

Concept of violence in jurisprudence

The social policy of any law-based state should be focused on creating decent living conditions and a high standard of well-being not only for the present but also for future generations. The demographic crisis that exists today in Ukraine is not a positive phenomenon for the Ukrainian people, which is why public authorities should promote both the education of a new healthy generation and the preservation of the existing gene pool. Having proclaimed that the person, his/her life and health, honor and dignity, inviolability and security are recognized as the highest social value in Ukraine (Article 3 of the Constitution of Ukraine), the state has committed to protect the individual, especially the child, with all available means. Articles 51-52 of the Constitution of Ukraine provide for state protection of childhood, equality of children in their rights irrespective of their origin, as well as whether they are born in or out of wedlock, and it states that any violence against the child and his/her exploitation are prosecuted by law. The Law of Ukraine “On the Protection of Childhood” notes that every child is guaranteed the right to liberty, personal integrity and protection of dignity. An important step towards the implementation of international standards for the protection of the rights of the child in the national legislation of Ukraine was the adoption of the “National Plan of Action for the implementation of the UN Convention on the Rights of the Child, approved by the Law of Ukraine “On the National Program “National Action Plan for the Implementation of the UN Convention on the Rights of the Child” for the period up to 2016 year”, the purpose of which is to ensure the functioning of the system of protection of children's rights in accordance with the requirements of the UN Convention on the Rights of the Child. But despite the extensive system of state and international legal protection, the number of criminal offenses committed against children has increased significantly recently.

Effective counteraction to violent crime against children implies a clear awareness of this phenomenon. Therefore, our research has a terminological aspect: we will find out the content and scope of the concept of “violence against children” as well as find out the correlation of this concept with a relatively new concept of criminological science “aggressive and violent crime”, since a clear understanding of the subject of research will be achieved only under conditions of unambiguous perception of the content of the abovementioned concepts.

The phenomenon of violence itself constantly accompanies the development of society. So, if we reach the times of Kyivan Rus, then about the existence of violence can be deduced from the treatise by the Byzantine emperor Constantine Bagrianorodny “On the Nations”, which dates back to the middle of the X century. According to his story, in the beginning of November, when the rivers were freezing, the prince and his wife left Kyiv and traveled to the lands of the Derevlyans, Dregovich, Krivich and other Slavs

paying tribute to him. Trip to the field continued until spring. The process of collecting the tribute was often accompanied with violent actions on the part of the militants [5, 33].

In Russian Pravda (extended version) violence is mentioned in several articles: “22. The same is true in all cases, about theft and in cases of suspicion of theft; if there is no kidnap in the accused, and the suit is not less than half a hryvna in gold, then to subject the accused to forcible testing by iron” [17, 17].

Historical and legal excursus allows us to conclude that violence was seen not only as a constituent element of individual crimes (a means of committing a crime), but also as a separate crime. Thus, according to article 142 of the Statute of Penalties imposed by world judges (1984) “For arbitrariness, as well as for the use of violence, however, without causing beatings, wounds or injuries (Article 28), the guilty person is arrested for no more than three months.” [7, 58].

Given the importance of the concept “violence” content understanding, this issue was the subject of consideration by the Supreme Court of Ukraine. Thus, according to paragraph 5 of the resolution of the Plenum of the Supreme Court of Ukraine “On judicial practice in cases of crimes against property” under violence that is not dangerous to the life or health of a victim of robbery, it should be understood as the deliberate infliction of mild bodily harm which has not caused a short-term health disorder or minor disability, as well as the commission of other violent acts (attacks, beatings, unlawful imprisonment), provided that they were not dangerous to life or health at the time of infliction. Such violent acts committed during robbery are fully covered by the part two of Article 186 of the Criminal Code and do not require additional qualifications under other articles of the Criminal Code [14].

