

TYPES AND CONTENT OF RESTRICTIVE MEASURES TOWARDS PERSONS WHO HAVE COMMITTED DOMESTIC VIOLENCE UNDER THE CRIMINAL CODE OF UKRAINE

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Abstract. Within the conditions of the spreading the pandemic, the number of domestic violence cases has increased significantly, necessitating a review of restrictive measures in different countries. The concepts, features, legal nature, legal grounds and conditions for the application of restrictive measures, their types and content, nature (short-term or long-term), shortcomings of the modern model of criminalization of domestic violence in Article 126-1 of the Criminal Code of Ukraine have been systematized in the present academic paper as well as ways of solving problems that exist in this area. The method of content analysis of laws and regulations has been used in the research and the development of the legal framework of Ukraine towards combating and protecting against domestic violence has been analyzed. The object of the research is a system of restrictive measures in order to combat domestic violence. Restrictive measures can be attributed to countering domestic violence due to measures that restrict: 1) general place of stay / residence; 2) communication; 3) approaching to the victim; 4) electronic means of communication; 5) undergoing the program of correction of aggressive behavior; 6) search or pursuit; 7) preventive work; 8) monitoring the offender. These measures are carried out by specially authorized bodies upon request for a certain period. In general, the content of restrictive measures in accordance with the legislation provides for combating violence in the short term through passive measures and in the long term through behavior correction programs. Restrictive measures can be considered coercive criminal measures, which are characterized by an additional nature and can be applied by a court in the case the adult has committed a crime related to domestic violence. The duality of restrictive measures has been identified: on the one hand, they are a law of the forum, but on the other - a duty / prohibition for the offender.

Keywords: domestic violence, restrictive measures concerning violence, criminalization of domestic violence, classification of domestic violence.

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Introduction. Within the conditions of the pandemic, the number of cases of domestic violence is growing: in Brazil by 40% - 50%, in Spain - by 20%, in Cyprus - by 30%, in the UK - by 25% (Bradbury-Jones & Isham, 2020). The number of injuries as a result of violence is also increasing (Olding, Zisman, Olding & Fan, 2021). The increase in the length of staying at home has negatively affected the number of cases of domestic violence in the United States. According to research of Hsu & Henke (2021), staying at home due to the COVID-19 pandemic has led to an increase in violence by an average of 5%.

In Ukraine, domestic violence is extremely common, as evidenced by the data of the OSCE study (2019), conducted in the spring-summer of 2018 through a survey of 2048 women aged 18-74, analysis of information from focus groups, interviews, discussion with experts. Respondents note the prevalence of the phenomenon: 64% of respondents consider the phenomenon common, 67% have encountered various forms of violence (psychological, physical, sexual). This situation indicates the need to review, update the legal framework in order to ensure women's rights and opportunities for protection and advocacy. The research also shows that various forms of violence are widespread in Ukraine, in particular due to gender inequality, social expectations, lack of choice, lack of access to protection services against violence, lack of information about possible ways of protection for victims, lack of trust in protection institutions, insufficiently effective legal framework for protection, lack of clear instructions for the implementation of protection, centralized data collection system. The following legal issues should also be highlighted, namely: the formality of laws on the work of protection bodies (protection centers, police, psychological support centers, subjects of violence prevention). The lack of shelters and support services, in particular due to the lack of legal regulation of the mechanisms of their functioning, qualified specialists, especially at the regional level, quality programs for working with offenders exacerbate this problem. In fact, there are no preventive measures to combat violence, despite the approved Standard Program for Abusers Who Commit Domestic Violence (hereinafter - the Standard Program) (the Ministry of Social Policy, 2021c). Thus, the Standard Program provides for "the formation of awareness by the perpetrator that domestic violence is a violation of human rights punishable under current legislation", which actually means informing potential offenders about criminal liability.

Literature Review. Domestic violence is being studied as a form of abusive treatment in household space (Bradbury-Jones & Isham, 2020). Restrictive measures are considered in the scientific literature as certain obligations or prohibitions due to their application to a certain category of persons who have committed crimes related to domestic violence, in relation to the victim - a person who is (has been) with the abuser in the family or / and close relations as well as subject to the application of a wider range of conditions (Pavlova, 2019). Typically, such measures are aimed at restricting a certain category of subjective rights of the offender: housing, communication, personal freedom and other rights. The restriction of the right varies for each individual measure; it is a mandatory feature of all subjective rights. Restrictive measures should also be provided for in criminal legislation, which is their additional feature. The court is the body that is empowered to exclusively apply measures in order to restrict the rights of offenders on the basis of a ruling or sentence (Novikova, 2020).

