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CONCERNING THE IMPROVEMENT OF THE SYSTEM OF ADMINISTRATIVE PENALTIES FOR THE COMMISSION OF THE OFFENCE PROVIDED BY ARTICLE 173-2 CUOAO

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Problematic issues of the system of administrative penalties for the commission of domestic violence, failure to comply a protective order or failure of corrective program are considered in the article. The points of view of scientists about the system of administrative penalties for the commission of domestic violence and its improvement are analyzed. Specific proposals as to improvement of the legislation in the field of administrative and legal regulation to counter domestic violence are provided.
Keywords: domestic violence, fighting, counteraction, administrative and legal regulation, legislation, administrative detention, fines, community service, administrative and legal regulation, subjects of the public administration.

Problem Statement. A thorough investigation of administrative-legal regulation of counteraction of domestic violence and its improvement are impossible without determination of a system of administrative penalties for the commission of domestic violence, failure to comply a protective order or failure to pass a corrective program and its problem features, since it is evident that the achievement of the goal of the administrative responsibility in the field of the phenomenon studied is directly interconnected with concrete administrative penalties. Therefore we have to determine a system of administrative penalties for the commission of domestic violence, performance of their analysis, reveal of certain problem issues in the application of these penalties and giving certain proposals as to their improvement. It is especially topical with regard to adoption of the Law of Ukraine dated 12 February 2015 No. 187-VIII *«On the amendments to the Code of Ukraine of Administrative Violations as to settlement of the issue of responsibility for the commission of domestic violence»*.

Analysis of the latest investigations and publications. Attention of many scientists was attracted to the problem issues of application of the system of administrative penalties for the commission of domestic violence, inter alia O.M. Bandurka, Yu.P. Bytiak, M.A. Bondarenko, V.I. Vietrov, I.P. Holosnichenko, L.L. Hoholieva, L.V. Dorosh, O.V. Kovaliova, O.D. Kolomoiets, V.K. Kolpakov, A.T. Komziuk, V.I. Olefir, H.O. Ponomarenko, V.M. Smitiienko, V.V. Stashys, L.O. Feshchenko, N.B. Shamruk, S.S. Yatsenko and other scientists. However, dispite of a great number of publications in this range of problems, some issues remain unregulated and need further investigation.

Goal of the Article is to determine problem issues of the system of administrative penalties for the commission of domestic violence, by way of consideration of different viewpoints of leading scientists apropos of the system of administrative penalties for the commission of domestic violence, as well as in giving proposals as to the improvement of the legislation in the sphere of administrative-legal regulation of counteraction to domestic violence.

Contribution of basic concepts. The theory of administrative law has accented many times that achievement of the goal of administrative responsibility, including counteraction of domestic violence, is directly interconnected to concrete administrative penalties, whose efficiency depends on the type of administrative penalty and on the sufficiency of its influence onto the legal awareness of the guilty, as well as other persons with the purpose of prevention of new or repeated administrative offences. It therefore give rise to a problem of determination of the efficiency of administrative sanctions for the commission of the administrative offence, provided by Article 173-2 Code of Ukraine On Administrative Offences (hereinafter – CUoAO).

As of today, the sanction of para.1 Article 173-2 CUoAO provides for administrative penalties in the form of community service work for the term from thirty to forty hours or of administrative arrest for the term till seven days. And in case of the same actions commited by a person who was during a year imposed administrative penalty for an offence, provided by para 1 Article 173-2 CUoAO, – community service work for the term from forty to sixty hours or administrative detention for the term till fifteen days. It should be mentioned that in such form the sanction of the analyzed Article CUoAO exists for a quite short time, as it was amended by the Law of Ukraine dated 12 February 2015 No. 187-VIII [1]. Before the amendment the sanction for a unlawfull action, determined by para. 1 Article 173-2 CUoAO provided a penalty in form of a fine from three to five tax-free minimums of citizens' income or community service work for the term from thirty to forty hours, or co corrective work for the term till one month with the deduction of twenty percent from the wages, or of an administrative arrest for the term till five days. In its turn, para. 2 Article 173-2 CUoAO provided for a penalty in the from of fine from five to ten ax-free minimums of citizens' income or community service work for the term from forty to sixty hours, or corrective work for the term from one до two months h the deduction of twenty percent from the wages, or of an administrative arrest for the term till fifteen days.

