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Phenomenology of domestic violence

Феноменологія домашнього насильства

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Abstract

The issue of combating domestic violence is one of the most important in today's conditions, both in Ukraine and throughout the world, because violence is recognized as violating human rights. In order to improve the situation and implement mechanisms for combating domestic violence at the international level, a system of international legal protection of the rights of persons, affected by this phenomenon has been created. The purpose of the work is to assess and study the provisions of international legal acts aimed at combating domestic violence. The research methodology is a complex of methods: historical, comparative-legal, descriptive, systemic-structural, dogmatic, sociological and modeling, induction and deduction, and philosophical method. As a result of the study, an analysis of the features of the emergence and development of international legal regulation in the field of combating domestic violence was carried out, in particular, the system and features of individual international acts aimed at regulating relevant relations are considered. Also, the criminal law rules regulating the fight against domestic violence were analyzed. Attention is drawn to the development and experience of the criminal-legal response to the investigated phenomenon in the international community and its

Анотація

Питання протидії домашньому насильству є одним із найважливіших в умовах сьогодення як в Україні, так і в усьому світі, адже насильство визнане як таке, що порушує права людини. З метою покращення ситуації та впровадження механізмів протидії домашньому насильству на міжнародному рівні створено систему міжнародно-правового забезпечення прав осіб, що постраждали від цього явища. Метою роботи є оцінка та вивчення положень міжнародних нормативно-правових актів, які направлені на протидію домашньому насильству. Методологією дослідження становить комплекс методів: історичний, порівняльно-правовий, описовий, системно-структурний, догматичний, соціологічний і моделювання, індукції та дедукції та філософський метод. У результаті дослідження здійснено аналіз особливостей виникнення та розвитку міжнародно-правового регулювання у сфері протидії домашньому насильству, зокрема, розглядається система та особливості окремих міжнародних актів, спрямованих на регулювання відповідних відносин. Також, проаналізовано кримінально-правові норми, які регламентують протидію домашньому насильству. Звернено увагу на розвиток та досвід кримінально-правової

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transformation in modern conditions. The possible directions of the development of international legal regulation regarding the criminal legal response to domestic violence in Ukraine and the world have been determined.

Keywords: phenomenology, domestic violence, forensic qualification, family relations, legal regulation.

Introduction

The family is an important element of both the nation and the cultural community. At the same time, the family mirrors society and the changes taking place (in particular, those taking place at the psychological level, quality of life).

Domestic violence should be understood as a socially dangerous act that encroaches on the institution of the family. Violence in the family affects not only relations within the family itself but also results in the emergence of illegal attitudes in society. Domestic violence is an integral part of the general structure of violent crime, which includes actions related to physical and mental violence against a person or the threat of its use.

Taking into account the task of states to ensure human rights and combat crime, each state must make efforts to create safe living conditions for its people, including in the development of effective methods that prevent the spread of such a phenomenon as domestic violence.

But it is worth noting that for a long time, the problem of domestic violence was considered the prerogative of established customs and traditions and remained outside the scope of legal regulation, and interference in family life by the state and society was considered a gross violation of privacy. This results in a significant number of latent offenses that have been overlooked by law enforcement agencies.

The international movement for women's rights contributed to drawing attention to the problem of domestic violence at the global level because it is women who suffer the most from violent actions by members of their families. Currently, domestic violence is not a geographically isolated problem and every day damages the most valuable human goods - honor and dignity, health and life. Therefore, it is important to develop mechanisms for combating domestic

протидії досліджуваному феномену в міжнародній спільноті та його трансформацію у сучасних умовах. Визначено можливі напрями розвитку міжнародно-правового регулювання щодо кримінально-правової протидії домашньому насильству в Україні та світі.

Ключові слова: феноменологія, домашнє насильство, насильство, криміналістична кваліфікація, сімейні відносини, правове регулювання.

violence, taking into account the peculiarities of this phenomenon. This determines the relevance of an in-depth study of the phenomenology of domestic violence as an important phenomenon and individual characteristics of criminal behavior.