In foreign countries, court orders on protection are a traditional restrictive measure to protect against domestic violence, which generally provide a negligible reduction in violence (Dowling et al., 2018b). Under certain conditions, orders are more effective, especially with a lower level of communication between the offender

and the victim. Orders are less effective for offenders who have committed a crime and / or violence, having psychological problems.

Shelters for victims and aggrieved persons are among the means of protection against domestic violence (Gregory, Nnawulezi & Sullivan, 2021). However, recent trends indicate a strengthening of the rules in shelters, which leads to increased psychological pressure on victims. Programs aimed at correcting offenders' behavior abroad and cognitive-behavioral therapy for 1 year are widely used as a restrictive protection measure against violence. Such programs are effective, as confirmed by a study of Zarling, Bannon & Berta (2019) on a sample of 3474 men arrested for domestic violence. The measures of police are also effective in combating violence, including timely response to incidents (Dowling et al., 2018a).

The investigation of Juodis, Starzomski, Porter & Woodworth (2014) focuses on the following countermeasures, namely:

- 1) planning of measures for victims' safety and teaching young people the skills to form and maintain psychologically healthy relationships,
- 2) coordinated responses of the defense authorities,
- 3) programs to assess the risks of violence,
- 4) special programs to correct the behavior of offenders.

Based on the analysis of legal norms on domestic violence, Pavlova (2019) examines the legal grounds and conditions for the application of measures towards restricting the rights of offenders. The basis for application is the commission by the offender of crimes that can be classified as domestic violence. Additionally, it is possible to determine the conditions for the application of measures in order to restrict the rights, namely:

- 1) penalties not related to imprisonment;
- 2) exemption of a person from criminal liability on grounds not provided by the Criminal Code of Ukraine;
- 3) exemption of a person from punishment on the grounds provided by the Criminal Code of Ukraine.

Characteristic features of restrictive measures that determine their legal nature are as follows (Kisilyuk & Smaglyuk, 2018):

- 1) measures of state coercion, as applied by the court on behalf of the state;
- 2) measures of an additional nature belonging to the category of other measures of a criminal law nature, forasmuch as they are applied along with punishment (except for punishments related to imprisonment);
- 3) restrictive measures provided by Art. 91-1 of the Criminal Code of Ukraine; they constitute an institution of the General Part of the Criminal Code of Ukraine;
- 4) the use of measures is a right, not an obligation of the court, in the interests of the victim in case of immediate danger from the offender. In this case, the court must take into account the opinion of the victim and apply these measures or give reasons why it does not consider it necessary to apply the restrictive measures;
- 5) the measures are applied to a person who is a special subject of criminal liability (forasmuch as his characteristics do not affect the qualification and are taken

into account when sentencing, exempted from punishment and / or criminal liability), who has turned 18 years old when committing a crime related to domestic violence;

6) the outlined measures are characterized by terms and are applied from 1 to 3 months and, if there is a need, they can be continued in accordance with a court's order for up to 12 months (part 3 of article 91-1 of the Criminal Code);

7) forasmuch as restrictive measures are devoid of capital punishment, their application does not entail a criminal record.

Pavlova (2019) argues that the legislation in this area envisages similar terms – “crimes related to domestic violence” (The Verkhovna Rada of Ukraine, 2018) and “domestic violence” (The Verkhovna Rada of Ukraine, 2020). The term “crimes related to domestic violence” is defined by the author in a more comprehensive sense. In addition to Art. 126-1 of the Criminal Code of Ukraine, it includes other crimes committed against a former spouse, family members, being in marital (family) and / or close relations, regardless of the indication of such circumstances in the criminal law as signs of a qualified or basic crime. This term includes such types of violence as: sexual, physical, economic, psychological, which cause the appropriate types of suffering (physical and psychological), cause health disorders, deterioration of quality of life, disability, etc. (Pavlova, 2019).

