

CERTAIN PROBLEMATIC ASPECTS OF THE CRIMINALIZATION OF DOMESTIC VIOLENCE

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Abstract. The article examines international legal acts which became a prerequisite for supplementing the Criminal Code of Ukraine with Article 1261 “Domestic violence”. Some shortcomings of this provision are analyzed. The author establishes that including systematic nature as an objective feature in a criminal offense, whose interpretation is left to law enforcement practice, does not exclude subjectivity and lack of uniformity of application. The author provides examples of how this feature is understood by scholars and law enforcers. The concept of economic violence as a form of domestic violence is analyzed. It is emphasized that although the Istanbul Convention provides for this violence form, it does not mandate criminalizing it. Under current legislation, economic violence primarily consists of an economic offense encroaching on someone else’s property rights. The author concludes there is a substantive discrepancy between the interpretation of economic violence as an economic offense and its placement in the section with criminal offenses whose generic object is life and health of a person. The author substantiates the view that it is necessary to exclude the reference to economic violence from Article 126-1 of the Criminal Code.

Keywords: criminal offense, domestic violence, economic violence, psychological violence, systematic nature.

Author contributions

The author made a full contribution to writing the article independently. The author independently selected the literature, analyzed it and drew conclusions.

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INTRODUCTION

In the late nineteenth and early twentieth centuries, the international community began to actively fight to prevent and combat domestic violence. Today, there is a deep awareness of the inadmissibility of violence, which is a gross violation of human rights. Currently, many international legal acts have been adopted that deal with the prevention of domestic violence (Stepanenko et al., 2023, P. 201).

Considering the fact that Ukraine is a European country, it is appropriate to draw attention to certain regional standards on this issue, which are adopted and operate in Europe. In 2006, the Council of Europe initiated a campaign in its member states to recognize domestic violence as a criminal offense, provide support to victims and form a new attitude towards the problem of violence against women in the home as a phenomenon that cannot be tolerated (Shapovalova & Pavlysh, 2011, P. 25).

The fundamental basis in the field of human rights and freedoms, their legitimate interests and needs is the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, 1950), adopted by the Council of Europe in 1950 and ratified by Ukraine on July 17, 1997 (Law of Ukraine No. 475/97-BP, 1997) and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention, 2011), which was opened for signature on May 11, 2011 in Istanbul. Ukraine signed this

Convention on November 7, 2011, and ratified it on June 20, 2022 (Law of Ukraine No. 2319-IX, 2022) These international legal acts became a prerequisite for supplementing the Criminal Code of Ukraine with a new provision - Article 126¹ «Domestic Violence», which, in our opinion, still needs to be amended.

THEORETICAL FRAMEWORK

Many scholars have analyzed certain shortcomings of Article 126¹ of the Criminal Code of Ukraine. O. O. Dudorov and M. I. Khavroniuk, giving an interpretation of the systematic nature of domestic violence, note that it means the constant repetition of identical or similar actions (or inaction), each of which in itself may give the impression of insignificance, but in aggregate they have an extremely negative impact on the victim, and the intensity of this impact may depend on both the degree of aggressiveness of each individual act and their number (Dudorov & Khavroniuk, 2019, P. 78). M. Zmysla generally believes that domestic violence, which is criminalized in Article 126¹ of the Criminal Code, is a continuing criminal offense, as it begins with one act of violence, which continues, the perpetrator is in a criminal state continuously, and the victim is harmed for all episodes of violence as a single criminal offense (Zmysla, 2021) . According to K. M. Plutytska, the placement of Article 126¹ of the Criminal Code in the section «Criminal offenses against life and health» is somewhat controversial (Plutytska, 2018). Lesiak N. I. and Yakimova S. V. also believe that the reference to economic violence as a form of domestic violence in the context of criminal offenses whose generic objects are life and health of a person does not seem to be entirely justified (Yakimova & Lesiak, 2019). A. Blaga, I. Basysta, V. Bryzhyk, I. Hrytsai, I. Drozdova, A. Zaporozhetsev, O. Kovaleva, O. Knizhenko, A. Labun, L. Nalyvaiko, V. Rufanova, O. Kharytonova, and others have also devoted their works to the issues of domestic violence. Among foreign researchers, the greatest contribution to the study of this problem was made by S. M. Perez-Vincent, E. Carreras, M. A. Gibbons (Fomenko & Shablysty, 2022).

