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Historical-Legal Analysis of Criminal-Legal Counteraction to Domestic Violence in Ukraine

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Abstract

The purpose of the study is to examine the historical aspects of the development of legislation defining criminal law measures of influence for committing domestic violence. The following methods were used to achieve this goal: empirical (observation, description) and theoretical (analysis, system approach, deduction). The use of the historical method allowed for outlining the process of forming legislation in the field of countering domestic violence in accordance with the chronology of past events; the use of logic and dialectics methods enabled the analysis of normative sources on the research subject. The scientific originality of the study consists in highlighting the historical-legal aspects of criminal law measures in the context of limiting domestic violence. It is established that countering domestic violence through the use of criminal law measures of influence is the result of the historical development of Ukrainian statehood and the legal system, ratification of international documents, and bringing the norms of Ukrainian legislation in line with international legal provisions. The Ukrainian model of countering domestic violence was gradually improved by adopting relevant legal regulations. Therewith, the issue of formal consolidation of the system of criminal law measures to prevent domestic violence remained unresolved for a long time. The amendments made to the Criminal Code of Ukraine are the result of adapting the best international practices designed to lay a solid foundation for the application of adequate criminal law measures to overcome domestic violence. The study allowed for tracing and clearly determining the main historical steps in the establishment of a system of criminal law measures for regulating domestic violence and identifying which regulatory sources have become an integral part of national legislation on these issues

Keywords:

domestic violence; criminal law measures; ensuring equality; historical-legal aspects; legislation

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Introduction

Ensuring gender equality and countering gender discrimination are historically established areas of guaranteeing the rights, freedoms, and interests of citizens. The development of legislation on the application of criminal law measures for committing violence has contributed to the introduction of fundamentally important innovations aimed at preventing and suppressing these crimes. It is necessary to thoroughly investigate and summarise the historical experience and practice of developing legislation on this issue to apply effective mechanisms for preventing and countering domestic violence.

The examination of historical-legal aspects of the establishment of the legislative framework, which details criminal-legal instruments for regulating domestic violence, contributes to the determination of the prerequisites, features of the development of legislation on the chosen subject, the establishment of the main features and ways of development of criminal-legal measures for regulating domestic violence.

However, it still remains insufficiently covered, and the need to improve criminal law mechanisms for regulating domestic violence requires further research and generalisation. It is necessary to emphasise the historical-legal aspect of the establishment of criminal-legal measures to counteract violence, which remains relevant given the changes made to the Criminal Code of Ukraine.

The purpose of the study is to examine the historical aspects of the development of legislation defining criminal law measures of influence for committing domestic violence. Achieving this goal involves performing the following tasks:

- perform an overview of historical events and documents on the establishment of a system of measures to counteract domestic violence;
- analyse the main international and national sources of law that substantially influenced the establishment of a Ukrainian model for regulating domestic violence;
- investigate the historical-legal component in the process of developing criminal law measures to prevent violence.

Results and Discussion

Domestic violence is one of the most massive violations of human rights and freedoms, the characteristic features of which are cruelty, systematic, necessarily – the presence of intent, and it also leaves incorrigible emotional suffering throughout life [1].

The problem of domestic violence has a deep historical background. Some of its aspects were somehow condemned at different stages of society's development. The ideas of equality, harmony, and non-discrimination were and remain important postulates of the relationship between men and women

and were fundamental even in the early stages of establishing Ukrainian statehood.

The ecclesiastical and secular law of Kievan Rus began a centuries-old tradition of honoring marriage, preventing violence, disrespect, and discrimination. Mutual respect of spouses, coordination of desires to start a family were considered the norm of sexual behaviour. Violence was severely condemned by the institute of the church of Kievan Rus [2].

Studies of S.S. Kosenko [3] prove that the legislative regulation of violence begins in the time of ancient Russia (Russkaya Pravda of the 11th-12th centuries, the Charter of Vladimir, Knyaz charters, and charters of the 11th-14th centuries, Sudebnik 1497). Notably, Yaroslav the Wise's Russkaya Pravda is one of the most important legal documents of that time, which contains measures of criminal-legal influence on illegal actions and punishment for their commission. According to the Charter of Knyaz Vladimir, a brawl between a man and a woman was considered a crime.