Vozniuk (2019) lays emphasis on certain shortcomings of the model of violence criminalization in accordance with the analysis of the rules of Article 126-1 of the Criminal Code of Ukraine, namely:

1) due to the literal interpretation of this norm, an erroneous impression is formed about the coverage of all cases and types of violence in Art. 126 of the Criminal Code of Ukraine;

2) problems of identifying the facts of qualification of each individual case exclusively under Art. 126 and the need for additional qualifications in accordance with other rules of law and articles of the Special Part of the Criminal Code of Ukraine;

3) the difficulty of distinguishing domestic violence as a crime from an administrative violation of the law;

4) formation of preconditions for violation of the principle of non bis in idem.

By the way, while taking into account the unresolved issues of previous studies, it is worth highlighting the lack of studying the practical experience of using the norms to counter domestic violence in Ukraine. Therefore, the necessity arises to continue research in this area and study the features of the practical applying law enforcement of new legislation in the field of combating domestic violence in Ukraine.

Aims. The purpose of the academic paper lies in identifying the types and content of restrictive measures against perpetrators of domestic violence, assessing the effectiveness of the practice of restrictive measures and developing recommendations for optimizing the system of measures in order to protect against violence.

Methods. In the present research, a qualitative investigation method has been used based on the content analysis of regulatory legal acts and the dynamics of the

development of the legislative framework of Ukraine in the field of counteraction and protection against domestic violence. The object of the research is a system of restrictive measures against violence. Content analysis of the legal framework has been carried out on the basis of the following regulatory legal acts of Ukraine for the period of 2017-2021, posted on the website of the Verkhovna Rada of Ukraine (2021) and the Ministry of Social Policy (2021), namely:

1. Resolution of the Cabinet of Ministers of Ukraine on the Procedure for the formation, maintenance and access to the Unified State Register of Cases of Domestic Violence and Gender-Based Violence (The Ministry of Social Policy, 2018).
2. Criminal Code of Ukraine (The Verkhovna Rada of Ukraine, 2001).
3. Law of Ukraine “On Amendments to the Criminal and Criminal Procedural Codes of Ukraine in order to implement the provisions of the Council of Europe Convention on the Prevention of Violence against Women and Domestic Violence and Combating These Phenomena” (The Verkhovna Rada of Ukraine, 2018).
4. Law of Ukraine “On Ensuring Equal Rights and Opportunities for Women and Men” (The Verkhovna Rada of Ukraine, 2005).
5. Order “On approval of the Standard Program for Offenders” (The Ministry of Social Policy, 2021c).
6. Law of Ukraine “On Prevention and Counteraction to Domestic Violence” (The Verkhovna Rada of Ukraine, 2020).

Results. For the period of 2017-2021, the regulatory framework of Ukraine concerning regulating restrictive measures and combating, preventing and punishing violence has been significantly improved. At the same time, the formation of an effective system and institution for combating domestic violence is at an early stage. Since the 1990s, attempts to combat violence have been ineffective due to the following basic problem, namely: lack of legal regulation, limited legal and regulatory framework and lack of public awareness of possible ways to address the problem of violence. The Law of Ukraine “On Prevention of Domestic Violence” adopted in 2001 indicated the organizational and legal basis for the prevention of legal liability for domestic violence, however, effective actions and measures to restrict, counter violence, help victims and influence offenders were missed in the Law. There were no special norms of criminal liability in the criminal legislation of Ukraine for domestic violence or violence between persons in family / close relationships as signs of qualifications or circumstances aggravating punishment.

Criminal liability for domestic violence has been introduced in Ukraine since 2017. It is worth noting that among all cases, 90% of women are subjected to violence. According to the Law of Ukraine “On Prevention and Counteraction to Domestic Violence”, “domestic violence means acts (actions or omission to act) of physical, sexual, psychological or economic violence committed in the family or within the place of residence or between relatives, or between former or current spouses, or between other persons who live together (have lived) in the same family, but are not (have not been) in a family relationship or registered marriage with each other, regardless of whether the person who has committed domestic violence lives

(has lived) in the same place as the victim, as well as the threat of committing such acts” (The Verkhovna Rada of Ukraine, 2020). The present Law also defines the list of restrictive measures of rights; it defines the duties of the offender to correct behavior on the basis of the application of measures of restriction to the suspect, person convicted or accused of violence in accordance with the Criminal Code of Ukraine (hereinafter - CCU). According to Section XIII of Art. 91 of CCU, restrictive measures against the offender are defined as follows (Figure 1) (The Verkhovna Rada of Ukraine, 2001):

