ukraine').

The analysis of the provisions of Part 3 Art. 28 of the Law of Ukraine 'On the Constitutional Court of Ukraine' indicates that this rule has some serious limitations on discharge from legal liability: 1) judges of the Constitutional Court of Ukraine are not legally liable for the results of the vote in the Constitutional Court of Ukraine and its panels; 2) judges of the Constitutional Court of Ukraine are not legally liable for the statements in the Constitutional Court of Ukraine and its panels; 3) the exception is liability for insult or defamation trying cases, taking decisions and giving opinions by the Constitutional Court of Ukraine. Due to the limitations of the rule the formal application of Art. 375 of the Criminal Code of Ukraine for passing a deliberately unjust decision or ruling of the Constitutional Court of Ukraine is possible. Thus, Part 3. Art. 28 of the Law of Ukraine 'On the Constitutional Court of Ukraine' sets out the grounds for dismissal of judges,

9 N Halevykh, L Paliuh, 'Taking a Deliberately Unjust Court Decision – Issues of Criminal Liability' (2015) 49 (1066) Legal Bulletin of Ukraine 7.

10 A Selivanov, *Constitutional Jurisdiction and Constitutional Justice in Ukraine* (Logos 2010).

11 Actually – no longer in force as the wording remains in the legislation until cancelled by an unauthorized body.

which are only: 1) the election results, not the decision or approval; 2) statements in the Constitutional Court of Ukraine and its panels, and the decision or ruling contains no statements in principle; 3) exception regarding insult or slander when trying cases, taking decisions and giving opinions is irrelevant to the application of Art. 375 Criminal Code of Ukraine as a decision or ruling cannot contain insults or slander.

New controversial judgment of the Constitutional Court of Ukraine № 1-r/2019 of 26 February 2019<sup>12</sup> in case of recognition of Art. 368-2 of the Criminal Code of Ukraine 'Illegal Enrichment' as a unconstitutional returned us to the problems of criminal liability and proving for miscarriage of justice in the sphere of constitutional proceeding.

Thus, the analysis of the objective signs of passing a deliberately unjust verdict, judgment, order or ruling allows us to specify that the act lies in the drafting, signing and pronouncing a legal act by a judge (judges), which does not comply with the rule of law and legality in the course of exercising their powers in the name of the state in criminal, civil, administrative, commercial or constitutional proceedings.

To bring judges to criminal responsibility for taking an unjust verdict, judgment, order or ruling, criminal justice authorities must establish that the judge (the judges) who took the relevant decision, administered justice, being in this position legally, fulfilled their duties in accordance with the provisions of the procedural laws. To bring a judge (judges) to criminal liability under Art. 375 of the Criminal Code of Ukraine, criminal justice authorities also have to ascertain his (their) guilt in the form of direct intent. This is indicated by 'deliberation'. That is, a judge (judges) in the course of drawing up, signing and / or pronouncing a judgment, decision or ruling realizes (realize) that the legal act (decision) is unjust.

Passing a verdict, judgment, order or ruling by a judge (judges) in the course of exercising his (their) powers in criminal, civil, administrative, commercial or constitutional proceedings taken by mistake cannot be punished under Art. 375 of the Criminal Code of Ukraine.

### **3. CRIMINAL PROCEDURE MEASURES OF COUNTERACTION TO MISCARRIAGE OF JUSTICE**

The Criminal Procedure Code of Ukraine provides for Section 37, which regulates the issues of criminal proceedings against a certain category of persons. In this case it concerns the judges and the judges of the Constitutional Court of Ukraine. In criminal proceedings against judges, a judge or judge of the Constitutional Court of Ukraine gets a notice of suspicion issued by the Prosecutor General or his deputy (Art. 481 CPC of Ukraine). The apprehension or detention of a judge requires the consent of the High Council of Justice. Unless the High Council of Justice sanctions it, no judge can be arrested or held in custody before conviction by a court, except for detention of judges during or immediately after the commission of a grave or particularly grave crime. A judge detained on suspicion of committing acts entailing criminal liability must be immediately dismissed after establishing his identity, with the exceptions as follows: 1) if the High Council of Justice granted consent to arrest the judge in connection with the act; 2) the detention of the judge during or immediately after committing a grave

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12 The official Site of the Constitutional Court of Ukraine <<http://www.ccu.gov.ua/docs/2627>> accessed 27 May 2019.



or particularly grave crime, if such detention is necessary to prevent the commission of a crime, crime consequences or preserve the crime evidence. The judge must be dismissed immediately if the purpose of such detention (crime prevention, prevention of the crime consequences or preservation of the crime evidence) is achieved (Art. 482 CPC of Ukraine).