The adoption of the aforementioned Law is seen to have eliminated the administrative penalty in the form of fine and corrective work from the sanction of para. 1 and para. 2 Article 173-2 CUoAO. We should emphasize in this regard that

the elimination of the mentioned administrative penalties from the sanctions of the said Article was preceded a long scientific discussion, and therefore we have to analyse the eliminated penalties from the sanctions of para. 1 and para. 2 Article 173-2 CUoAO and determine the negative and positive aspects of their application.

A performed questioning of employees of the police and courts of law showed that too small sizes of the sanctions have no positive result and no contribution to the achievement of the chief overall objective of an administrative penalty that is the individual and general prevention, aimed not only at the aggressor in the family, where the violence is committed, but at other persons, who can commit the said offence. Since the fine and corrective work are administrative penalties of property nature, the overwhelming majority of scientists, whose researchers studied administrative responsibility for the commission of domestic violence, believe that the application of such administrative penalties is not effective and purposeless, since the offender's property is mostly in the joint common ownership of the spouses or in the joint common ownership of the parents and children, and a restriction of the property rights of the offender will simultaneously mean the restriction of the property rights of the victim as well [2, p. 144; 3, p. 68-69]. In such a case, having once paid the fine for the man, the victim woman will hardly apply to authorities in case of repeated commissioning of the violence towards her or children. And a deduction to the state budged of twenty percent of the wages of the person, committed the domestic violence, will not facilitate the establishment of family well-being either.

At the same time attention should be drawn to the statistics of state court administration testifying the fact that fines made almost 90% of all court verdicts, brought in the fact of domestic violence [4]. Thus, according to the statistical data of the State Court Administration of Ukraine for 2014, the number of considered cases of the administrative offence, provided by Article 173-2 CUoAO made 81396. In the result of consideration of these cases by the courts of law, 71911 persons were brought to administrative responsibility. Among them 63119 persons were imposed fines, 5528 persons were imposed community service work, 66 – corrective work, 3198 – arrest. According to statistical data for the year 2015, before the amendment to the law, the administrative penalty in the form of a fine was imposed to 14910 persons, in the form of corrective work – to 75, in the form of community service work – to 12492, whereas arrests – to 2160 persons [5]. The given statistical data shows that the corrective work is the least frequent administrative penalty, imposed for the commission of domestic violence before the amendment of the sanction of Article 173-2 CUoAO. We attribute this to the fact that an overwhelming percentage of domestic aggressors are the persons leading an immoral life, abusing alcohol, drugs, toxic substances, and having no regular income, making the application of the this type of administrative penalty to them impossible.

Inexpediency of the application of this type of penalty was stated in works of such scientists as D.M. Lukianets, O.A. Banchuk, V.P. Tymoshchuk, I.B. Koliushko, T.O. Kolomoiets.

On the opinion of .O. Kolomoiets, a depth analysis of properties of the very type of administrative penalty, the legal bases of its imposition, real requirements of enforcement indicates significant obsolescence of existing regulatory models of corrective work, many problems of the practice of execution of orders on their imposition due to significant changes in the socio-economic realities of the life, which virtually levelling the value of this type administrative penalty of personal kind [6, p. 107].

In consideration of the mentioned above, we support the legislator as to the elimination of the community service tasks as a type of administrative penalty from the sanctions of Article 173-2 CUoAO.

Considering such type of administrative penalty, as fine, we have to accentuate that a restriction of ownership right of the person committed a domestic violence, in the form of imposition a fine to him, will not necessarily affect the ownership right and interest of the victim, since according to Law of Ukraine «On the prevention of domestic violence» the family members coming within the purview of this law are not only the persons being officially married, or living as a family without official registration, their children under custody (guardianship, trusteeship), *but also the parents of direct or indirect relationship subject to living together*. In this case they may have separate budget, thus an imposition to the guilty persons of sanctions of property nature will affect the victim in no way.

