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Problems of administrative liability for domestic violence against children

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■ **Abstract.** The scientific research reflected in the content of this study is devoted to the main theoretical, legal and practical issues of administrative liability for domestic violence against a child. The purpose of the study – outline the specific features of protection of a child's right against domestic violence in Ukrainian legislation and identify the factors which indicate the necessity to distinguish domestic violence against a child as an administrative offence with more serious consequences, and, accordingly, to apply a more severe penalty to the offender. According to the purpose and specifics of the subject matter of the study, the author has applied a set of methods: philosophical methods – dialectical, phenomenological and others; general scientific methods: systematic, induction, deduction of analysis, synthesis, analogy, comparison; and methods of a specific legal science: comparative-legal, legal statistics, legal generalisation, legal analysis, formal-legal etc. The study examines the definition of domestic violence under Ukrainian law and summarises some ways to counteract this phenomenon. It is emphasised that the Code of Ukraine on Administrative Offences does not distinguish between the specifics of administrative liability for domestic violence against an adult and a child. However, according to statistical studies, the number of children suffering from domestic violence is increasing every year. It highlights the relevance of the study. The practical value is that the study identifies and characterises the main theoretical, legal and practical issues of administrative liability for domestic violence against a child, and develops substantiated proposals for amending Article 173-2 of the Code of Administrative Offences

■ **Keywords:** juvenile rights; the principle of the best interests of the child; object; subject; objective side; subjective side; Article 173-2 of the Code of Administrative Offences

■ Introduction

Protecting children from domestic violence is not a new challenge for society, as since ancient times parents have disposed of their children at their discretion, and their immoral actions have been subject to universal condemnation. Children are the most vulnerable category of society, particularly sensitive and unable to protect themselves, thus, with the development of statehood, powerful mechanisms to counteract violence against children have been established in each country and at the international level. Domestic violence against them is the most dangerous and widespread nowadays. Domestic violence is a phenomenon that the entire civilized world is fighting against. The protection of children from domestic

violence is reflected in international standards [1] and national legislation. National regulations are designed to promote the all-round development of the individual, guarantee their rights and freedoms, and ensure social security and protection of all members of society, regardless of age.

Section II of the Constitution of Ukraine [2] explicitly defines the rights, freedoms and obligations of a person and citizen, including their content, including children. In addition, children have additional juvenile rights [3, p. 10], which are based on the principle of the best interests of the child, as defined in the content of the Law “On Protection of Childhood” [4], and specify the rights and freedoms of the child and define the concept of basic terms. In particular, the age and social criteria of a child as a person under the age of 18 or who has not acquired the rights of an adult before, due to the circumstances specified in the legislation, are highlighted. Ensuring the personal requirements of the child, according to their physiological characteristics (gender, age,

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health status), social status (family characteristics, life experience, intellectual development, ethnicity and family culture), and considering the child's opinion in decision-making, if the child is capable of voicing it by their level of development and age, is the foundation of the principle of ensuring the best interests of the child. In addition to the above, it is crucial that all government agencies and social institutions surrounding the child should ensure safe living conditions for children, i.e., their general requirements. In the author's opinion, the above-mentioned is the foundation for the establishment and functioning of the state organisational and legal mechanism, part of which is the determination of administrative liability for offences against children. In the administrative legislation of Ukraine, there are some theoretical, legal and practical problems with establishing liability for such unlawful acts.

For the first time, in 2003, the Code of Administrative Offences of Ukraine [5] (hereinafter – CAO) introduced a provision on domestic violence or failure to comply with a protective order. This provision reflected Article 173-2 [6], which stated that any intentional actions of a physical, psychological or economic nature that could have caused or caused damage to the mental or physical health of the victim or failure to comply with a protective order by the person to whom the order was issued.

In 2008, 2015 and 2021, several amendments were made to Article 173-2 of the CAO [5]. The content of the administrative rule now includes domestic violence, gender-based violence, failure to comply with an urgent restraining order, or failure to report the place of temporary residence. In practice, the author considers that the content of the provision has become more voluminous and has acquired a broader meaning. However, the legislator has not yet defined the specific features of administrative liability concerning a child in the content of this provision.

Recently, children in Ukraine have suffered greatly from violence, including domestic violence. The Code of Ukraine on Administrative Offences [5] defines administrative liability for violent acts committed against a child in several provisions, in particular, Article 180 of the CAO [5] establishes the liability of parents or persons in loco parentis for the actions or inaction of these persons that caused the child to become intoxicated – it provides for a fine of six to eight tax-free minimum incomes. In addition, Article 184 of the CAO [5] provides for liability for the failure of parents or persons in loco parentis to perform their child-rearing duties. Such evasion is subject to administrative liability – a warning or a fine of one to three tax-free minimum incomes.