Based on the above, it is appropriate to formulate the tasks of this research, which are: 1. To analyze various approaches to understanding the nature and content of domestic violence. 2. To investigate the peculiarities of domestic violence as a phenomenon in the criminological aspect. 3. To characterize such categories as family, marriage, and family relationships in the context of research into the phenomenology of domestic violence. 4. To note the advantages and disadvantages of different approaches to understanding the evolution of the content of domestic violence. 5. To offer the author's view on the improvement of means of combating domestic violence.

Theoretical Framework or Literature Review

The criminal-legal characterization of family violence is explored in the work of Bandurko (2013). In particular, the author noted that among criminological problems, one of the main, but at the same time debatable and least developed, is the problem of studying the identity of a criminal and an offender who commits domestic violence. The concept, essence, and causes of violence in the family are considered in the work of Botnarenko (2016). The question of the phenomenology of crime as a branch of criminology was analyzed by Veprytskyi (2013). Thus, the scientist notes that the phenomenology of crime details available approaches and factors depending on the type of crime, its causes, and conditions, based on the fact that in criminology crime is often defined as a social or socio-legal phenomenon, as "a relatively massive, historically changing social phenomenon, which

has a criminal-legal nature, a class essence and consists of the entire set of crimes committed in a certain state in the relevant period".

The peculiarities of proceedings in the form of private prosecution and proceedings based on agreements and the question of when the refusal to prosecute is an insufficient argument are analyzed in the work of Glowjuk (2019).

Humin (2011) analyzed the theoretical and practical aspects of a person's violent criminal behavior. Separate issues of violent acts as criminal and punitive acts are analyzed in the work of Ignatov (2005).

General theoretical provisions of legal psychology are outlined in the textbook by Konovalov, and Shepitko (2013). Cross-cutting and isolated concepts of the criminal law of Ukraine were investigated by Navrotskyi (2020). Standards for the prevention of family violence at the UN and Ukrainian realities are analyzed in Orlovska's article (2014). In particular, attention is paid to the UN model legislation on crime prevention, as well as institutional reform to fight crime.

In their work, Perelighina and Mytnyk (2018) concluded that there is currently no unified definition of the concept of domestic violence. In our opinion, domestic violence should be understood as any act of physical, sexual, psychological (in the form of emotional or verbal violence), or economic violence committed against family members, close relatives, as well as persons who live with the abuser in the same house.

Legal and psychological aspects of conflict resolution related to violence in families were studied by Sydorenko (2001). Tkachenko (2013) conducted a theoretical and criminological characterization of the factors that cause violence in the family.

The key principles of gender policy in the criminal law of Ukraine and the main directions of reforms in combating violence against women and domestic violence are studied in the work of Kharytonova (2018).

International experience and modern problems of family violence are analyzed in the work of Yakhyazade (2013). In the opinion of the author, the effective overcoming of the problems of violence in the family requires further improvement of the provisions of domestic legislation, elimination of conflicts in the

legislation, an increase of requirements for law enforcement agencies, as well as an increase of the level of legal education of the population.

Methodology

The use of the general scientific dialectical method helped to form the general methodological basis of the study and to identify and deeply reveal the social nature of domestic violence. By its legal nature, the dialectical method is a method of learning a reality in its contradictions, integrity, and development. Therefore, this method contributed to revealing the essence of domestic violence, as well as to understanding how this phenomenon developed, and what made it necessary to pay more attention to countering domestic violence. Moreover, thanks to the dialectical method, taking into account the general trends in the development of teachings on violence and its countermeasures, conclusions were formulated about the future possibilities of developing legislation on countering domestic violence.

The formal-dogmatic method played an equally important role in the conducted research. This method is important for analyzing the content of legal norms. Given that the essence of this method is to study law per se, without comparison with other areas, this method helps to reveal legal categories, define concepts, and legal constructions, and understand legal techniques. Therefore, the application of the formal-dogmatic method made it possible to analyze the theoretical developments of various aspects of countermeasures and causes of domestic violence.