As it was mentioned above, having eliminated the fine from the sanction of the Article CUoAO under consideration, for the time being the lawmaker provides only two types of administrative penalties for committing an offence, provided by Article 173-2 CUoAO they are *community service works and administrative detention*. But we cannot disregard the fact, that according to the law, community service works shall not be imposed to the persons, determined as disabled of groups I or II, pregnant women, women, of 55 years old or more and men of 60 years old or more, and the administrative detention cannot be applied to pregnant women, women, having children younger 12 years old, to persons younger 18 years old, disabled of groups I or II [7]. Here emerges the question of how the administrative responsibility can be imposed to the persons, who committed the offence, provided by Article 173-2 CUoAO, and are disabled of I or II group, or a woman older 55, or having a child younger 12 years old. As we see, the amendment of the law providing administrative responsibility for the commission of domestic violence, does not consider the mentioned aspects, whereby complicating the process of enforcement of the rule of law under consideration, and in some cases bringing certain categories of persons to responsibility completely impossible.

In connection with the foregoing, we consider necessary to return the administrative penalty in the form of fine to the sanction of Article 173-2 CUoAO as an alternative to such penalties, as community service and administrative detention. In this case the administrative-tortuous norm studied determines three types administrative penalties, their

sizes, evidencing the possible individualization of the penalty. It is the way giving the possibility to choose a variant of administrative penalty for the commission of domestic violence, failure to comply a protective order or failure to pass the correctional program with due regard to a concrete circumstances, personality of the offender and relations between the victim and the guilty persons.

As regards of community service work, it should be notices that today it is the very type of the penalty that is acknowledged by scientists to be most purposeful for the commitment of the offence studied. This is because, firstly, they are not penalties limiting the property rights of a person, and this, in its turn, effects the motivation of application of the victim of domestic violence to a law-enforcement authority. Second, an application of this type of work will have a significant educational effect, because, as the practice shows, the main work, that local self-government authorities designate in this cases, is the maintenance of public order in public (i.e. crowded) areas [8, p. 492]. Regarding the said administrative penalty, we believe that it is appropriate that local authorities to designate carrying out community service work in the agencies and authorities entrusted to implement the measures of preventing domestic violence, which will facilitate more effective realization of the educational objectives of this penalty.

Considering the administrative penalty in the form of administrative arrest, it should be noticed that its application in the field of counteraction of domestic violence is determined by majority of researches to be not quite appropriate. Thus O.D. Kolomoiets points out, that administrative detention should be used for the commission of domestic violence as an extreme measure for both loss of the offender's wages in the work place and loss of the work place by such person [8, c. 492]. In her tern, O.V. Kovaliova points out, that application of administrative arrest gives possibility to the victim of domestic violence to take a rest from the aggression from the part of the offender for a certain time, while he serves administrative detention, but when he returns home, he becomes more aggressive, accusing the victim of domestic violence in his having to serve the administrative detention. Next time when the family faces violence, the victim, most probably, will not apply to law-enforcement authorities for the offence committed, since in such a case she will suffer again [3, p. 69].

In supporting the scientists and world community, who suppose necessary to criminalize any domestic violence, we believe that the very administrative detention as the strictest type of the administrative penalty shall be applied to the guilty person, so far as it relates to temporarily deprivation of liberty of the guilty person till fifteen days and drawing the guilty persons in community service (manual labour), which should lead to the individual and general prevention. Attention should be drawn to the importance of strengthening the administrative responsibility for committing domestic violence, which has been mentioned repeatedly in the literature. Thus O. V. Kovaliova offered as far back as 2008 to establish the criminal responsibility with the administrative prejudicefor the commission of domestic violence: after being brought to the administrative responsibility twice [9, p. 17]. K. Levchenko, the President of the International Human Rights Organization "La Strada", believes that "the only way out in fighting against the domestic violence is to criminalize the domestic violence, by making changes in the Criminal Code of Ukraine, as demanded by the Council of Europe Convention on preventing of the violence towards women and domestic violence and combating these phenomena these [4].

It also should be mentioned, that our questioning of policemen us evidences the necessity to strengthen the administrative sanctions for the commission of domestic violence. Thus 84% of policemen think that the sanctions of Article 173-2 CUoAO are not very effective and fully support the offer to establish the criminal responsibility with the administrative prejudice for the commission of domestic violence.