Article 173-2 of the CAO [5] defines the general principles of domestic violence, and liability for unlawful acts applies to both adults and minors over

16 years of age. In addition, the identity of the victim is not specified, and it can be either an adult or a child. Thus, Article 173 2 of the CAO [5] provides for liability in the form of a fine, community service and administrative arrest, without identifying the victim. In the author's opinion, there is a necessity to improve Article 173-2 of the CAO [5] with a distinction between the victim and the type and amount of administrative penalty for committing domestic violence against a child.

Countering domestic violence in the twenty-first century has acquired new forms. At the international and national levels, mechanisms for counteracting this phenomenon are constantly being improved, and the number of scientific studies is increasing. The political doctrine based on the protection of human rights and human-centeredness is explicitly manifested in the works of Y.O. Shabanova [7], who considers a person as a dual entity where the human is simultaneously manifested as meaning (idea) and existence (form). These postulates became the foundation of the concept of counteracting domestic violence. After all, the comfortable living of each family member in their own home and familiar conditions is the purpose of a civilized society. The analysis of international experience in combating domestic violence [8] indicates that the legislation of the United States and EU countries, compared to Ukraine, provides for stricter measures against perpetrators, which affects the reduction of violations, but does not guarantee their complete absence.

Some problems of combating domestic violence against children were considered by: K. Levchenko & O. Shved [9]. In her comprehensive study, scholar N. Lesko analysed some urgent problems of administrative liability for domestic violence against children [10]. V. Mykolaets, T. Matselyk & N. Novytska in scientific research comprehensively reviewed and outlined the interdisciplinary nature of the problem of domestic violence against children [11].

Despite the wide development of this subject, no sufficient attention has been devoted to the specific theoretical, legal and practical problems of domestic violence against children and the specifics of administrative responsibility: no distinction has been made between domestic violence against children, which emphasises the relevance of the subject under development.

The purpose of the research is to examine the concept of domestic violence in the administrative legislation of Ukraine and the content of the provision provided for in Article 173-2 of the CAO [5]. To explore the theoretical, legal and practical problems of administrative liability for domestic violence against a child. To characterise the factors that indicate the necessity to distinguish domestic violence against a child as an administrative offence with

more serious consequences and, accordingly, to apply a greater penalty to the offender. To justify the necessity of amending Article 173-2 of the CAO [5].

■ Materials and Methods

Considering the current problems of public life, the research area was chosen, and a subject was identified as relevant and in demand of scientific knowledge and practical improvement. The information on the subject was reviewed and the necessary materials were selected. To objectively explore the subject of the research, the author conducted a set of scientific activities which, following the scientific style, are gradually reproduced in the content of the research. At the beginning of the work, to ensure the reliability of the results and conclusions obtained, the statistical data reflected in the case law report, and journalistic sources of information were analysed. The next step in the research was to explore the content of the provisions of international documents and national regulations that are of scientific interest on the subject. Thus, the regulatory framework for this work is: The UN Convention on the Rights of the Child [1], the Constitution of Ukraine [2], the Code of Administrative Offences of Ukraine [5], the Law of Ukraine "On Preventing and Combating Domestic Violence" [12], the Law of Ukraine "On Childhood Protection" [4]. After analysing empirical data, practical sources and regulations, the author summarises the research of scholars who have comprehensively explored the problems of domestic violence. After all, the problem of domestic violence is not new and has been addressed by scientists in various fields. The author analyses some relevant proposals of scientists, provides their generalisations and conclusions, and substantiates practical proposals for improving the content of Article 173-2 of the CAO [5]. To conduct a comprehensive study of the subject matter, considering the specific features of the research, the author used a special set of general and special methods of scientific knowledge. Each method was used to achieve the purpose. Several philosophical methods are used in the interconnection, and theoretical methods are used in general scientific methods. In particular, using the dialectical method, the author has explored the essence of administrative liability for domestic violence against a child through the prism of change and development of this phenomenon, and the relationship between the existing standard and the author's proposals. The phenomenological method was used to develop the hypothesis and the author's definition of originality. The author uses the methods of analysis and synthesis and their branch-specific variants to clarify theoretical, legal and practical problems in the field of cognition. When exploring the subject of research in general, the methods of induction and deduction were helpful.