The purpose of the article is to study certain shortcomings of the disposition of Article 126¹ of the Criminal Code «Domestic Violence» which require amendments and additions or additional clarifications.

METHODOLOGY

To achieve the purpose of the research and to solve the tasks set, the author used general and special scientific methods of cognition: dialectical - in the study of certain features of the objective side of domestic violence; historical and legal - in the study of international legal acts which became a prerequisite for supplementing the Criminal Code of Ukraine with Article 126¹ of the Criminal Code; legal (dogmatic) - for the interpretation of certain terms and clarification of the content of certain provisions of the legislation on preventing and combating domestic violence; analysis and synthesis - when studying the scientific and practical understanding of the concept of «systematicity» of domestic violence; systemic-structural and functional - when clarifying the expediency of establishing criminal liability for economic violence as one of the forms of domestic violence.

RESULTS

Article 1 of the European Convention establishes the obligation of each state that has ratified the Convention to respect human rights by guaranteeing to everyone within its jurisdiction the rights and freedoms set forth in the Convention. Each state party to this important international instrument assumes negative and positive obligations to ensure the rights and freedoms set forth in the Convention and its protocols. This means that, on the one hand, the state undertakes to refrain from violating human rights and freedoms through the actions of its authorized persons (negative obligations), and on the other hand, to protect human rights and freedoms from violations by private individuals (positive obligations).

That is why it is a positive obligation of the state to adopt appropriate legal provisions that should establish liability for arbitrary interference in family life, including domestic violence. Such remedies may be of civil, criminal or other nature (Davydova et al, 2021).

In a situation of domestic violence, a whole range of human rights provided for in the European Convention may be violated, including the right to life (Article 2), the right not to be subjected to torture or inhuman or degrading treatment or punishment (Article 3), the right to live free from slavery and forced labor (Article 4), and the right to respect for private and family life (Article 8). At the same time, a person suffering from domestic violence may be a victim of discrimination (Article 14), and his or her right to effective legal protection (13) may be violated if the state does not create appropriate laws and does not implement in practice the principle of equal access to remedies in situations of domestic violence.

For a long time, torture, inhuman or degrading treatment or punishment prohibited by Article 3 of the European Convention on Human Rights was interpreted only as a violation of human rights exclusively by the state through the actions of officials or employees. Recently, however, there have been dramatic changes in the interpretation of this article. Nowadays, inhuman or degrading treatment is considered not only in the «human-state» plane, but also as a violation of human rights that can occur in the private sphere between individuals in the case of domestic violence. Thus, the European Court of Human Rights has noted that all doubts as to whether the state should be held liable under Article 3 of the European Convention on Human Rights for inhuman treatment committed by private individuals must be rejected (Decisions *N.L.R. v. France*, 1997, *A. v. United Kingdom*, 1998).

The active work within the Council of Europe to combat domestic violence is evidenced by the adoption by the Committee of Ministers of the Council of Europe of a number of recommendations to the Council of Europe member states, which should be taken into account by the member states when determining the relevant areas of state policy and action plans aimed at their implementation (Stepanenko, 2023, P. 9).

However, since the adoption of the first Recommendation, there has been some change in terminology. Thus, Recommendations No. R(85)4 and No. R(2002)5 used the term «family violence», and today the Council of Europe uses the term «domestic violence». This is due to the improved understanding of this phenomenon at the present stage of development of social relations. The term «domestic violence» is more universal than the term «family violence», as it includes intentional violent acts not only by family members, but also by intimate partners, regardless of the place of commission of such acts and forms of violence (Shapovalova & Pavlysh, 2011, P. 32).

Certain provisions of these Recommendations formed the basis of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention, 2011). International instruments ratified by Ukraine are part of national legislation, so they should be used not only as additional arguments for the court's position in a particular case, but also as a rule of law in force in this area of social relations.

The Istanbul Convention obliges state parties to criminalize the following criminal acts: «intentional conduct resulting in grievous distress to mental integrity by means of coercion or threats; intentional conduct consisting of repeatedly engaging in threatening behavior directed at another person that causes him or her to fear for his or her safety; intentional behavior that consists of committing acts of physical violence against another person; forcing an adult or child to enter into marriage; sexual violence, including rape; female genital mutilation, forced abortion or forced sterilization. The peculiarity is that, on the one hand, the Convention enshrines the obligation for states to criminalize mental violence and persecution, but, on the other hand, Article 78 of the Convention reserves the right for states to provide for non-criminal sanctions for these acts.» (Istanbul Convention, 2011)

On December 6, 2017, the Criminal Code of Ukraine was supplemented with Article 126¹, which establishes criminal liability for domestic violence. These changes came into force only on January 11, 2019.