The presence of special procedures for giving a notice of suspicion to judges and judges of the Constitutional Court of Ukraine, their detention or the choice of preventive measure indicates the violation of the principle of equality before the law and the courts. This breach of the equality principle is the result of a special status of judges, complex procedures for appointment to this position and judicial immunity. The concept of judicial immunity is revealed in the Law of Ukraine 'On the Judiciary and Status of Judges', which states that a judge cannot be held liable for his decision, except for committing a crime or a disciplinary offence (Art. 49). A judge cannot be compulsorily brought or forcibly delivered to any institution or body, beside court, except for the above cases. Judges can be notified of the suspicion of a criminal offense only by the Prosecutor General or his deputy. The judge may be suspended from administration of justice for a period not exceeding two months in connection with a criminal prosecution on the basis of a grounded complaint of the Prosecutor General or his deputy under the current statutory procedure. The decision on a temporary suspension of judges from justice is adopted by the Supreme Council of Justice.

The analysis of legal provisions on bringing judges (judges) to criminal prosecution indicates that there are specific procedures for the investigation of crimes committed by them. These special procedures envisaged by the Criminal Procedure Code of Ukraine point out inequality of judges suspected of committing a crime and other suspects. It is important to note that this need is conditioned by judicial inviolability and immunity, determined by the status of judges and allows them to be independent in making decisions.

To clarify the specific features of investigation of an unjust verdict, judgment, order or ruling deliberately taken by a judge it is necessary to establish which investigating authority should conduct it. According to the CPC of Ukraine, it is the investigators of the State Bureau of Investigation who carry out pre-investigation of crimes committed by a judge, except for cases when pre-trial investigation of these crimes is assigned to the jurisdiction of the National Anti-Corruption Bureau of Ukraine (Art. 216). Despite the fact that the Law of Ukraine 'On the State Bureau of Investigation' is in force, the body of criminal justice itself – the State Bureau of Investigation – has not been formed yet. That is why, the general provision is applied, which indicates that the investigators of the National Police carry out pre-trial investigation of criminal offenses, provided by the law of Ukraine on criminal liability, except those assigned to the jurisdiction of other bodies of pre-trial investigation. In our opinion, this approach cannot be applied concerning the procedure of investigating a deliberately unjust verdict, judgment, order or ruling. This category of cases is quite complex because investigating actions are taken against a judge; investigators have to search and seize documents from the court document circulation, interview people who mostly have a legal background (education). At the time of substantial reform and renewal of the National Police, we can say that an investigation by the National Police against judges suspected of taking a deliberately unjust verdict, judgment, order or ruling is not correct, because the possibility of effective investigation by the investigators of the National Police in the

period of significant changes is limited. This situation is also affected by the fact that the procedure of the pre-trial investigation is controlled by the prosecutor (Art. 36 CPC of Ukraine). In this case, the investigator of the National Police is in a situation where he is deprived of any initiative during the preliminary investigation, as an appointed prosecutor manages the case. The status of an investigator during the preliminary investigation also raises doubts as the adversarial principle puts him on the side of the prosecution, which reduces his capacity to make decisions not only on the prosecution, but also as for acquittal of a person suspected at the stage of preliminary investigation.