The statistical method proved to be essential, as it helped to process official statistical data [13]. Using the comparative-legal method, the author compares legal liability for domestic violence in Ukraine and other countries of the world, in particular, in the EU, the USA and Ukraine. The method of abstraction is used for deep cognition, which consists of the mental separation of special, significant features, signs, and relations of all elements of the subject of research. The formal-legal method is used in the analysis of regulations. The specific analysis of regulatory documents was performed using the method of legal analysis. A detailed legal analysis was conducted in Article 173-2 [5]. The author considers and analyses its structural elements (object, subject, objective and subjective sides). The method of generalisation was used to develop and present the conclusions, and the author's generalisations and practical proposals in this research. All of these methods, which the author emphasises, have been applied comprehensively.

In exploring this problem, the author used anthropological, hermeneutical, and epistemological approaches to analyse scientific achievements and substantiate conclusions.

■ Results and Discussion

The Law [12] defines the forms of domestic violence, which can be expressed in both active and passive forms of inaction. There are the following types of domestic violence: physical, sexual, psychological, and economic. Such manifestations of violence are called domestic violence in cases where it is committed in the family or on the territory of a common residence or between relatives. Also between current or previous spouses, or between other persons who live (lived) together as a family. Threats of the above-mentioned violence can be its manifestation.

For acts that are not socially dangerous, such as foul language, threats, shouting, slapping, deprivation of housing (the list is not exhaustive), administrative liability is provided, and the offender's actions are qualified as domestic violence under Article 173-2 of the CAO [5]. To prove the offender's guilt and bring them to justice, a district police officer, juvenile prevention inspector, or patrol police officer drafts an administrative report that is sent to court.

For professional qualification of an act when bringing a person to administrative responsibility for committing domestic violence, it is essential to correctly identify all elements of the offence. In particular, the existence of an object, which is public relations in the field of human and civil rights protection. As outlined above in this research, children have all the rights that adults have, and additional children's rights are based on the principle of ensuring the best interests of the child.

The objective side is expressed in the intentional commission of any actions or omissions of a physical, psychological or economic nature that caused damage to the health of the victim. Failure to comply with an urgent restraining order and failure to notify the relevant units of the National Police of Ukraine of the place of temporary stay in case of its issuance is recognised as an offence [12], i.e. both action and inaction have specific manifestations in the commission of an offence, which occurs in the research. The content of the provision highlights gender-based violence, i.e. discrimination against a member of a close person based on their gender. An important element of the objective side of this offence is the consequences and the causal link between the act (inaction) and the consequences. Forms of manifestation of an act as a threat to: physical violence; psychological violence; economic violence, including any manifestation of domestic violence in the presence of a child.

All manifestations of sexual violence against a child are subject to criminal liability.

The subject is general (part 1 of the Article) or special (part 2 of Article 173-2 of the CAO [5]).

Subjects of domestic violence must be current or previous family members. Article 3 of the Family Code of Ukraine [14] defines a family as:

- persons living together are interconnected by rights, obligations and common life;
- spouses who live together or separately for valid reasons (due to study, work, medical treatment, the necessity to care for parents, children, etc.);
- child, even if they do not live with their parents;
- a single person.

Legislation on preventing and combating domestic violence clearly defines the persons who can be subjects [12] of the offence studied.

The subjective side is determined by the attitude to the consequences and is characterised by the presence of guilt in the form of intent. The presence of guilt in the form of intent and a causal connection between the action and the consequences is required.

Paragraph 2 of Article 173-2 [5] defines a qualifying feature – the commission of this offence by a person who has previously committed such an offence and was subject to an administrative penalty within a year for any violation provided for in paragraph 1 of this Article. In the author's opinion, it would be appropriate to include domestic violence against a child as a qualifying ground.

Domestic violence is an interdisciplinary phenomenon. Psychologists, sociologists, educators, lawyers, and other researchers are trying to understand it and develop effective levers of counteraction. Contemporary scholar O.S. Dmytrashchuk [15], in her study, thoroughly examines international experience in combating domestic violence, including against children. Emphasises the interesting experience of

Poland in terms of communicating to the community the decision to punish a person for domestic violence. Highlights the equally interesting example of the United States and some Asian countries that have developed and successfully used a comprehensive approach to combating domestic violence against children and delineate responsibility for domestic violence against children by using harsher penalties.

The Code of Administrative Offences of Ukraine [5] contains several provisions, which have been discussed above, that provide for the administrative liability of parents and other family members for child abuse. Article 173-2 [5] additionally defines gender-based domestic violence against women but does not specifically mention violence against a child, who is a more vulnerable human being and requires additional protection. In the author's opinion, any unlawful intentional acts (action or inaction), if the victim is a child, should be offences that have an additional qualifying feature and a more severe administrative penalty. When imposing an administrative penalty, in addition to the above actions, it is necessary to consider the failure to report one's whereabouts when such an order is issued if the offender has harmed a child and the child is a victim of domestic violence.