We also believe necessary to strengthen the responsibility for the commission of domestic violence. However, in our opinion, the measures of the criminal responsibility should be used after individual preventive measures, usage of all existing methods, technologies and programs for combating the domestic violence, aimed at saving the family due to a settlement of the conflict, because the matter concerns the family institution. And only in the case when such measures are unsuccessful, and the person commits domestic violence again, we shall apply the measures of criminal responsibility.

Making changes in the law can be explained by the followings: 1) the necessity of bringing legislation in the field of counteraction of domestic violence to the international standards; 2) statistical data, which evidences a very high rate of repeated commission of domestic violence during a short period of time. We should also understand that no government authority can give precise statistical data, because a large number of victims, suffering from the domestic violence, simply not apply to the authorities; 3) the necessity of effective defence of victims of domestic violence, because an act having a body of an administrative offence may be followed by an act having a body of crime and may lead to socially dangerous consequences that could have been prevented.

As it has already been mentioned before, the administrative penalties were the subject matter of researches of different scientists, who suggested their own vision of the penalty for commissioning the offense, provided by Article 173-2 CUoAO. Thus O.D. Kolomoiets suggested making changes to the CUoAO in the part of expanding the type of the administrative penalties, i.e. supplement the provisions, which may set the special demands to the behaviour of the person, committed the domestic violence. The main idea of these demands may involve both a restriction of certain rights of the offender and an obligation e.g. a prohibition to buy, to have, to carry and to use firearms or any kind of weapons, or to make the offender come to agencies of internal affairs from one to four times per month for a preventive conversation [8, p. 493]. O.V. Kovaliova, in her turn, suggested, along with the community service and administrative arrest as the administrative responsibility for the commission of a domestic violence or failure to comply a protective order, using the compulsion programs of the

social rehabilitation for the person, who committed domestic violence, with the aim of transition from the punitive function of the legal prescriptions to the renewed one in the system of the protection of the rights and freedoms of the persons, who suffered from the domestic violence [3, p. 71]. At the same time, we should emphasize that nowadays the legislation provides for the person to pass a corrective program that can be considered as an analogy to O. V. Kovaliova`s offer. However, this program is enforced to those offenders, who committed the domestic violence repeatedly after an official warning to him on the intolerance to the commission of such acts. We believe that such programs should be applied to the person right after the first commission of domestic violence.

We consider the offers of O. D. Kolomoiets and O. V. Kovaliova to be quite reasonable, and believe that their introduction to the legislation of our country will have a positive effect and facilitate a quality counteraction to domestic violence.

Also, we think that the system of administrative penalties for the commission of the domestic violence should have a complex of measures aimed at the counteraction to the studied phenomenon, including not only the punitive sanctions (fine, community service, administrative detention), but also the penalties, which have cautionary and preventive effect for the family aggressors, that will not only correspond to the goal of the administrative penalty by way of the exclusion of commission by them of new acts of domestic violence, but also the prevention of criminally-punished acts which may result from the commission of domestic violence. Only such complex system of administrative penalties, which has several types of punished and several types of cautionary and preventive administrative penalties, to our opinion, will provide an effective counteraction to domestic violence, since a judge depending on the circumstances of the case, personality of the victim and of the offender, their economic condition, as well as interrelations between them, can, with the consideration of the principle of the penalty individualization, choose an effective administrative penalty in every concrete situation.

Because Article 24 CUoAO provides a possibility of establishment of other administrative penalties by the laws of Ukraine, besides those stipulated therein, we believe that the current legislation has to be amended, accommodating the proposals of O.D. Kolomoiets and O.V. Kovaliova as to the improvement of the system of administrative penalties for the commission of domestic violence. Again in consideration of the results of the performed questioning of policemen, who emphasize that a quite large number of domestic aggressors abuse alcohol, drug, we consider necessary to attract attention to a positive experience of the Republic of Belarus. Thus on 31 January 2010 there is entrance in force of the Law of the Republic of Belarus dated 4 January 2010 «On the order and conditions of referral of citizens to activity therapy centres and conditions of stay therein», according to which the citizens, sick for habitual drunkenness, drug addiction or toxicomania, who were charged for three or more times during a year to an administrative responsibility for the commitment of administrative offences in a state of alcoholic intoxication or in a state, resulted from the use of drug, psychotropic, toxic or other stupefying substances, were warned of the possibility of their referral to activity therapy centres and during a year after this warning were charged to an administrative responsibility for the commitment of an administrative offence in a state of alcoholic intoxication or in a state, resulted from the use of drug, psychotropic, toxic or other stupefying substances, shall be referred to activity therapy centres [10]. With the consideration of the experience of the Republic of Belarus, we believe it necessary to consider a possibility of introduction to the national legislation of the mentioned administrative penalty for the commission of domestic violence. To our opinion, the problem of application of such penalty may be settled by way of a petition of the district police inspector, which he shall submit to the court along with the case materials on the domestic violence.