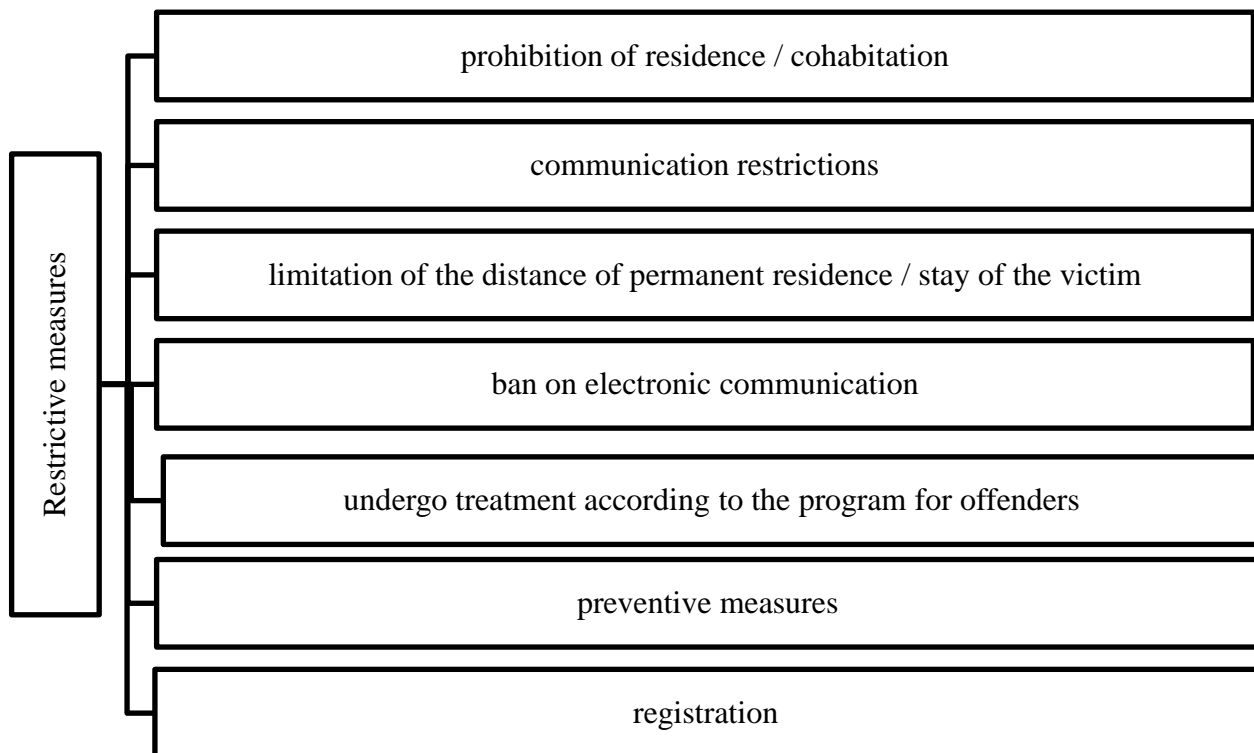


Figure 1. Types and content of restrictive measures

Source: compiled by the author on the basis of the Verkhovna Rada of Ukraine, (2001; 2002).

Additionally, the legislation of Ukraine provides the following measures, namely:

1. An urgent prohibition order obliging the abuser to immediately leave the home of the victim, contact the victim in accordance with the decision of the National Police on the application of the victim or on the initiative of employees (The Verkhovna Rada of Ukraine, 2020).

2. Restrictive injunction defining the prohibition on the abuser's stay in the place of residence, approaching a certain distance to the location of the injured or aggrieved person, the prohibition of the search and pursuit of the victim, various methods of communication, including through third parties for a period of 1-6 months with a possible extension for another 6 months. In accordance with the Law of Ukraine "On Ensuring Equal Rights and Opportunities for Women and Men" (hereinafter Law No. 2866-IV), "restrictive injunction regarding the offender means a measure of temporary restriction of the rights or imposition of duties on the offender,

aimed at ensuring the safety of the injured or aggrieved person, has been established in court” (The Verkhovna Rada of Ukraine, 2021c). Thus, restrictive measures 1-4 should be referred to the temporary restriction of the rights of the offender, and measure 5, in accordance with Art. 91 of Criminal Code of Ukraine, - to impose obligations on the offender to undergo treatment according to the program of formation of a new model of psychological behavior (The Verkhovna Rada of Ukraine, 2021a).

