

# Criminological and Criminal Problems of Punishment for Domestic Violence: Theoretical, Practical and Judicial Aspects

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## ABSTRACT

The article is devoted to the analysis of criminological issues about the conditions and causes that contribute to the emergence of domestic violence, as well as the victimological component of this anti-social phenomenon. The sex and characteristics of victims of domestic violence were analyzed. Based on this, the procedural issues related to the refusal of the victim to further prosecution by law enforcement agencies of the person who committed the criminal offence were analyzed. Further consideration concerned the types of punishment applied to perpetrators of domestic violence, identified gaps in the judicial system of sentencing and release from it. Based on the decisions of the Constitutional Court of Ukraine, the ways to improve the legislation on domestic violence are analyzed.

**Keywords:** *domestic violence, punishment, release from punishment, victim.*

## 1. INTRODUCTION

The problem of domestic violence, which is gaining relevance and popularity among academics and practitioners every year in connection with the adoption of the Istanbul Convention, which was developed and adopted to combat gender inequality, domestic violence and sexual crimes, has been implemented. These norms into the current legislation by the Law of Ukraine № 2227-VIII of 06.12.2017 "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 abuse" [1], and is reflected in Art. 126<sup>1</sup> of the Criminal Code of Ukraine "Domestic Violence" [2]. However, our article is based on the analysis of statistical data of the "Prosecutor General's Office" and the "register of court decisions" on trends and prospects for improving the legislative coverage of this issue.

## 2. RESEARCH ANALYSIS

In the context of the COVID-19 pandemic in 2020 [3], the police received almost twice as many complaints of domestic violence than in the previous half-year. In this regard, the President stressed the

importance of increasing people's confidence in the services designed to help in such cases [4]. In examining this issue, we investigated trends in convictions (see Table 1).

The table apologizes that the number of convictions has increased more than 4.5 times in the last year.

The unprecedented growth of unemployment in Ukraine is seen in Ukraine in 2020. According to the statistics of the State Employment Center by economic activities, from January to June 2019, the planned mass layoffs amounted to 71,470 people, while for the same period in 2020 amounted to 127,847 people. The number of vacancies registered with the State Employment Service from January to June 2019 was 651,512 when in 2020 for the same period it was 474,695. Thus, 567,330 - persons who worked before, for the same period in 2020 in Ukraine registered 893,427 unemployed persons, of which 720,280 were previously employed. However, more shocking is that as of July 1, 2020, the number of vacancies was 57,927, and the number of unemployed was 517,704, which was 9 applicants for 1 vacancy [5].

**Table 1.** Comparative population with the number of convicts under Art. 126<sup>1</sup> for 2019-2020

Region	Number of convictions for 126 <sup>1</sup> in 2019	Number of convictions for 126 <sup>1</sup> in 2020	Permanent population
Vinnitsia	10	50	1540490
Volyn	0	12	1029450
Dnepropetrovsk	16	77	3178172
Donetsk	13	105	4124361
Zhytomyr	26	75	1211011
Transcarpathian	11	37	1251494
Zaporozhye	5	26	1689634
Ivano-Frankivsk	10	28	1366035
Kyiv	2	21	1772353
Kirovograd	3	34	928743
Luhansk	5	31	2133936
Lviv	25	90	2495450
Mykolayivska	7	27	1121063
Odessa	11	37	2365547
Poltava	5	56	1381451
Rivne	8	46	1152642
Sumy	13	63	1067749
Ternopil	4	20	1036451
Kharkiv	6	66	2645873
Kherson	21	70	1028183
Khmelnysky	4	21	1253193
Cherkasy	2	18	1190955
Chernivtsi	17	31	898843
Chernihiv	2	12	985216
Kyiv	4	14	2922794
<b>Total</b>	<b>231</b>	<b>1067</b>	<b>41771089</b>

Such disappointing statistics are related to the Covid-19 pandemic, which is also one of the factors contributing to the increase in the level of criminal offences, including those related to mental violence [6].

### 3. THE PURPOSE OF THE ARTICLE

Along with the problem of unemployment, there is another problem in Ukraine - migration. According to the demographic and social policy of Ukrderzhstat, in 2019 the number of citizens leaving Ukraine from urban and rural areas is 26,798 people aged 20 to 39, while the number of citizens arriving is 45,011 people aged 15 to 24 years (21 thousand people arrived) [5]. According to the results of such statistics, it is seen that young people come to Ukraine to study, get an education that is available in Ukraine, compared to foreign countries, especially in the field of medicine, and the working population aged 20 to 39 leaves Ukraine, for employment or permanent residence. The above statistics show the lack of jobs as a consequence of the inability to ensure a sufficient standard of living, which creates an unsatisfactory social and moral atmosphere, including the preconditions for migration, rising crime.