The provisions of the statutes of the Grand Duchy of Lithuania of 1529, 1566, and 1588 also outlined the issue of conviction and punishment for committing violent acts in the family: strict sanctions were provided for crimes committed against family members (for the murder of one of the family members, the death penalty was provided). It was forbidden to enter into a marriage against the will of a woman. However, domestic violence against women was mostly punished only for committing extremely grievous crimes. Thus, in the times of Kievan Rus and in the era of the Grand Duchy of Lithuania, the first fixed provisions appeared aimed at applying punishment for committing certain actions containing signs of domestic violence.

Recalling the history of the Ukrainian Cossacks, the issue of respect for the opposite sex and ensuring protection from violence was an unwritten rule for the Cossack Army. The Ukrainian family of this period was built in accordance with the proportional development of the two sexes. In the system of spiritual values of the Cossacks, the traditions of honouring the woman acquired ideological significance [2].

Various punishments were imposed for violating the idea of equality and respect, using force against women and children, and committing violence. In particular, when a Cossack "defames a woman not out of decency", he was supposed to be beaten with whips, sticks, since it was believed that such a crime dishonours the entire Zaporizhzhia Army. However, the legal documents of that time did not provide for a mechanism of legal protection and adequate punishment for committing domestic violence. For a long time, this subject remained outside the field of legal regulation and was considered the prerogative of established customs and traditions.

During the years of Ukraine in the USSR, the legislation did not provide for a separate penalty for domestic violence. The issue of domestic violence and violence against women, in general, began to be investigated in detail only in the middle of the 20th century, especially after the emergence of feminist movements and after the declaration of 1975 by the UN General Assembly – the year of women.

Thus, for a long time, the problem of domestic violence was outside the field of legal regulation. Any interference of the state and society in family relations was considered a gross violation of the secrecy of private life and was justified by established customs and traditions [4].

The first real steps to counter violence were taken after the end of World War II. The regulatory documents adopted during this period had a positive effect on ensuring parity of women's and men's rights. The provisions of the UN Charter of 1945 and the Convention on the elimination of all forms of discrimination against women, adopted by the UN General Assembly in 1979, marked the beginning of legal equality, prevention of discrimination and violent actions in the system of marriage and family relations. In the context of overcoming the problem of domestic violence, according to Art. 16 of the convention, state parties are obliged to take appropriate measures to eliminate discrimination against women in all matters related to marriage and family relations based on equality between men and women [5].

Given that the problem of domestic violence also concerns children, during this period a number of documents were adopted that defined and consolidated the rights of children, in particular, their right to protection from physical and psychological pressure. First of all, the Universal Declaration of Human Rights, adopted by the UN General Assembly resolution of December 10, 1948, should be mentioned. This international document established fundamental provisions for the protection of the rights of spouses and children, defined fundamental positions necessary for the development of national legislation. Therewith, the ratification of this document by the republics of the former USSR took place much later – in 1980 [6]. Ukraine ratified the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in 1981, and the Convention Against Torture (CAT) in 1987 [7]. The 1989 Convention on the Rights of the Child contained an obligation for countries involved to take the necessary legislative, administrative, social, and educational measures to protect the child from all forms of physical and psychological violence, abuse [8]. In other words, for committing violence against children, the state is obliged to apply various mechanisms of influence on the violator, depending on the severity of the act committed. Notably, the problems

of domestic violence began to be investigated and analysed in depth only at the end of the 20th century. Thus, a number of important documents were adopted to prevent the spread of violence. On December 20, 1993, the UN General Assembly adopted the “Declaration on the Eradication of Violence Against Women” [9], which defines the content and cases that cover the concept of “violence”. The document is aimed at protecting women's rights, ensuring equal rights for men and women, and preventing their violation.

Undoubtedly, the adoption of the Declaration on the Eradication of Violence Against Women is due to the large number of violations committed by men through the use of violent acts. Achieving equality in the rights and responsibilities of family members required an international solution to this issue.