When conducting legal research, it is important to analyze problematic issues using the formal-legal and structural-functional methods. Thus, the formal-legal method allows for tracing the interrelationships between the internal content and external expression (form) of state-legal phenomena and institutions. The structural-functional method offers the study of social phenomena and processes as a structurally dismembered whole. Therefore, the formal-legal and structural-functional methods as a whole contributed to the review and analysis of legal norms that regulate issues related to the prevention of violence in the family environment, the definition of the subjects of domestic violence, and, in general, the definition of the phenomenology of domestic violence.

Modeling, analysis, and synthesis methods were used in the process of developing ways to

improve the organizational and legal framework for combating domestic violence. In particular, the modeling method helped to analyze the possible ways of developing legislation to combat domestic violence, and the analysis and synthesis made it possible to better understand the phenomenon of domestic violence.

A statistical method was used to process statistical data to understand the scale of domestic violence and to identify victims of domestic violence.

Results and Discussion

Before considering the issue of the phenomenology of domestic violence, let's analyze the definition of phenomenology.

In general, the term "phenomenology" comes from the Greek words *phainómenon*, which means "that which appears" and *lógos* – knowledge. Phenomenology is a so-called philosophical direction, the basis of which is the observation and description of the phenomenon as it is in the mind of the observer, and puts the study of phenomena in the first place, that is, what appears in the mind of a person when he perceives this world. Scientists define phenomenology as a branch of philosophy that considers the qualities and characteristics of objects and the relationship between them as a necessity, as a phenomenon of nature. The tasks of phenomenology are the formalization of relations between objects and their presentation in the form of laws and interdependence. Phenomenology of social studies by formal means the structure of social systems, groups, other constituent elements, their development and interaction, and dependence (Veprytskyi, 2013).

Phenomenology is actively used not only in philosophical research but also in criminal law, helping researchers gain a deeper understanding of the phenomena associated with certain criminal offenses.

The phenomenon of domestic violence belongs to social phenomena that have several aspects and depend on many factors. Domestic violence is a real-world phenomenon that occurs within the family and between people who have certain personal relationships. The key features of this phenomenon are that the violence is directed by one person against another and that it occurs in the context of family relations, that is, between close people who have both social and, no less important, emotional ties.

Scientists from many fields of knowledge pay attention to the study of the problems of violence: philosophy, sociology, political science, history, law, psychology, anthropology, and others. We agree with O. Yu. Sydorenko, who notes that violence is a "general psychological, philosophical, sociological, moral and legal category" (Sydorenko, 2001).

In philosophy, violence is studied in the context of ethics, politics, and social philosophy. Quite often, violence is seen as a philosophical phenomenon that reflects problems of power, control, morality, and law.

The authors of the philosophical encyclopedic dictionary understand violence as the use of force or the threat of its use (Philosophical encyclopedic dictionary under the editorship of M.T. Maksimenko, 2002). In turn, the American philosopher Sh. Wolin points out that violence comes from the Latin word "violentia", which means a spontaneous and uncontrolled manifestation of force, as opposed to the concept of the legal and normal use of force by the institution of the state (Wolin, 1970).

Philosophers examine the question of what moral limits should be placed on the use of violence and whether it can be morally just. Thus, the philosophical approach to defining violence focuses on the ethical aspects of this concept and how it is related to moral values and principles.

In turn, sociologists examine the concept of violence in the context of social dynamics, human interaction, and the influence of social factors on the formation of violent stereotypes. Sociologists define violence as "coercion (action) carried out by an individual or a group of persons to achieve a set goal and which is associated with the direct infliction of physical, psychological or moral harm on another person or with the threat of such infliction" (Andrushchenko, Bekh, & Bashkirev, 2002).

From a psychological point of view, violence is a complex phenomenon that includes not only physical actions but also psychological pressure and emotional violence. The definition of violence in psychology is usually based on the concepts of power, control, and behavioral submission.

At the same time, scientists, philosophers, sociologists, and psychologists point out that violence can have both destructive and constructive functions. The destructive function of violence is that it causes harm to another

person who becomes a victim of violence. It can be physical, psychological, sexual, economic, and other violence. The destructive function of violence can cause injuries, pain, fear, and other negative consequences not only for the victim but also for those around him. In turn, the constructive function of violence is that it can perform a useful social role. For example, violence can protect the interests of the state in the event of external threats, defend the rights of citizens against government oppression, and ensure security within the state. In addition, cases of self-defense or the use of violence to stop another violent person can have positive consequences for the individual and society.