Another factor contributing to violent crime in Ukraine is the unfavorable trends of urbanization. The Ukrainian village is largely destroyed. Almost all able-bodied men leave the villages for employment. According to the information of the demographic and social policy of Ukrderzhstat, in 2019 the number of retired men from rural areas is 2346 people, most of them aged 20 to 49 years [7]. Some of them went to the capital or other cities of Ukraine, others - abroad (mainly to the Russian Federation and Poland). As a result, many lost their usual social ties, the process of urbanization began (today the urban population of Ukraine is over 70%), which led to the collapse of the current system of social control, increasing the anonymity of citizens, their alienation from the social environment, fear of their existence, as well as indifference to the fate of others. Hence the prevalence of the idea of the admissibility of violent actions, stereotypes of aggressive and violent behaviour in conflict situations, indifference to immoral or illegal behaviour of the environment [8].

Besides, the President addressed the Prime Minister Denis Shmygal with the task to develop a new draft national strategy in the field of human rights as soon as possible [9]. I would like to draw attention to the fact

that in Part 1 of Art. 55 of the Istanbul Convention, implemented in paragraph 7 of Part 1 of Art. 284 of the CPC of Ukraine, which provides for a rule on the possibility for the victim to drop the charge in private prosecution proceedings, will no longer apply to cases in which a criminal offence is related to domestic violence.

#### 4. THE MAIN MATERIAL

According to the interpretation of the Supreme Court regarding the impossibility of reconciling the perpetrator with the victim in the case of a criminal offence related to domestic violence, it is very correct, because the analysis of the practice of convictions in 2019 was violated. So from 231 convictions, however for 2020 already 1067 convictions.

**Table 2.** Regional statistics on victims of domestic violence for 2019-2020

Region	Number of convictions for 126 <sup>1</sup> in 2019	Number of world agreements for 126 <sup>1</sup> in 2019	Victim concluding a reconciliation agreement			
			wife	roommate	mother	
				children		
Vinnitsia	10	3	1	1	0	1
Volyn	0	0	0	0	0	0
Dnepropetrovsk	16	3	0	0	0	3
Donetsk	13	9	2	5	0	2
Zhytomyr	26	16	8	5	0	3
Transcarpathian	11	11	1	1	0	2
Zaporozhye	5	1	1	0	0	0
Ivano-Frankivsk	10	0	0	0	0	0
Kyiv	2	0	0	0	0	0
Kirovograd	3	2	1	0	0	1
Luhansk	5	2	2	0	0	0
Lviv	25	13	7	1	0	5
Mykolayivska	7	3	1	1	0	1
Odessa	11	3	0	0	0	0
Poltava	5	2	1	0	0	1
Rivne	8	4	1	1	1	1
Sumy	13	2	0	1	0	1
Ternopil	4	0	0	0	0	0
Kharkiv	6	0	0	0	0	0
Kherson	21	11	5	3	0	3
Khmelnysky	4	4	2	2	0	1
Cherkasy	2	2	0	1	0	1
Chernivtsi	17	11	0	3	2	6
Chernihiv	2	0	0	0	0	0
Kyiv	4	0	0	0	0	0
<b>Total</b>	<b>231</b>	<b>102</b>	<b>33</b>	<b>25</b>	<b>3</b>	<b>32</b>

Let's analyze in more detail: 16.10.2019 № court case 84947135 Kozelshchyna District Court of Poltava region Judge Lysenko A. V released from criminal liability based on Article 46 of the Criminal Code of Ukraine, in connection with the reconciliation of the accused with the victim Criminal proceedings №12019170200000278 from 11.09.2019 (court № / 1210/19) Person \_ 1 is not married, with vocational education [10], not officially working. The victim was the mother, respectively, there was a violation of the explanations of the Supreme Court of Ukraine [11].

As for the information on the types of punishment applied to persons convicted of domestic violence, as can be seen from the following table, in the first place there are 86 community sentences in public, the next release of a person on probation 36 sentences, the third arrest - 26 in accordance. As apologized from the statistics in most cases, a convict who commits domestic violence is not separated from his family [12], even when serving a sentence, because it is known that community service takes place from 60 to 240 hours in free time, which in our opinion only embitters a person who has committed

a criminal offence because he works for the state free of charge for 4 hours a day, and then returns to the family at the request of which he is prosecuted.

Only 36 sentences out of 159 are related to imprisonment, in other cases, the person remains in the same situation as the perpetrator of the criminal offence.