It is important that at the beginning of the 21st century, Ukraine became one of the first countries in Eastern Europe to recognise domestic violence as an important public problem, depriving abusers of the opportunity to hide behind a screen of non-interference in private life [10]. Protection from violence documents are mainly aimed at women and children who are victims of male violence.

Domestic violence mainly affects children, women who are in a state of economic, psychological, or other dependence on men, intimate partners, or parents, the elderly, persons with disabilities, and other vulnerable categories of persons.

The Verkhovna Rada adopted the Law of Ukraine of November 15, 2001 “On prevention of domestic violence”, which recognised both the existence of this phenomenon in society and the readiness to resist it (now the Law is no longer valid). In accordance with its requirements, authorised units (in particular, police units) took measures to prevent violence based on the results of receiving a report or message about the facts of a real threat of domestic violence or about the facts of committing such violence [11]. Recognition of the problem of domestic violence at the legislative level led to the establishment of a regulatory framework and effective practice for taking measures to define the basis for countering and punishing this act.

Despite the fact that this law specified the legal and organisational basis for prevention and legal responsibility for committing domestic violence, it did not contain effective measures to stop such violence, influence the abuser, and help affected persons [10].

Shortcomings in the legislative justification of the phenomenon of domestic violence substantially affect the criminal legal qualification, which is important for determining an adequate measure of criminal legal influence for the committed offence. However, given the existence of a substantial number of unresolved issues and contradictory provisions, this document needed substantial additions.

Measures in the field of preventing domestic and gender-based violence are provided for in section 5 of the Law of Ukraine “On ensuring equal rights and opportunities for women and men”. According to it, the abused person or their representative has the right to apply to the court with an application for issuing a restrictive order, which establishes one or more measures to temporarily restrict the rights of the offender or impose obligations on them [12].

A new stage in the fight against this negative phenomenon was the adoption of the Law of Ukraine “On preventing and countering domestic violence”, which introduced a comprehensive approach to combating domestic violence, considering the European experience. The law contains key concepts and foundations for preventing domestic violence, and the priority is to properly investigate cases of domestic violence, bring abusers to justice, and change their behaviour. Divisions of the National Police of Ukraine have acquired a wide range of powers to detect, stop, and prevent domestic violence. It provides for the right of the abused person to appeal to law enforcement agencies and the court to bring abusers to justice, apply special measures to them to counteract domestic violence [13].

Therewith, the terms “gender”, “gender violence”, “gender stereotypes” and other derived terms used in the Istanbul Convention were removed from the final version of the Law. Instead, the term “gender-based violence” is used, which does not fully correspond to the concept of gender-based violence, and therefore, Ukrainian legislation cannot fulfil its international obligations if the definitions derived from the term “gender” are not applied [14].

In addition, the main goals of the Istanbul Convention are to protect women from all forms of violence; prevent, prosecute, and eliminate violence against women and domestic violence, and promote the elimination of all forms of discrimination against women, achieve equality between women and men [15]. The Istanbul Convention covers all forms of violence against women, including domestic violence, and defines it as a violation of human rights and a type of discrimination.

The adoption of the regulations discussed above has formed a proper legal framework for improving the existing mechanisms and measures of influence for committing domestic violence. Therewith, the application of criminal legal measures to influence violators of the foundations of gender policy and equality, marriage, family norms, and other legal relations is possible based on specialised regulatory documents.

As a result of the implementation of the provisions of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), the Criminal Code of Ukraine defines a list of criminal law measures.

The Law of Ukraine “On amendments to the Criminal and Criminal Procedure Codes of Ukraine to implement the provisions of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence” was adopted to implement measures to consolidate the provisions of the Istanbul Convention, on December 6, 2017.

According to the Law, the Criminal Code of Ukraine is supplemented with the following articles: “domestic violence” (Art. 126-1); “restrictive measures applied to persons who have committed domestic violence” (Art. 91); “forced marriage” (Art. 151-2); “non-compliance with restrictive measures, restrictive regulations, or the programme for abusers” (Art. 390-1), etc. Section 4 “Criminal offences against sexual freedom and sexual integrity” was completely updated [16]. The document entered into final force in early 2019. Until now, domestic violence in Ukraine was not considered a criminal offence, and the corresponding actions were qualified as administrative offences.