Violence is generally defined as an influence, the use of physical force against someone; rape, violence, coercion; the use of force to achieve something; coercive influence on someone, something; actions with the use of physical or mental force against someone, rape, coercion, violence (Kalashnyk, 2002). It is also defined as "intentional influence of one person on another, against the will of the latter, which causes this person physical, moral, property damage or contains a threat of causing said damage with a criminal purpose" (Shemshuchenko, 2002).

Analysis of numerous scientific literature in the field of criminal law makes it possible to note that most scientists define violence as an influence. So, it is possible to define the following positions regarding the understanding of violence:

- "intentional, socially dangerous and illegal influence carried out through mental or physical assault by a person on other persons, as a result of which damage is caused or a real threat is created to life, health, honor, dignity and other rights and freedoms of citizens, which are guaranteed by the Constitution of Ukraine and are protected by the criminal law" (Humin, 2011).
- "energetic influence on the organs and tissues of the human body, their physiological functions, through the use of material factors of the external environment (mechanical, physical, chemical and biological) and/or informational influence on his psyche, which is done against his will, capable of causing death, physical and/or mental trauma, as well as limit a person's freedom of expression or action" (Ignatov, 2005).
- "external influence on a person or a group of people, coercion, causing damage to life and

property, which are carried out against the will of those against whom they are directed; the physical or mental influence of one person on another, which violates the latter's right to personal integrity, with the aim of achieving a certain criminal result" (Konovalova, & Shepitko, 2013).

- "inflicting bodily harm, killing or threatening to do so" (Navrotskyi, 1997).

V.O. Navrotsky notes that since ancient times, the term violence has denoted physical impact on another person's body. "sexual" violence. (Navrotsky, 2020).

Taking into account the above, the following approaches to the definition of violence in criminal law can be distinguished:

- 1) violence is exclusively a physical influence on another person;
- 2) violence is both physical and psychological impacts on another person.

In addition, the economic impact is also possible. Given the presence of various forms of violence and the fact that it is quite important to foresee criminal liability for their commission, violence cannot be defined only as a physical impact. That is why defining violence as a comprehensive criminal law concept is justified by defining it as a physical and psychological impact on another person.

Also, the following basic signs of "violence" are distinguished in the scientific literature:

1. Violence is a socially dangerous phenomenon because it poses a threat to the normal functioning and development of both society as a whole and its individual members;
2. It is an illegal act, that is, it violates the norms of the law;
3. Violence is committed with intentional guilt;
4. Violence is expressed in an active influence on another person, that is, it is an active act manifested through certain forms (for example, a blow, a push, etc.);
5. This action is coercive, that is, it violates the principle of voluntariness;
6. Coercion manifests itself in the form of physical, mental, and sexual influence;
7. The result of violence is the damage caused: moral (psychological suffering, stress, etc.) and material (expenses for treatment, lawyers' services).

Each of these three broad categories is divided into new subgroups that reflect more specific types of violence.

Interpersonal violence is divided into the following subgroups:

- domestic violence that occurs between family members, including regarding children;
- violence in the community, which occurs against someone with whom the offender is not in a family relationship and, as a rule, outside the home (violence at school (bullying, mobbing), violence in the youth environment).

So domestic violence is one of the types of violence, and therefore it has all the above-mentioned signs of violence and certain special features, which we will mention further.

O. V. Kharytonova notes that "domestic violence" correlates with the English term "domestic violence". The word "domestic" has connotations of "family, domestic, home, family". Therefore, when we talk about domestic violence, we need to understand that we are talking not only about the home in the physical sense of the word, the place of permanent residence of a person but about a certain symbolic space where "domesticity" is derived through the delineation of the circle of persons to whom the legislation applies about domestic violence (Kharytonova, 2018).