**Table 3.** Information on persons convicted of domestic violence (Article 126<sup>1</sup> of the Criminal Code of Ukraine) in 2019 (for sentences that have entered into force)

№ з/ п	Characteristic	YEAR	
		2019	
A	Б	2	
1	<b>Number of persons, sentences (resolutions) in respect of which entered into force (total)</b>	<b>231</b>	
2	<b>Convicted persons</b>	<b>159</b>	
3	<b>Justified persons</b>	<b>0</b>	
	<b>Closed cases (total)</b>	<b>70</b>	
4	F r o m a ll :	in connection with the refusal of the prosecutor or the victim, his representative to be charged in criminal proceedings	23
		in connection with effective repentance	2
		in connection with the reconciliation of the perpetrator with the victim	37
		in connection with death	8
5	<u>TYPES OF PUNISHMENT</u> Imprisonment	5	
6	Restriction of liberty	5	
7	Arrest	26	
8	Public works	86	
9	Fine	1	
10	Exempted with probation	36	

*Note: statistical information is compiled according to the statistics of reports form № 6 "Report on the number of persons convicted, acquitted, cases closed, insane, to whom coercive measures of a medical nature and types of criminal punishment were applied" and form № 7 "Report on the composition of convicts" State Judicial Administration of Ukraine, official website [https://court.gov.ua/inshe/sudova\\_statystyka](https://court.gov.ua/inshe/sudova_statystyka)*

In this case, the decision of the European Court of Human Rights on the commission of domestic violence is positive, so the European Court of Human Rights found a violation of Art. 8 of the Convention on Human Rights (right to respect for private and family life), according to the information resource ECHR. Ukrainian Aspect [13].

The bottom line: Ms Levchuk married OL in 2006. In 2007, they gave birth to triplets, the local council provided them with social housing - an apartment. Their relationship deteriorated as OL abused alcohol, argued, harassed and threatened her and her children, sometimes resorting to physical violence. Their marriage was dissolved in 2015 and she received custody of the children. However, OL continued to live in the apartment.

ruled in the case of Levchuk v. Ukraine (application № 17496/19), in which it

Police and social services have repeatedly intervened in the conflict, with the former husband being indicted but never formally convicted of domestic violence.

As the situation did not improve, in 2016 Ms Levchuk opened proceedings under Article 116 of the Housing Code, which provided for the possibility of evicting social housing owners for systematic misconduct. Eventually, in 2018, national courts dismissed the lawsuit. Although they acknowledged that OL "Must change their attitude", they did not find that the misconduct was systematic and believed that there was no reason for such an extreme measure as eviction.

The Ukrainian citizen's complaint concerned the rejection of the eviction claim of her ex-husband, as their cohabitation exposed the complainant and her children to the risk [14] of domestic violence and intimidation.

The decision regarding Levchuk is already a precedent that our judges will not be able to circumvent and they will be forced to apply the practice of evicting a domestic offender from the common property when committing domestic violence.

In recent years, there has been a problem with the Supreme Court's refusal to open cassation proceedings on the cassation appeal of a prosecutor who participated in the criminal proceedings of the appellate court in cases involving criminal offences related to domestic violence. October 2019 (case № 653/666/19 proceedings № 51-4906ck19); the decision of the Supreme Court of October 21, 2019 (case № 474/442/19 proceedings № 51-5124ck19).

However, by the decision of the Joint Chamber of the Criminal Court of Cassation of the Supreme Court of 12 February 2020 (case № 453/225/19 proceedings № 51-4000km19) in respect of which criminal proceedings on charges under Part 2 of Art. 125 of the Criminal Code of Ukraine (hereinafter - the Criminal Code) [15] closed on the basis of paragraph 7 of Part 1 of Art. 284 of the Criminal Procedure Code of Ukraine (hereinafter - CPC) [16]. In addition, the prosecutor requested on the basis provided for in paragraph 1 of Part 1 of Article. 438 of the CPC, cancel and review the decision of the appellate court and appoint a new trial in this court. Arguing his claim, the complainant emphasizes a significant violation of paragraph 7 of Part 1 of Article. 284 of the Code due to failure to comply with the Law of Ukraine of December 6, 2017, № 2227-VIII "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" (hereinafter - Law № 2227-VIII). The prosecutor also notes that the appellate court, contrary to the provisions of Part 4 of Art. 401, part 4 of Art. 405 of the CPC carried out the proceedings in the absence of PERSON\_1. According to the prosecution, the impugned decision does not comply with Articles 370, 419 of the Code and on February 25, 2020 (case №442 / 2191/19 Proceedings № 51-6133 km 19) to the cassation appeal by the prosecutor, disagreeing with the decision of the appellate court due to significant violation requirements of the criminal procedure law, asks it to cancel and appoint a new trial in this court. The prosecutor motivates his claims by the fact that the appellate court unreasonably upheld the decision of the court of the first instance, which, closing the criminal proceedings against IR Vrublyak under Part 1 of Art. 125 of the Criminal Code of Ukraine on the basis of item 7 of h. 1 Art. 284 of the CPC of Ukraine, did not take into account the