The changes consist of a qualitatively new approach to resolving the issue of domestic violence. The use of European experience allowed legally consolidating the fundamental aspects of overcoming domestic violence, clearly defining the levers for solving the problem. Domestic violence ceased to be a purely family, private matter, as the state introduced an effective mechanism for countering and preventing it [17].

According to Art. 126-1 of the Criminal Code of Ukraine, domestic violence is the deliberate systematic commission of physical, psychological, or economic violence against spouses or former spouses, or another person with whom the abuser is (was) in a family or close relationship, which leads to physical or psychological suffering, health disorders, disability, emotional dependence, or deterioration of the quality of life of the victim [18].

This type of violence is a complex and historically persistent phenomenon that affects individuals, society, and the state in general. [19]. Domestic violence is not only the result of the abuser's potential impunity but also the victim's perception of normal circumstances in the family. Since childhood, the subconscious mind of most people has not clearly formulated the idea of what normal relationships in the family should be [20].

Using Demographic and Health Survey (DHS) data from 32 different developing countries (including Ukraine), Rawlings S. & Siddique Z. investigated the impact of domestic violence on the mortality of children born by female victims. According to the results of the study, it was discovered that children of mothers who were victims of domestic violence are 0.4 per cent more likely to die during the first month of life, 0.7 per cent – during the year, and 1.1 per cent – during the first five years after birth. The

authors also found that the use of domestic violence and marital rape laws in different countries that criminalise violence against women and/or family rape reduces the frequency of such violence [21].

Thus, according to the Criminal Code of Ukraine, it is clearly and unambiguously established that domestic violence is a crime, even if it occurs "in the family circle" and concerns only husband and wife. Committing domestic violence is punishable by 150-200 hours of community service or arrest for up to 6 months, restraint for up to 5 years, or imprisonment for 2 years [18].

Thus, A.A. Vozniuk [22] proposes to distinguish between the concepts of "domestic violence" and "a crime related to domestic violence" in the Criminal Code of Ukraine. The author suggests interpreting domestic violence as a crime, provided for in Art. 126-1, and a crime related to domestic violence should be interpreted as any socially dangerous act provided for in a Special part of the Criminal Code of Ukraine, which consists in the use of physical, mental, economic, or sexual violence against spouses or former spouses, or another person with whom the abuser is (was) in a family or close relationship. The author suggests that this concept, and an exhaustive list of such crimes, should be fixed in a note to Art. 91-1 of the Criminal Code of Ukraine.

According to Art. 91-1 of the Criminal Code of Ukraine, the following restrictive measures may be applied to persons who have committed domestic violence: 1) prohibition to stay in a place of cohabitation with a person who has suffered from domestic violence; 2) restriction of communication with a child if domestic violence is committed against a child or in their presence; 3) prohibition to approach a certain distance to a place where a person who has suffered from domestic violence can permanently or temporarily reside, temporarily or systematically stay in connection with work, study, treatment, or for other reasons; 4) prohibition of correspondence, telephone negotiations with a victim of domestic violence, other contacts through means of electronic communications in person or through third parties; 5) referral for a programme for abusers or probation programme [18].

Disclosure of the list of measures applied for committing domestic violence within the framework of the main criminal law initiated the process of an effective response to it.

As the review of the historical process of forming the basis for the application of criminal measures shows, the official consolidation of a clear list of means to restrict and stop an illegal act is a logical continuation of precise rule-making work on regulating the issue of countering violence and ensuring gender equality.

Criminal-legal measures of influence on the results of domestic violence were formed in accordance with the norms, customs, and traditions in

force in the state. Today, Ukraine has created a powerful mechanism for preventing and countering domestic violence. The Criminal Code of Ukraine and the Law of Ukraine "On preventing and countering domestic violence" provide for tougher penalties for abusers and provide an opportunity for employees of the National Police of Ukraine to control the behaviour of the violator to avoid repeated violence. Therewith, the issue of ratification of the Istanbul Convention remains open [17].