The organization "La Strada - Ukraine" defines "gender-based violence" as violence that is perpetrated against people because of their gender or affects mainly people of a certain gender. This is an extreme manifestation of discrimination based on gender, the victims of which are women most often. At the same time, the following types of gender-based violence are distinguished: physical violence; psychological violence; sexual violence; economic violence; domestic violence; persecution; rape; sexual harassment; female genital mutilation; forced sterilization; forced abortion; forced marriage; crimes in the name of so-called honor; violence in an institutional environment; violence in war, conflict and post-conflict situations; human trafficking; gender discrimination (La Strada Ukraine, 2018).

Taking into account the mentioned characteristics, the question arises whether it is always possible to assert imperatively about domestic violence in the case when the victim of

a criminally punishable act is a member of the accused's family?

In the decision of the Supreme Court of April 7, 2020 (Resolution 647/1931/19, 2020) it is stated that in this case, the prosecution claimed that the accused committed the crime as a result of a sudden quarrel. The court stated that such wording in itself does not indicate that the violence was caused by a certain discriminatory attitude towards the victim. Also, it was not clear from the content of the indictment that the incriminated act of aggression was one of the episodes in the atmosphere of domestic violence that developed between the accused and his mother. The reference only to the fact that the victim of the crime is a member of the accused's family is not enough to assert the existence of a situation of domestic violence in the sense given to this term by the Istanbul Convention and the law adopted for the purpose of its implementation. In order to substantiate the applicability of the exception regarding domestic violence in paragraph 7, part 1 of Article 284 of the Criminal Procedure Code to a specific case, the prosecution must prove circumstances that indicate that the victim of the incriminated crime is at the same time a victim of domestic violence. This does not exclude the fact that evidence of the existence of a situation of domestic violence may be contained in the very circumstances of the crime, which prove that a certain case of violence is a manifestation of behavior characteristic of domestic violence.

Summarizing the above, domestic violence as a phenomenon encompasses the following characteristics:

- this is an illegal, intentional physical and/or psychological influence of one person on another;
- committed through physical, psychological, sexual, or economic violence;
- are committed in the family or within the limits of the place of residence or between relatives, or between former or current spouses, or between other persons who live (lived) together in the same family, but are not (were not) in family relations or in marriage between themselves, regardless of whether the person who committed domestic violence lives (has lived) in the same place as the victim;
- one of the parties belongs to a certain vulnerable group and/or is in a vulnerable situation;
- violence is committed on the basis of a person's specific role;

- such violence causes various kinds of damage or creates a real threat of causing such damage.

Conclusions

- 1) The problem of domestic violence is complex and not fully resolved, despite the fact that it has a significant interest both among scientists and among organizations of the international community.
- 2) It is generally accepted to consider violence as an attempt on life, the use of physical force or coercive influence on someone, or resistance to force. However, it is important to consider other forms of violence, such as economic, sexual, and psychological.
- 3) The term "domestic violence" is mainly used by foreign legislation, science, and practice. But due to its legal nature, the identification of the terms "family violence" and "domestic violence" is often to blame. We believe that the main difference between the concepts of domestic and family violence is that the criminological sign of domestic violence is the place of its commission, and it is not always connected with the sphere of marital and family relations, and the concept of "family violence" has a family character of the motivation of the commission illegal acts and is directly related to the concept of "family".
- 4) It is necessary to distinguish between domestic violence as a phenomenon, domestic violence as an administrative offense, domestic violence as a criminal act, and criminal offenses related to domestic violence. The following studies will be devoted to the disclosure of the content of these categories.

Regarding further scientific research, we consider it necessary to analyze the international experience of combating domestic violence and to investigate the effective regulation of prevention of violence in the family.

Among the main areas of improvement of the mechanism of combating manifestations of domestic violence, it is worth mentioning the strengthening of legal responsibility for committing acts that can be qualified as manifestations of domestic violence; providing a wider range of law enforcement agencies with powers aimed at stopping domestic violence and bringing persons guilty of such acts to criminal and other types of legal responsibility; introduction into domestic legislation of the best models of combating domestic violence, which

have proven themselves in foreign countries; implementation of a wide range of measures aimed at the prevention of domestic violence.

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