The criminal legislation of Ukraine defines domestic violence as the systematic commission of physical, psychological or economic violence against a spouse or former spouse or another person with whom the perpetrator is (was) in a family or close relationship, which leads to physical or psychological

suffering, health disorders, disability, emotional dependence or deterioration of the victim's quality of life. Analyzing this definition, it should be noted that one of its shortcomings is the inclusion of such an objective feature as systematic nature in the criminal offense, the interpretation of which is left to the discretion of law enforcement practice, which, in turn, does not exclude cases of subjectivity and lack of uniformity of application (Pankevych & Sukhorebra, 2022).

DISCUSSION

The analysis of scientific literature and case law makes it possible to note that systematic nature is characterized by two criteria: quantitative, i.e., the repeatedness of periodically performed actions, and qualitative, i.e., interconnection, internal unity, which form a certain line of behavior of the perpetrator towards a particular victim or victims. Only when both quantitative and qualitative criteria are met can it be argued that violence is systematic. The study should focus on the quantitative criterion of systematic nature (Stepanenko & Agapova, 2020).

The quantitative feature indicates the number of acts constituting the objective side of a criminal offense. M. I. Bazhanov once pointed out that systematic means committing an act more than twice (i.e., three or more times) if the unlawful acts are an expression of a certain negative trend in the behavior of the perpetrator (Bazhanov, 2000, P. 56). O. O. Dudorov and M. I. Khavroniuk, giving an interpretation of systematicity, note that it means the constant repetition of identical or similar actions (or inaction), each of which in itself may give the impression of insignificance, but in aggregate they have an extremely negative impact on the victim, and the intensity of this impact may depend on both the degree of aggressiveness of each individual act and their number. Scientists add that a criminal offense is considered completed from the moment at least one of the three forms of violence (physical, psychological or economic) is committed for the third time, resulting in at least one of the consequences specified in the law. It does not matter whether the fact of the first two acts of violence was reflected in the police administrative report, in an urgent restraining order, in a restrictive order or in another document. Of course, the fact of documentation is important for proof, but no more so than other evidence provided for by law, such as testimony of victims, witnesses, expert opinions, etc. (Dudorov & Khavroniuk, 2019). Thus, scientists determine the minimum number of acts of a person: at least three. In other words, the quantitative criterion of systematic nature as a sign of domestic violence is that a person commits three or more acts of violence (physical, psychological or economic) (Stepanenko & Agapova, 2020).

As for the court practice on this issue, it should be noted that in most cases, courts also establish a minimum of three episodes of violence to prove the systematic nature of domestic violence.

For example, in the verdict of the Leninsky District Court of Zaporizhzhia of February 10, 2020, the court disclosed three episodes to qualify the perpetrator's actions under Article 126¹ of the Criminal Code of Ukraine.

In the verdict of the Saksahansk District Court of Kryvyi Rih, Dnipro region, dated January 19, 2021, the court disclosed four episodes of violence, three of which the perpetrator was held administratively liable under Part 1 of Article 173 CAO .

Sometimes courts do not even establish the number of episodes of violence, but only indicate a certain long period of time, as the Dnipro District Court of Dnipro Region did in its verdict of September 13, 2021.

M. Zmysla generally believes that domestic violence, which is criminalized by Article 126¹ of the CCU, is a continuing criminal offense, as it begins with one act of violence, which continues, the perpetrator is in a criminal state continuously, and the victim suffers damage for all episodes of violence as a single criminal offense. Therefore, recorded cases of violence even after the opening of criminal proceedings under Article 126¹ of the CC should also be taken into account, as they form one criminal offense under this provision of Article (Zmysla, 2021).

Some controversial issues of the concept of «systematic» were resolved in the Ruling of the Supreme Court of Ukraine of February 25, 2021. The court noted that the phrase «systematic commission of physical, psychological or economic violence» describes an act. A criminal offense is considered

completed from the moment at least one of the three forms of violence (physical, psychological or economic) is committed for the third time, resulting in at least one of the consequences specified in the law. It does not matter whether the first two acts of violence were documented in a police administrative report, restraining order or other document. The fact of documentation is relevant for proving systematic nature, but no more so than other evidence provided for by law.