#### 4. CRIMINALISTIC MEASURES OF COUNTERACTION TO MISCARRIAGE OF JUSTICE

A case study of 12 sentences, passed on persons accused of taking a deliberately unjust verdict, judgment, order or ruling,<sup>13</sup> allow us to specify certain problems faced by the investigators, prosecutors and judges in these cases. Thus, the acts provided for in Art. 375 of the Criminal Code of Ukraine were committed 8 times in civil proceedings, 4 times – in administrative proceedings in cases of administrative violations, 1 time – in criminal proceedings. 7 times judges took deliberately unjust verdicts, judgments, orders or rulings without aggravating features, 4 times – for financial gain, 2 times – with serious consequences. Interestingly, this type of crime is often combined with malfeasance in office: the abuse of power or position (2 cases), exceeding of power or authority (1 case), forgery (9 cases). There were also cases of combining this crime with fraud (1 case), unauthorized tempering with the computer (1 case), and theft of documents (1 case).

The only case of acquittal concerns events in the Euromaidan when traffic police officers completed a report on administrative offense against an Automaidan activist, which he had not committed. As a result of proceedings, a judge passed a deliberately unjust decision in those circumstances. On 8 April 2016, Sviatoshyn district court in Kyiv, after considering a case as for a charge under Part. 2, Art. 375 Criminal Code of Ukraine, passed an acquitting judgment on account of procedural violations in the course of notifying the judge of suspicion of committing the crime. The Court concluded that under the current legislation, the Deputy Prosecutor General of Ukraine was to notify of the suspicion. The court found the judge not guilty because the violation of the notification procedure led to incomplete preliminary investigation and breach of procedural law. Thus, we can see an example of incompetent conduct of preliminary investigation and violations of procedural rules. This made a full and thorough investigation of the criminal proceedings and proving of guilt of the judge accused of taking a deliberately unjust ruling impossible.<sup>14</sup>

13 Archive of Letychiv District Court of Khmelnytsky region, the case number 1-58/12; Archive of Court of Appeal in Sevastopol, the case number Yo / 2790/2/12; Archive of Kremenchug district court of Poltava region, the case number 1614/2538/12; Archive of Leninsky District Court in Nikolayev, the case number 1416/7548/12; Archive of Melitopol district court of Zaporozhye region, the case number 815/5626/2012; Archive of Holoseiev district court in Kyiv, the case number 752/2780/13-K; Archive of Leninsky District Court in Nikolayev, the case number 489/9376/13-K; Archive of Chigirin district court of Cherkasy region, the case number 708/752/14-K; Archive of Bolekhiv City Court of Ivano-Frankivsk region, the case number 339/417/14-K; Archive of Sviatoshyn District Court in Kyiv, the case number 759/15 166/15-K; Archive of Pechersk district court in Kyiv, the case number 757/3752/15-k.

14 Archive of Sviatoshyn District Court in Kyiv, the case number 759/15 166/15-K.



The investigation of a deliberately unjust verdict, judgment, order or ruling begins with the fact that this offense is quite difficult to detect. The statistical data of the Supreme Court of Ukraine give us an idea about it. Thus, in 2015 the local courts made 1,560,906 decisions, and in 2016 – 1,398,717 decisions. Herewith, in 2015 – 54 510 (3, 5%), and in 2016 – 45,419 (3, 2%) decisions of local courts were reversed or reviewed on appeal. In 2015 – 17 642 (1, 8%), in 2016 – 21,094 (1, 5%) decisions of local courts and courts of appeal were reversed or reviewed under procedure of cassation.<sup>15</sup> Therefore, we have to admit that judges of local and appellate courts make decisions that are reversed or reviewed. This may indicate errors made by judges or their willful acts aimed at taking deliberately unjust decisions.

Here arises the issue of possibility of revealing verdicts, judgments, orders and rulings that are unjust. We believe that a specially created body, such as the National Anti-Corruption Bureau of Ukraine should reveal such decisions, if the crime is associated with corruption or a selfish motive. However, we should keep in mind that this body is not a substitute for courts of appeal or cassation courts nor is it created to check the quality of their review. This body should respond to information from mass media or citizens regarding the facts of corruption.