Somewhat different is the interpretation of the concept considered in the resolution of the Plenum of the Supreme Court of Ukraine “On judicial practice in cases of crimes against sexual freedom and sexual integrity of a person”. Thus, in accordance with paragraph 3 of this regulation, physical violence, provided by the dispositions of Articles 152, 153 of the Criminal Code, should be considered deliberate external negative influence on the organism of the victim or on his/her physical freedom, committed in order to overcome or prevent the resistance of the injured person or bring him/her to a helpless state. Such influence may be expressed in the form of strikes, beatings, injuries, compression of the respiratory tract, holding hands or feet, restriction or deprivation of personal freedom, introduction into the body of the victim against of her will of narcotic, psychotropic, poisonous, potent substances, etc.”[15].

It should be noted that criminology deals with the issue of violence, its characteristics, forms of manifestation, in the context of committing criminal offenses,. As the Ukrainian criminologists point out the following typical types of violence:

1) deprivation of life, infliction of bodily harm, violation of sexual integrity, seizure of hostages and other means of property seizure, torture and the use of unlawful methods of influence in respect of detainees and those under investigation;

2) excess of power, deprivation of various rights, ill-treatment of children, etc. [4, 84].

Typically the types mentioned above are called violent crimes in legal scientific and educational literature. At the same time, we can not but note that the issue of a clear definition of actions that constitute violent crime remains unsolved by domestic criminal law and criminological sciences. For example, we can note that soviet lawyers referred to violent crimes only such actions as intentional murder, intentional grave bodily harm, hooliganism [8, 174]. Although this approach is unlikely even logically grounded, the question remains unclear as to why the authors did not include moderate or mild injuries in this list? In addition, the group of crimes against sexual integrity, commission of which is mainly accompanied with violence, is not named.

One can not but point out that legal science and educational literature as well as the aforementioned judicial acts, use a limited interpretation of the term “violence”, meaning under it only the use of physical force and, accordingly, distinguishing between physical violence and the threat of physical violence. Such an interpretation of this term does not correspond to its consistent use in colloquial language, as well as the legislative definition of “domestic violence” used in the Law “On Prevention and Combating Domestic Violence”. But it is quite clear that in today's conditions of social development violence can not be limited to only the use of physical force. For example, such a relatively common phenomenon in Ukraine as baiting, being socially dangerous, causing significant harm to the formation and development of a full value personality, may not be accompanied by the use of physical force, however, it can not be but called a violent phenomenon. Typically, the baiting is determined with the help of the term “violence”.

It should be noted that according to the Law of Ukraine “On Education”, “baiting (harassment)” is an action (an act or omission) of participants in the educational process consisting in psychological, physical, economic, and sexual violence, including the use of electronic communications, that are committed against a minor or a juvenile and / or by such a person in relation to other participants in the educational process, which could or could have harmed the mental or physical health of the victim”[8]. We would like to emphasize that such a definition is fully consistent with the interpretation of domestic violence, which is enshrined in paragraph 3 of Part 1 of Art. 1 of the Law of Ukraine “On Prevention and Combating Domestic Violence”.

It should be noted that already on February 5, 2019, the Boryspil City-Regional Court of the Kyiv region, having considered the administrative material received from the Borispol PD of the MD of the NP in the Kiev region, on bringing to administrative responsibility for the baiting, found

guilty of committing a baiting and imposed a fine. Under the circumstances of the case, a minor, a child recognized as a persecutor, while on the premises of the Boryspil General School № 7, “committed an act of baiting, that is, the actions of psychological and sexual violence involving the use of electronic communications against the minor, which was manifested in the illumination of obscene photos in the network of “instagram” , resulting in harm to the victim's mental health "[2].

The understanding of violence as such an act, which is not related to the physical impact on the person, also gives the decision of the Netishyn City Court of the Khmelnytsky Oblast on February 28, 2019. Under the circumstances of the case, a pupil of the 8-B class of an educational institution in the period from September 1, 2018 to February 12, 2019 “had been committing acts that consisted of psychological violence (abuse, contumeliousi, threats)” concerning to a physics teacher, thereby causing harm to mental health of the injured person. At the same time, this student “constantly disrupted the educational process, namely: during the lessons spoke in the words of an obscene vocabulary, during the lesson engaged loud music, clinging to other children, than prevented them from studying” [9].

The abovementioned court decisions, as well as the provisions of the current legislation, which were referred to by judges, allow us to conclude that both a legislator and a court practice apply a broad approach to the interpretation of the term considered, which involves not only its physical form, but also the other ones, in particular psychological, economic etc.