The research consists of two parts. Part two provides for several qualifying features and a more severe administrative penalty, but the author proves the necessity of its improvement.

Women and children are the most common victims of domestic violence. Children frequently become victims or witnesses of abuse, which significantly traumatises their mental health and is a manifestation of violence [16]. The provision that currently provides for liability for domestic violence considers the status of women but does not explicitly mention children.

Part 2 of the Law of Ukraine "On Preventing and Combating Domestic Violence" [12] defines a child victim of domestic violence as a person under the age of 18 who has been subjected to domestic violence in any form, and a child who has witnessed domestic violence. By adopting this provision, the legislator has taken a positive step towards protecting children's rights against violence and abuse, however, in practice, when determining the status of a victim of domestic violence, law enforcement agencies face certain problems that, in the author's opinion, can be solved by the proposed amendments to the legislation.

According to the statistics of recent years, an increase in cases of domestic violence has been recorded in Ukraine [17]. In 2021, 56% more citizens reported cases of domestic violence to the National Police than in 2020. In addition, 10% more administrative protocols were compiled, and 19% more urgent restraining orders were issued against offenders. In addition, the number of offenders registered increased

by 11%. While in 2020 there were 209,000 reports of domestic violence, 3,400 of them were from children, which is 1.63% of the total number of reports.

Human rights organisations and qualified lawyers emphasise the necessity to improve the work of the relevant state bodies and courts in establishing the facts of domestic violence where children are victims. After all, with the entry into force in 2018 of the Law of Ukraine "On Preventing and Combating Domestic Violence" [12], the concept of "child witness = child victim of domestic violence" was introduced into the national legislation, meaning that law enforcement officials must declare such a child a victim of domestic violence by the established procedure. These positive changes reflect the development of juvenile policy in Ukraine and the protection of the best interests of the child. Significantly, the improvement of Ukrainian legislation in this area is based on international approaches to the legal regulation of juvenile justice and juvenile prevention [18].

According to the Convention on the Rights of the Child [1], the state is obliged to ensure the physical, intellectual, mental, spiritual, and moral development of minors. Therefore, the state's multi-dimensional activities should be based on the development and implementation of measures to protect and safeguard childhood – relevant legislation and systematic, coordinated activities of authorised state bodies that protect the rights and interests of minors from factors that harm their health and development. According to research by leading scientists around the world, domestic violence has an adverse impact on a child's development and education [19].

Among the positive achievements of society in protecting children from domestic violence in Ukraine are several theoretical and practical problems. In particular:

- mechanisms for identifying child witnesses of domestic violence have not yet been developed (children who witnessed domestic violence are not marked by police officers in protocols as victims of domestic violence, and authorised state bodies do not always report such cases);
- the law does not provide for a mandatory psychological examination of a child subjected to domestic violence;
- the Code of Ukraine on Administrative Offences [5] does not systematise the provisions reflecting manifestations of domestic violence against children;
- article 173-2 of the CAO [5] does not distinguish between the specifics of liability for domestic violence against a child and an adult;
- the appropriateness of administrative penalties for domestic violence against children has not been reviewed and improved.

Having explored the online databases of the Unified Register of Court Decisions (Article 173-2 of

the CAO [5]) for the entire period of 2020 [20], regarding the specifics of the responsibility of offenders for committing domestic violence against a child, notably, 67 out of more than 400 decisions proved the person's guilt, which is not a comforting indicator.

It is crucial for this research to summarise the findings of the Analytical Center of the Ukrainian Women Lawyers Association, which explored court decisions on bringing a person to justice for domestic violence in 2020. Their findings, based on the analysis of statistical data [13], proved that during this period, only 17% of the total number of court decisions concerned children of domestic violence victims, and in almost 15% of cases, the child was not considered a victim, although the violence was committed in their presence.

In most decisions, the courts limited themselves to the wording contained in the protocol. According to statistics for the entire period of 2020 [12], a fine is most frequently imposed by the court for committing unlawful acts against a child under Article 173-2 of the CAO [5] – in more than 70% of cases. The amount of the fine is determined by an administrative rule of UAH 170 to 680, depending on the frequency of domestic violence. 23% – community service.

Studies have demonstrated that 30% of cases of domestic violence against children are committed when the perpetrator is intoxicated, and 40% of cases of domestic violence against children are repeated [12], which, in the author's opinion, is an indicator of improper preventive activities of authorised state bodies and police units.