Despite the resolution of certain controversial issues in the above-mentioned Resolution, the situation regarding the qualification of the actions of a person who committed one act of violence that lasted continuously for a long time remains unclear. In this regard, there is a need for a more detailed judicial interpretation of the concept of «systematic nature» as part of domestic violence.

It is worth reminding that in Article 126¹ of the Criminal Code of Ukraine, the legislator distinguishes three forms of domestic violence: physical, psychological and economic violence. While the first two forms are more or less clear, as for the type of violence unknown to the Criminal Code of Ukraine, such as economic violence, it is true that Article 3(b) of the Istanbul Convention, in its definition of domestic violence, refers to economic violence, among other things. However, in Chapter V Substantive Law, which actually describes which manifestations of violence should be criminalized by the parties, economic violence is not even mentioned. Therefore, the question arises whether there was, in principle, a need to introduce a new concept of violence for the Criminal Code of Ukraine.

Article 1 of the Law of Ukraine «On Preventing and Combating Domestic Violence» defines economic violence as a form of domestic violence, including intentional deprivation of housing, food, clothing, other property, funds or documents or the ability to use them, abandonment or neglect, obstruction of necessary treatment or rehabilitation services, prohibition to work, coercion to work, prohibition to study and other economic offenses (Law of Ukraine No. 2229-VIII, 2017).

Despite the unlawfulness of the above actions, if they are not committed by affecting the body or psyche of a person and are not intended to harm life, health or freedom, then it is obvious that there can be no question of violence, even if we call it «economic». If the victim is deprived of housing, food, clothing, etc. to cause him or her suffering, this is violence. If it is done for mercenary or other purposes, it is a criminal offense against property or another criminal offense under the Criminal Code of Ukraine, not violence. Other manifestations of so-called «economic violence» should be treated by the same principle. And then there will be no need to introduce a new type of violence into the Criminal Code of Ukraine (Dovgan-Bochkova, 2018).

According to K. M. Plutytska, the placement of Article 126¹ of the Criminal Code in the section «Criminal offenses against life and health» is somewhat controversial. While physical and psychological violence mainly cause harm to the life and/or health of a person, i.e. are the direct object of a criminal offense, in the case of economic domestic violence, the direct object may be property, will, honor, dignity, civil rights such as the right to work, entrepreneurship, inviolability of housing, education, etc. (Plutytska, 2018).

H. I. Lesiak and S. V. Yakimova also believe that the reference to economic violence as a form of domestic violence in the context of criminal offenses whose generic objects are life and health of a person does not seem to be entirely justified. According to the current legislation, economic violence primarily consists of an economic offense that infringes on someone else's property, the right to use, dispose of or possess property. A specific feature of economic violence is the infliction of material and sometimes reputational damage, for example, in connection with economic activity or infringement of intellectual property. Therefore, despite the fact that domestic violence in the form of an economic offense can have a fairly wide range of criminal consequences and manifest itself in various types of criminal offenses, there is a certain substantive discrepancy between the interpretation of economic violence as an economic offense and its placement in the section alongside criminal offenses whose generic object is the life and health of a person (Yakimova & Lesiak, 2019).

In view of the above, in our opinion, the reference to economic violence should be excluded from Article 126¹ of the CC.

Another drawback of Art. 126¹ of the Criminal Code of Ukraine is that the very composition of the criminal offense, being material, contains consequences, the essence of which is very difficult to establish, especially to prove them procedurally (Pankevych & Sukhorebra, 2022).

CONCLUSIONS

Currently, a number of international legal acts have been adopted that deal with the prevention of domestic violence. Considering the fact that Ukraine is a European country, it is appropriate to pay attention to certain regional standards on this issue that have been adopted and are in force in Europe. On May 11, 2011, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) was opened for signature in Istanbul. Ukraine signed the Convention on November 7, 2011, and ratified it on June 20, 2022. In connection with Ukraine's signature of this Convention, on December 6, 2017, the Criminal Code of Ukraine was supplemented by Art. 126¹, which establishes criminal liability for domestic violence. However, this provision has certain shortcomings and therefore needs to be amended and finalized. First of all, this concerns the consolidation of such an objective feature as systematic nature as part of a criminal offense, the interpretation of which is left to the discretion of law enforcement practice, which, in turn, does not exclude cases of subjectivity and lack of uniformity of application. Many questions also arise regarding the concept of economic violence as a form of domestic violence. Although the Istanbul Convention provides for this form of violence, it does not establish the obligation of the parties to criminalize it. According to the current legislation, economic violence is primarily an economic offense that infringes on someone else's property, the right to use, dispose of or possess property. Therefore, there is a certain substantive discrepancy between the interpretation of economic violence as an economic offense and its placement in the section alongside criminal offenses whose generic object is the life and health of a person. In this regard, it would be advisable to exclude the reference to economic violence from Article 126¹ of the CC.