requirements of 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" of 06 December 2017. In addition, the prosecutor notes that the decision of the appellate court does not meet the requirements of Articles 7, 9, 284, 370, 419 of the CPC of Ukraine, in addition, March 10, 2020 (case № 531/270/19 proceedings № 51-5338km19) the position of the prosecutor is to his instructions that the courts of first and appellate instances, not taking into account the requirements of the Law of Ukraine of December 6, 2017, № 2227-VIII "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine to implement the provisions of the Council of Europe Convention on Preventing Violence against Women and domestic violence and the fight against these phenomena "(hereinafter - the Law № 2227-VIII) [1] came to an unfounded conclusion about the possibility of closing the criminal proceedings against PERSON\_1 on the basis of paragraph 7 h. 1 Article. 284 of the CPC in connection with the refusal of the victim to be charged. Thus the prosecutor notes that considering defined in item 3 of h. 1 Art. 1 of the Law of Ukraine of December 7, 2017 № 2229-VIII "On prevention and counteraction to domestic violence" (hereinafter - the Law № 2229-VIII), the incriminated PERSON\_1 crime, is a crime related to domestic violence, and the materials of the criminal proceedings contained all the necessary information for the court to establish this fact without going beyond the charges.

The panel of judges of the First Judicial Chamber of the Court by the decision of November 28, 2019, transferred the criminal proceedings against PERSON\_1 for consideration by the joint chamber on the basis of Part 2 of Article. 434<sup>1</sup> PDA.

This decision was made by the panel of judges due to the fact that it considered it necessary to depart from the conclusion on the application of paragraph 7 of Part 1 of Article. 284 of the CPC in a similar legal relationship, set out in the decision of the Court of October 3, 2019 (case № 653/666/19, proceedings № 51-4906ck19).

After hearing the judge's report, the prosecutor's explanation, examining the materials of the criminal proceedings and the arguments set out in the cassation appeal with additions to it, the joint chamber concluded that the appeal was not subject to satisfaction in view of the following.

Law № 2227-VIII, which entered into force on January 11, 2019, amended the Criminal and Criminal Procedure Codes.

In particular, paragraph 7 of Part 1 of Art. 284 of the CPC, which provides that criminal proceedings are closed if the victim refuses to be charged in criminal

proceedings in the form of private prosecution, was supplemented by the words: "except for criminal proceedings for a crime involving domestic violence" [16].

In the cassation appeal, the prosecutor's arguments are reduced to allegations of illegal closure of criminal proceedings due to introduced on January 11, 2019, to Art. 284 of the CPC changes and the fact of committing PERSON\_1 crime against his wife.

However, the commission of a criminal offence against a family member or other person specified in Part 2 of Art. 3 of Law № 2227-VIII, does not automatically cancel the guarantees of the right to protection. If the prosecution considers that a socially dangerous act is related to domestic violence, it must state this in the notice of suspicion, in the indictment, and provide appropriate evidence to substantiate its position. Otherwise, the suspect (accused) will be deprived of the procedural opportunity to effectively defend and refute the accusation.

## 5. CONCLUSIONS

On the other hand, as can be seen from the materials of this case, the indictment does not contain any references to the commission by a person of a criminal offence related to domestic violence. In the said procedural document, the investigating authorities also stated that there were no aggravating circumstances.

As the pre-trial investigation authorities did not accuse the offender of a criminal offence of domestic violence, he was not aware of such an accusation and was unable to defend himself against it.

A criminal offence related to domestic violence should be considered any criminal offence, the circumstances of which indicate the presence in the act of at least one of the elements (signs) listed in Art. 1 of Law № 2229-VIII, regardless of whether they are listed in the incriminated article (part of the article) of the Criminal Code as signs of the main or qualified corpus delicti. Established in paragraph 7 of Part 1 of Art. 284 of the CPC, the prohibition to close criminal proceedings applies to persons who have committed a crime related to domestic violence, provided that the investigating authorities have brought such a charge to the person and he had the opportunity to defend himself against it.

Pursuant to Articles 433, 434, 4342, 436, 441, 442 of the CPC and Part 1 of Article 36 of the Law of Ukraine "On the Judiciary and the Status of Judges" of June 2, 2016, № 1402-VIII (hereinafter - Law № 1402-VIII) the Chamber of the Court recognized that the Supreme Court ensures the stability and unity of judicial practice in the manner and manner prescribed by procedural law. This task is realized, in particular, through the administration of justice, during which the Supreme Court in its decisions expresses the legal position on law

enforcement, thus orienting the case law to the uniform application of the law.

Part 6 of Article 13 of Law № 1402-VIII provides that the conclusions on the application of the rules of law set out in the decisions of the Supreme Court are taken into account by other courts in the application of such rules of law.

In all these criminal cases, the Supreme Court decided to cancel and order a new trial in the court of the first instance.

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