Investigation of a deliberately unjust verdict, judgment, order or ruling is connected with the reconstruction of the events that occurred in the course of the trial. In addition, investigators tend to rely on the position of judges in the court of appeal and cassation authority in such cases. Investigators should undertake search and seizure of case files and documents that are relevant to the case (court hearing records, audio and video recording of the court hearing, a document confirming payment of court fees, etc.). The investigator must interrogate all the trial participants and collect evidence about the course of legal proceedings (if they took place), whether they started during working hours, whether parties and other participants in the proceedings were notified about it, how the judge behaved during the proceedings, whether he undertook an initiative during the trial or only performed a balancing function, whether he had relations with the parties to the proceedings or other interested persons.

The analysis of cases in which a judge was accused of passing a deliberately unjust verdict, judgment, order or ruling, has allowed us to conclude that the investigator was in a situation of proving the authenticity of signatures on the acts of court and had to conduct technical research of the document. This conclusion is based on the fact that almost for each of these cases an expert was involved to carry out a handwriting examination and technical study of the document. In addition, depending on the subject matter, forensic examination, judicial construction and technical examination, computer forensic analysis and phonoscopic examination were conducted. Thus, in each of these cases the investigator tried to integrate the collected evidence with the results of forensic examinations.

It is interesting that in 6 out of 11 sentences in which a judge was found guilty of passing a deliberately unjust verdict, judgment, order or ruling, it was revealed that the judges either imitated the trial or the trial did not happen at all, or it established legal facts that never happened. In two cases, instead of representatives of the parties,

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15 The official site of the Supreme Court of Ukraine <[http://www.scourt.gov.ua/clients/vsu/vsu.nsf/\(documents\)/FAFD37716AD40ED9C22580E400382EF6](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/FAFD37716AD40ED9C22580E400382EF6)> accessed 27 May 2019.

other persons were called on their behalf and they reached settlements that were approved by court decisions.

Interrogation of the trial participants was conducted due to the fact that the judge, counsels, lawyers, prosecutors, and other persons participating in the case had legal education and could both help the investigation and interfere with it. This interference can take the form of reference to the right to refuse giving evidence or making statements about oneself, family members or close relatives enshrined in the Constitution of Ukraine (Art. 63).

The investigator, prosecutor, carrying out pre-trial investigation and the judge who institutes the proceedings in this case, feel a considerable psychological impact of the public, colleagues involved in the administration of justice, participants in proceedings in which a deliberately unjust verdict, judgment, order or ruling was passed. A significant complication is the fact that bringing to justice judges who passed an unjust verdict, judgment, order or ruling shall take the form of pre-trial investigation, and then a trial, that is, it means the same situation, in which an unjust judicial act was passed.

It is important to carry out investigative actions in the form of pre-trial investigation. The collected materials and the indictment must be submitted to the court. Such cases should be heard by an experienced judge, because he feels a considerable psychological impact of the defendant, who also served as a judge and is accused of passing a deliberately unjust verdict, judgment, decision, or order.

## **5. CONCLUDING REMARKS**

The research in the sphere of counteraction to miscarriage of justice in Ukraine has enabled us to identify a number of problems in terms of criminal law and criminal proceedings. A comparative analysis of Criminal and Penal Codes demonstrated similar approach of Parliaments in forming articles, including punishment for miscarriage of justice. Specifics in the wording of Art. 375 Criminal Code of Ukraine formulates stepping of adoption of decisions by judges, that influence classification of this crime against justice and its characterization.

The study of criminal procedural problems of investigating a deliberately unjust verdict, judgment, order or ruling taken by a judge (judges) indicated that as the judges are granted inviolability and immunity, a special procedure of giving a notice of suspicion, apprehension or detention a judge in custody is applied. However, the legal loophole is created by the fact that in the Criminal Procedure Code there is no indication as to which investigative body should be investigating this crime. It is not specified either that an investigator should have a considerable investigation experience, because it is most likely that in the course of investigation he will be exposed to illegal influence of his colleagues. This conclusion is based on the fact that the situation when a judge passes a deliberately unjust sentence, judgment, ruling or order, is comparable with the procedures stipulated by the Criminal Procedure Code in reference to the case investigation and court hearing. The case study allowed us to point out the challenges faced by the investigator, prosecutor and judge in the investigation of this crime.