One can not deny violence and methods used by “collecting organizations” that are not directly related to the use of physical force, but are based mainly on intimidation of the person, psychological pressure, etc.: calls at night, threats of detention, prosecution, intimidation legal responsibility of relatives, letters to work and place of residence, disclosure of personal information, etc. According to the chairman of the coordinating council of the Association of anticollectors and human rights activists of Ukraine “Your Hope” Fedir Oleksiuk, 169 people committed suicide cause of the collecting business [13]. It is clear that the validity of such data may cause some doubts, but the impact of collector organizations on human life and health as a whole does not raise particular objections.

It should be noted that in modern society, such an act was called “stalking”, indicating its prevalence and recognition of its existence. Stalking makes it possible to understand that the interpretation of violence with physical impact on a person, other forms of explicit aggression does not correspond to the current state of social development, which has also changed the forms of violence. The unwanted intrusive persecution is also a form of violence.

Note that stalking was the subject of study of foreign scientists. So, in this context, the paper of that Joshua D. Dantley and David M. Buss, “The Evolution of Stalking” should be noted where the authors clear up the

understanding of stalking, its form and characteristics, including the gender aspect. Given the gender differences, Joshua D. Duntley and David M. Buss's theory provides various forms of protection against stalking, in particular, the strategies of women's actions against men who persecute women for sexual abuse. These are men who as a rule use "heavy" forms of stalking, in comparison with women [6, 324].

As Patricia Tayden and Nancy Tennessh emphasize the legal definition of stalking varies from one state to another. Despite the fact that most states define stalking as intentional, harmful, and repeated pursuit of another person, some states include in the normative definitions of this notion activities such as lies, surveillance, unacceptable communications, telephone harassment and vandalism [16, 1].

According to some data about 6 million Internet users in the world suffer from psychological violence. If we take into consideration our state, then about 90% of Internet users aged 15 to 24 undergo various forms of violence that negatively affects their psyche.

According to O. Pokalchuk, the Director of Amnesty International Ukraine, the domestic legislation of a large number of countries provides legal liability for stalking. For example, in Australia, Austria, the United Kingdom, Canada, the United States of America, and Japan, punishments in the form of imprisonment up to six years or a fine or (the issuance of a security order) is also provided. However, the actions of law enforcement bodies in applying legal norms are ineffective. Thus, even in the UK, the rate of those accused of prosecution is quite low, only of 2 out of 10 are brought to legal liability (from more than 10,000 filings filed in 2018, only 1822 individuals were charged with an official allegations [12].

Note that there is no separate legal norm in Ukraine that would entail responsibility for stalking. Accordingly, there are no mechanisms for counteracting such an action on the part of law enforcement agencies; there is no statistics on those affected by this negative phenomenon. Moreover, a significant number of citizens do not consider stalking as a crime, considering it to be permissible, and the possible means of counteracting the attempt is not to react.

One can not but note the fact that, nevertheless, internationally, various measures are taken to counter stalking. In this context, one can not but mention the fact that Art. 34 of the Council of Europe Convention on the Prevention and Combating of Violence against Women and Domestic Violence contains an interpretation of this phenomenon and obliges parties to an international treaty to take legislative or other measures to criminalize stalking: "The Parties shall take the necessary legislative or other measures to ensure that deliberate behavior consisting in the repeated implementation of threatening behavior directed at another person, which makes him or her afraid of his safety, was criminalized"[3]. However, Ukraine, signing the abovementioned international treaty (known as the Istanbul Convention), has

not yet ratified it, in particular, because of the rejection of a large number of Ukrainians of gender ideology. “The people of Ukraine do not support the ratification of the Istanbul Convention because of the imposition of a gender ideology that is incapable of protecting women from violence, but severely damaging moral principles and family values of the Ukrainian society” [1] – is noted in the appeal of the All-Ukrainian Council of Churches and Religious Organizations to the Parliament on inexpediency and risks of ratification of the Istanbul Convention. It should be mentioned that such a position of the council of churches is clearly contrary to the principle of tolerance and equality. There can be no equality if there is lack of tolerant attitude. At the same time, few will deny the fact that the principle of equality is the basis of a civilized society, and even more of a democratic and law-based state, as Ukraine is declared in art. 1 of the Constitution of Ukraine. Consequently, the lack of understanding by religious organizations of the fact that the unequal status of a man and a woman which is traditional for the Ukrainian society is an obstacle to the implementation of the principle of equality and prevents further social progress, “rejects Ukraine at the time of the Middle Ages”.