Ukraine needs to ratify this convention as soon as possible to maintain its international reputation for several reasons. First, Ukraine must demonstrate that it is a civilised and progressive country that is ready to become part of the European community. Secondly, Ukrainian women should be protected from domestic violence in their own country, using the convention as an international method of protection.

The effect in countering domestic violence can only be achieved by implementing alternative, other criminal-legal measures combined with punishment or instead of it [23].

One of the challenges of today is the need to adopt a law that would generally provide for the responsibility of military personnel and other persons covered by disciplinary regulations (in particular, police officers) for committing domestic and gender-based violence since in today's conditions they avoid such responsibility. The need for the adoption of such a law is enshrined in the National Action Plan for the implementation of the recommendations outlined in the concluding observations of the UN Committee on the Elimination of Discrimination Against Women [24].

Admittedly, the issue of the effective use of criminal law tools should develop with a clear understanding of the possibility and expediency of using certain tools of influence.

The study outlined the historical-legal aspects of the establishment of criminal law measures to limit domestic violence. Within the framework of the analysis of the problem, it was established that countering domestic violence through the use of criminal law measures of influence is the result of the historical development of Ukrainian statehood, the legal system, and the ratification of international documents.

Conclusions

The analysis of historical-legal features of the establishment of criminal-legal measures to respond to domestic violence demonstrated that the process of forming a Ukrainian system of regulation of legal relations in this area is based on the use of international documents and national legislative initiatives. Since ancient times, the issue of countering domestic violence has been under the control of state institutions, but for a long period, there was no system of legally defined ways to prevent

domestic violence. Ratification by Ukraine of the most important international conventions, the introduction of amendments and additions to the current legislation, and the development of legal regulations allowed to build of an effective system of criminal law measures to counteract domestic violence and fix it in the Criminal Code of Ukraine.

Future investigations in this area concern the analysis of the effectiveness and expediency of applying certain measures of influence on violators of legislation in this area. It is important to identify problematic and unresolved aspects in the process of solving the problem of domestic violence and search for effective ways to resolve them.

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Історико-правовий аналіз кримінально-правової протидії домашньому насильству в Україні

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Анотація

Метою статті є дослідження історичних аспектів розвитку законодавства, що визначає кримінально-правові заходи впливу за вчинення домашнього насильства. Для досягнення поставленої мети використано такі методи дослідження: емпіричні (спостереження, опис) і теоретичні (аналіз, системний підхід, дедукція). Використання історичного методу надало можливість окреслити процес формування законодавства у сфері протидії домашньому насильству відповідно до хронології подій минулого; використання методів логіки та діалектики – проаналізувати нормативні джерела за темою дослідження. Наукова новизна дослідження полягає у висвітленні історико-правових аспектів кримінально-правових заходів у контексті обмеження домашнього насильства. Встановлено, що протидія домашньому насильству шляхом використання кримінально-правових заходів впливу є результатом історичного розвитку української державності та правової системи, ратифікації міжнародних документів, приведення норм вітчизняного законодавства у відповідність до міжнародних правових норм. Висновки. Українська модель протидії домашньому насильству вдосконалювалася поступово шляхом прийняття відповідних нормативно-правових актів. Водночас питання офіційного закріплення системи кримінально-правових заходів запобігання домашньому насильству протягом тривалого часу залишалося невирішеним. Доповнення, внесені до Кримінального кодексу України, є результатом адаптації кращих міжнародних практик, покликаних закласти міцний фундамент щодо застосування адекватних кримінально-правових заходів подолання домашнього насильства. Дослідження дало змогу простежити й чітко визначити основні історичні кроки у формуванні системи кримінально-правових заходів регулювання домашнього насильства та з'ясувати, які нормативно-правові джерела стали невід'ємною частиною національного законодавства з окресленої проблематики

Ключові слова:

домашнє насильство; кримінально-правові заходи; забезпечення рівності; історико-правові аспекти; законодавство