The author considers the circumstances that prompted Ukraine to impose martial law to be favourable for domestic violence against children. Stressful situations in which adult relatives find themselves are the impetus for systematic alcohol consumption and, under their influence, using domestic violence against the most vulnerable children. The difficulty of access to families with children living in the territories where hostilities are occurring and in the occupied territories for representatives of the relevant state institutions gives rise to an imaginary permissiveness of adults, which can manifest itself in intentional domestic violence against children. Thus, the subject of the research is particularly relevant nowadays [21].

In addition, clause 11 of part 1 of Article 67 of the Criminal Code of Ukraine [5] defines the commission of a crime using martial law as an aggravating circumstance. In addition, in the author's opinion, it would be appropriate to supplement Article 35(5) of the Code of Ukraine on Administrative Offences with a provision concerning using martial law.

The author's proposals regarding the necessity of improving Article 173-2 of the CAO [5] are substantiated, in particular, that Part 2 of this Article should be supplemented and outlined in the following wording: *"The same actions committed against a child or a person*

who has been subjected to an administrative penalty for one of the violations provided for in part one of this Article – entail community service for a period of forty to sixty hours or administrative arrest for up to fifteen days.”

In the author's opinion, clause 5 of Article 35 of the Code of Ukraine on Administrative Offences [5] requires amendment, which should be stated in the following wording: “committing an offence using the conditions of martial law or in conditions of natural disaster or other extraordinary circumstances”.

Any person, and, in particular a child, should be reliably protected by the state from all adverse manifestations, including violence. The constant dynamics of improving the existing legislation in line with new challenges is an appropriate response for a state that cares about human rights.

■ Conclusions

As a result of a comprehensive synthesis of statistical data and theoretical developments, the author identified the main theoretical, legal and practical problems of administrative liability for domestic violence against a child. The provisions of international standards and national legislation are considered. The research

examines the content of particular provisions of the Code of Ukraine on Administrative Liability, which provide for the prosecution of violent acts against a child.

In addition, the author considers it appropriate to exclude the application of an administrative penalty in the form of a fine under Part 2 of Article 173-2 of the CAO on the basis that the payment of a fine in the vast majority of cases is an expense from the family budget, which reduces the costs of development and household necessities of the child, and this contradicts the principles of the modern juvenile policy of Ukraine.

The author of the research develops recommendations for changing the current version and improving the laws, namely Article 173-2 of the CAO and Article 35(5) of the Code of Ukraine on Administrative Offences.

Thus, a number of the above and other theoretical, legal and practical problems that arise in modern Ukrainian society require special attention from the state and improvement of the administrative and legal mechanism for counteracting the adverse consequences. The proposed changes, in the author's opinion, can become an additional guarantee of the prevention of domestic violence against children.

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Проблеми адміністративної відповідальності за вчинення домашнього насильства щодо дитини

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■ **Анотація.** Наукове дослідження присвячено розгляду основних теоретико-правових і практичних проблем адміністративної відповідальності за вчинення домашнього насильства щодо дитини. Метою статті є окреслення особливостей захисту права дитини від домашнього насильства в законодавстві України та виявлення чинників, які свідчать про необхідність виокремлення домашнього насильства щодо дитини як адміністративного правопорушення з більш тяжкими наслідками, і, відповідно, застосування суворішого стягнення до особи порушника. Згідно з поставленою метою та специфікою предмета дослідження, автор застосував комплекс методів: філософських – діалектичний, феноменологічний та інші; загальнонаукових методів – системний, індукції, дедукції аналізу, синтезу, аналогії, порівняння; методів конкретної правової науки – порівняльно-правовий, правової статистики, правового узагальнення, правового аналізу, формально-юридичний тощо. У роботі розглянуто визначення домашнього насильства за законодавством України, узагальнено окремі шляхи протидії цьому явищу. Наголошено, що в Кодексі України про адміністративні правопорушення донині не розмежовано особливості адміністративної відповідальності за домашнє насильство щодо дорослого та щодо дитини. Водночас, за даними статистичних досліджень, з кожним роком збільшується кількість дітей, які потерпають від домашнього насильства. Зазначене свідчить про актуальність дослідження. Практична цінність полягає в тому, що за результатами дослідження було виокремлено й схарактеризовано основні теоретико-правові та практичні проблеми адміністративної відповідальності за вчинення домашнього насильства щодо дитини, а також сформульовано обґрунтовані пропозиції стосовно внесення змін і доповнень до ст. 173-2 КУпАП

■ **Ключові слова:** ювенальні права; принцип найкращих інтересів дитини; об'єкт; суб'єкт; об'єктивна сторона; суб'єктивна сторона; стаття 173-2 КУпАП