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ОКРЕМІ ПРОБЛЕМНІ АСПЕКТИ КРИМІНАЛІЗАЦІЇ ДОМАШНЬОГО НАСИЛЬСТВА

Анотація. Стаття зосереджується на аналізі нормативно-правової бази та судової практики в Україні, що стосуються криміналізації домашнього насильства, з особливим акцентом на положеннях ст. 126¹ Кримінального кодексу України. Автор детально розглядає історичний контекст та міжнародні зобов'язання, включаючи Стамбульську конвенцію, які спонукали до реформування відповідного законодавства.

У статті аналізується важливість правової кваліфікації економічного насильства, його місце у структурі домашнього насильства та специфіка правозастосування. Висвітлюються проблеми існуючих законодавчих норм, виявлені недоліки та суперечності, які виникають у процесі їх застосування. Значна увага приділяється аналізу судової практики, що ілюструє різноманітність підходів до застосування ст. 126¹ Кримінального кодексу України та визначення систематичності домашнього насильства.

Особливу увагу приділено систематичності домашнього насильства як ключового критерію у визначенні цього злочину, а також його юридичному розумінню та тлумаченню. Аналіз наукової літератури й судової практики дає можливість зазначити, що систематичність домашнього насильства характеризується двома показниками: кількісним, тобто багаторазовістю періодично здійснюваних дій, і якісним, тобто взаємозв'язком, внутрішньою єдністю, що утворюють певну лінію поведінки винного щодо конкретного потерпілого чи потерпілих. Лише за наявності як кількісного, так і якісного критерію можна стверджувати, що насильство має систематичний характер.

Стаття представляє важливий внесок у розуміння проблематики домашнього насильства в Україні, висвітлюючи як теоретичні, так і практичні аспекти цього питання. Автор надає обґрунтовані рекомендації щодо вдосконалення законодавства, зокрема через внесення змін до чинних норм, аби адекватно відображати складність та многогранність цієї соціальної проблеми. Також увага акцентується на необхідності розробки комплексних стратегій протидії домашньому насильству, що включають як правові, так і соціально-освітні аспекти.

Ключові слова: кримінальне правопорушення, домашнє насильство, економічне насильство, психологічне насильство, систематичність.

CERTAIN PROBLEMATIC ASPECTS OF THE CRIMINALIZATION OF DOMESTIC VIOLENCE

Abstract. The article focuses on analyzing the normative legal framework and judicial practice in Ukraine concerning the criminalization of domestic violence, with a particular emphasis on the provisions of Article 126¹ of the Ukrainian Criminal Code. The author thoroughly examines the historical context and international obligations, including the Istanbul Convention, which have prompted the reform of relevant legislation.

The article assesses the importance of the legal qualification of economic violence, its role in the structure of domestic violence, and the specifics of its legal application. It highlights the problems of existing legislative norms, identifying shortcomings and contradictions that arise in their application. Considerable attention is paid to the analysis of judicial practice, illustrating the variety of approaches to applying Article 126¹ of the Ukrainian Criminal Code and determining the systematic nature of domestic violence.

Special attention is given to the systematic nature of domestic violence as a key criterion in defining this crime, as well as its legal understanding and interpretation. The analysis of scientific literature and judicial practice allows stating that the systematic nature of domestic violence is characterized by two indicators: quantitative, meaning the multiplicity of periodically committed acts, and qualitative, meaning the interconnection and internal unity that form a certain line of behavior of the offender towards a specific victim or victims. Only with the presence of both quantitative and qualitative criteria can it be asserted that the violence is systematic.

The article makes an important contribution to understanding the issues of domestic violence in Ukraine, highlighting both theoretical and practical aspects of this issue. The author provides substantiated recommendations for improving legislation, particularly through amendments to current norms, to adequately reflect the complexity and multifaceted nature of this social problem. The necessity of developing comprehensive strategies to counter domestic violence, including both legal and socio-educational aspects, is also emphasized.

Key words: criminal offense, domestic violence, economic violence, psychological violence, systematic nature.

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