Therefore, summing up all the issues given above, considering the analysis of law-enforcement practice, we can state that nowadays the system administrative penalties in the form of community service work and of administrative arrest for the commission of domestic violence is not effective and needs urgent changes, since it does not facilitate the main objective of the administrative penalty that is education of a person, respect to the rules of common life and prevention of commitment of new offences, it needs a complex changes with its supplement with not only punitive penalties, but also cautionary and preventive administrative penalties, aimed at the protection of victims from domestic violence.

Conclusions. In the consideration of the described above, we may come to the following conclusions:

1) Application of administrative penalties, provided by the sanction of Article 173-2 CUoAO does not facilitate effective counteraction of domestic violence and solution of the problem in the family and state; 2) With the purpose of improvement of legislation in the field studied we propose to return to the sanction of Article 173-2 CUoAO the administrative penalty in the form of fine as an alternative to community service work and administrative arrest; if the domestic violence committed repeatedly, apply the measures of criminal responsibility; assign the local self-government authorities the power to appoint community service work in authorities and institutions, which are entitled to take measures for the prevention of domestic violence; supplement the Law of Ukraine «On the prevention of domestic violence» by an article, containing the administrative penalties, offered by O.D. Kolomoiets – prohibition of buying, storage, bearing and use of firearms and other kinds of arm, the demand to appear to police agencies from one to four times a month for a preventive conversation, as well as referral to activity therapy centres of persons, sick for habitual drunkenness, drug addiction or toxicomania, who were charged to an administrative responsibility for the commission of domestic violence in a state of alcoholic intoxication or in a state, resulted from the use of drug, psychotropic, toxic or other stupefying substances, and were warned on the possibility of their referral to the activity therapy centres.

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ЩОДО УДОСКОНАЛЕННЯ СИСТЕМИ АДМІНІСТРАТИВНИХ СТЯГНЕНЬ ЗА ВЧИНЕННЯ ПРАВОПОРУШЕННЯ, ПЕРЕДБАЧЕНОГО СТАТТЕЮ 173-2 КУПАП

Анотація
У статті розглядаються проблемні питання системи адміністративних стягнень за вчинення насильства в сім'ї, невиконання захисного припису або непроходження корекційної програми. Аналізуються точки зору вчених з приводу системи адміністративних стягнень за вчинення насильства в сім'ї та її удосконалення. Надаються певні пропозиції щодо удосконалення законодавства у сфері адміністративно-правового регулювання протидії насильству у сім'ї.
Ключові слова: насильство в сім'ї, протидія, адміністративно-правове регулювання, законодавство, адміністративний арешт, штраф, громадські роботи, адміністративно-правове регулювання, суб'єкти публічної адміністрації.

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К ВОПРОСУ ОБ УСОВЕРШЕНСТВОВАНИИ СИСТЕМЫ АДМИНИСТРАТИВНЫХ ВЗЫСКАНИЙ ЗА СОВЕРШЕНИЕ ПРАВОНАРУШЕНИЯ, ПРЕДУСМОТРЕННОГО СТАТЬЕЙ 173-2 КУПАП

Аннотация
В статье рассматриваются проблемные вопросы системы административных взысканий за совершение насилия в семье, невыполнение защитного предписания или непрохождение корекционной программы. Анализируются точки зрения ученых по поводу системы административных взысканий за совершение насилия в семье и ее совершенствование. Предоставляются определенные предложения по совершенствованию законодательства в сфере административно-правового регулирования противодействия насилию в семье.
Ключевые слова: насилие в семье, противодействие, административно-правовое регулирование, законодательство, административный арест, штраф, общественные работы, административно-правовое регулирование, субъекты публичной администрации.