3. Preventive measures and registration by an authorized police unit with possible further deregistration (The Verkhovna Rada of Ukraine, 2020).

4. Undergoing treatment according to the program for abusers - a set of measures aimed at changing violent behavior, which forms a non-aggressive psychological behavior in a relationship for a period of 3-12 months (The Verkhovna Rada of Ukraine, 2020).

Law № 2866-IV (The Verkhovna Rada of Ukraine, 2005) defines the essence of the concept of “combating gender-based violence - a system of measures carried out by executive bodies, local governments, enterprises, institutions and organizations, as well as by citizens of Ukraine, foreigners and stateless persons who have been staying in Ukraine on legal grounds, aimed at stopping gender-based violence, providing assistance and ensuring the protection of the victim and obtaining compensation for the damage caused, as well as the proper investigation of cases of gender-based violence, prosecution of perpetrators and changes in their behavior” (The Verkhovna Rada of Ukraine, 2005).

Therefore, restrictive measures can be attributed to combating domestic violence through measures restricting:

- 1) joint residence / staying;
- 2) communication;
- 3) approaching the victim;
- 4) electronic means of communication;
- 5) undergoing treatment according to the program of correction of aggressive behavior;
- 6) search or pursuit;
- 7) preventive work;
- 8) registration of the offender.

These measures are carried out by specially authorized bodies upon request for a certain period. In general, the content of restrictive measures in accordance with the legislation provides for combating violence in the short term through passive measures and in the long term through behavior correction programs.

The development of the legal framework in Ukraine has contributed to the awareness of the population on ways of addressing and applying to specialized bodies in order to combat and protect against violence. Consequently, the Procedure of the Cabinet of Ministers of Ukraine (the Procedure for the formation, maintenance and access to the Unified State Register of Cases of Domestic Violence and Gender-Based Violence) has been adopted, however, the project is being implemented (The Ministry of Social Policy, 2018).

For instance, in 2020, the police has processed by 40% more complaints (101 thousand calls have been received) concerning various types of violence. In Ukraine, there is a network of institutions for protection and combating violence, which provides temporary shelter for victims, namely: 21 centers of social and psychological assistance; 23 shelters for victims of violence; 339 mobile brigades of social and psychological assistance to victims; 12 centers of medical and social rehabilitation for victims; 12 day care centers; 142 “hot lines” (The Ministry of Social Policy, 2021a). For instance, in the period from January 2020 to January 1, 2021, 29 344 complaints from victims of violence have been received through the hot lines, as well as 211 362 complaints about domestic violence have been registered by the subjects of interaction, while in 2019 – 130 514 (by 61,9% more), of which 2 765 - from children, 180 921 - from women and 27 676 - from men.

In February 2021, the Government has adopted the State Program for Prevention and Counteraction to Domestic and Gender-Based Violence for the period up to 2025 (The Ministry of Social Policy, 2021d). The program provides the development of template programs for victims and a program for children - abusers with recommendations for correct implementation and ensuring reporting; expanding the network of protection against violence and facilitating restrictions by establishing support services for victims (shelters, day centers of social and psychological assistance, mobile brigades of social psychological assistance, specialized services of primary social and psychological counseling). Along with this, the Program provides the inclusion of measures to counter violence through court hearings, the development of standards for the formation of non-violent value guidelines at the institutions of preschool, primary, secondary, vocational and higher education; completing training programs for specialists in the field of psychological training of authorized bodies of counteraction, protection of violence; involving business entities in the development of a system for preventing and combating violence and / or gender-based violence (prevention of violence in labor collectives as part of corporate social responsibility) (The Ministry of Social Policy, 2021d).