In this aspect, we can not but mention the results of a nationwide study, according to which only 25% of respondents defined tolerance as a value (this is the smallest result in comparison with other values (for comparison: 38% - patriotism, 43.9% - order, 44.7 % - material security, 47.5% - law-abidingness.) At the same time, 59.5% of respondents acknowledged the existence of a problem of discrimination within the Ukrainian society (14.8% of the citizens did not determine the seriousness of the problem of discrimination, 25.7% - did not recognize discrimination (its presence) at all) [11, 66 - 68].

40% of respondents indicated that they personally faced with discrimination (in this case, the most frequent types of discrimination were mentioned: discrimination on the basis of age - 57.4%, discrimination on the state of health (disability) - 48.8%, discrimination against proprietary evidence - 34%, sex discrimination - 32.3%. Individuals who indicated that they were discriminated against named, as a rule, several features, with only about 18% named only one feature. About 21% of this category pointed to two features at the same time, 22% - for three features, about 39% - four or more features). Moreover, 88.9% of respondents agreed that there should be no restriction on the rights based on gender or age, 90.3% - there should be no restriction on the rights based on race or nationality, 84.8% - there should be no restriction on the rights based on political and other opinions but they also mentioned that drug addicts (66% of respondents), former convicts (53.2% of respondents), Gipsy (47.5% of respondents), LGBT (46.2% of respondents) may be restricted in their rights [11, 70-72].

In view of the abovementioned, taking into account the evolution of forms of violence, in our opinion both the use of physical force and the threat of the

use of physical force are entirely covered by the concept of “violence” and is simply different types of this social phenomenon.

At the same time, it should be noted that the sphere of criminal and legal relations has certain features. Thus, the commission of a criminal offense provides for bringing a guilty person to criminal liability, the punishment within which is the most severe in relation to other types of legal liability. The degree of danger to a person of physical coercion and the threat of its use at a specific time point are different and, moreover, provide (particularly in the latter case) the possibility of applying for protection to the authorized state bodies or to take other measures to prevent the realization of the expressed threats. Although the perception by the victim of the real possibility of a threat at the time of its statement, forces him/her to fulfill the requirements of the offender. The victim's refusal to submit most often ends up causing harm to his/her health or even deprivation of life. In most cases, violent actions are combined with threats of even more damage to health. At the same time, the threat of the use of violence is not covered by the concept of violence from the criminal law point of view, since it does not entail directly the infliction of physical harm to another person. By threatening with deprivation of life or causing damage to health, the perpetrator does not always intend to actually cause physical harm. Therefore, criminal law and criminology consider physical violence and the threat of its use as two independent methods of committing a crime. [4, 86].

Thus, taking into account the aforementioned distinctions between the concepts of “violent crimes”, “aggressive crimes”, “violent and profitable crimes”, regarding the separation of the use of violence and the threat of violence, while characterizing violent crimes, and also taking into account the subject of our study, it is necessary to distinguish such signs of violent crimes against children:

- 1) the object of encroachment is the social relations protected by the criminal law, which ensure the physical and psychological integrity of the child;
- 2) violent crimes against children are committed with direct intent;
- 3) the method of committing a crime is violence or the threat of its use;
- 4) the absence of the will of the victim regarding the use of such violence or threat of its use;
- 5) the crime directed against the child, which must be perceived by a person who committes a violent crime.

Hence, violence is a phenomenon that dates back its roots in the time of the beginning of society itself, which is reflected in the first historical and legal sources. The views on violence have been changing with the development of society which (violence) today include not only physical but also other forms of manifestation. The criminal and law and criminological understanding of violent crime differs from the interpretation of this term in other spheres of social life.

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