Discussion. The lack of de facto normative legal regulation of domestic violence and a clear definition of restrictive measures against perpetrators in Ukraine have affected the widespread prevalence of various forms of violence, the victims of which are mainly women. The legislation has not been updated since 2000. Only in 2017, Ukraine adopted Law № 2229-VIII, which defined the conditions for the establishment of restrictive measures in the form of a temporary injunction, restrictive prohibition, preventive work and undergoing treatment according to the program for offenders. The development of the legal framework in this area and the use of automated information systems to combat violence (hot lines and the development of a support network for victims) contributes to the broad informatization of the population about possible ways to address situations related to violence. Herewith, the amendments to the CCU contain certain contradictions. The basic ones are as follows: the impossibility of a clear classification of all types of crimes related to violence, according to Art. 126-1 of the Criminal Code of Ukraine, difficulties in distinguishing between a criminal offense and an administrative offense

in case of domestic violence. This requires specifying the disposition of Art. 126-1 through the definition of the objective composition of the crime, a clear formulation of the list of crimes related to domestic violence. Vozniuk (2019) claims about such amendments: “at least a clear definition of the disposition of Article 126-1 of the Criminal Code of Ukraine, first of all, by specifying the content of the forms of the objective side of this crime”.

Pavlova in her study (2019), singles out such restrictive measures as responsibilities and prohibitive measures.

Based on the analysis of CCU, we have determined that the responsibilities include restrictions on: 1) common place of residence / staying; 2) communications; 3) approaching to the victim; 4) electronic means of communication; 5) registration of the offender.

Restrictions, such as prohibition, include: 1) undergoing treatment according to the program of correction of aggressive behavior; 2) search or pursuit; 3) preventive works.

These measures are carried out by specially authorized bodies upon request for a certain period. At the same time, Pavlova (2019) argues that the right of the court is a sign of restrictive measures, not an obligation that can be used in case of an imminent threat. This means the duality of restrictive measures: on the one hand, they are a right of the court, but on the other - an obligation / prohibition for the offender.

Thus, restrictive measures can be considered as coercive criminal law measures, which are characterized by an additional character; they can be applied by a court in the event that an adult commits a crime of domestic violence. Regarding their place in the system of measures of criminal law influence, based on the general content of Art. 91-1 of the Criminal Code of Ukraine, the measures outlined are subject to another measures of criminal law nature against individuals; they are aimed at restricting the victim from the violent actions of the offender and preventing any future forms of violence against him. Failure to comply with restrictive measures, instructions or failure to undergo treatment according to the program for offenders will result in criminal liability (Black, 2018; Yakimova & Dzhepa, 2020).

The conducted research makes it possible to determine the following ways of solving problems towards preventing and countering violence, namely: 1) to exclude from Article 126-1 of the Criminal Code or at least clearly define the disposition by specifying the content of various forms of the objective side of such crimes; 2) to formulate and enshrine in the notes to Article 91-1 of the Criminal Code of Ukraine the definition of crimes related to domestic violence as any dangerous act for the society, provided by the Special Part of the Criminal Code of Ukraine and involves using physical, economic, mental, sexual violence between married couple, between former family members, a person with whom the offender lives or is in a close relationship, as well as provide an exhaustive list of such crimes; 3) to replace the term “system-based” in the CCU with “systematically” and provide the term with a legal definition in the note to Art. 78 of CCU; 4) to replace the term “psychological violence” in the CCU with “mental abuse (violence)”.

Conclusion. The present research has systematized the concepts, features, legal nature, legal grounds and conditions for the application of restrictive measures, their types and content, nature (short-term or long-term), shortcomings of the modern model of criminalization of domestic violence in Article 126-1 of the Criminal Code of Ukraine and ways to solve problems existing in this area. Restrictive measures can be attributed to combating domestic violence through a set of special measures carried out by specially authorized bodies upon request for a certain period. In general, the content of restrictive measures, in accordance with the legislation, provides combating violence in the short term through passive measures and in the long term through behavior correction programs. Restrictive measures can be considered as coercive criminal measures, which are characterized by an additional nature and can be applied by the court in the case the adult commits a crime related to domestic violence. The duality of restrictive measures has been identified: on the one hand, they are a right of the court, but on the other - a duty / prohibition for the offender. The practical application of the research results lies in the possibility of supplementing the legal acts of Ukraine in the field of combating domestic violence. The specific proposals for exclusion / amendment / consolidation of legislation of Ukraine in the research area has been presented in the academic paper. Further scientific investigations should relate to the practical application of law enforcement of new legislative acts based on the study of court decisions.

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