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Problematic issues of applying an urgent restraining order in cases of domestic and gender-based violence

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Abstract. Even though the current Ukrainian legislation prescribes certain measures to influence perpetrators in cases of gender-based violence, an urgent restraining order is not part of such measures, which requires expanding the powers of the police to issue urgent restraining orders in cases of gender-based violence. The purpose of this study was to outline this problematic issue and to identify the shortcomings in the legal mechanisms for appealing against urgent restraining orders. The research methodology was based on a systematic and comparative analysis of judicial practice, as well as on sectoral interpretation of legal provisions and analysis of judicial acts. It was found that although the legislation defines most people as perpetrators of domestic violence, judicial practice establishes that such persons can be recognised as such only in cases where they are family members of the perpetrator. The absence of evidence of the latter leads to the closure of cases, regardless of the existence of evidence of violence. Thus, the fact that the victim and the perpetrator do not reside at the same address constitutes sufficient grounds for closing the proceedings due to the inability to confirm the person's status as a "perpetrator" (due to the absence of the offender as a legal subject of the offense). This is also the case when applying an urgent restraining order: the lack of evidence of a common household between the parties to the conflict deprives the police officer of the possibility of a quick response in the form of an order. Expanding the powers of the police to issue such an order in cases of gender-based violence will address this gap. The other side of the situation was addressed, specifically the lack of proper legal mechanisms for appealing against the order. Since an urgent restraining order is an act of law enforcement, it does not produce legal consequences and cannot be appealed. At the same time, failure to appeal the order may have negative consequences for individuals, including bringing them to justice for violating the order and/or committing domestic violence. The practical significance of the findings obtained lies in the possibility of using them as an argumentative basis for protecting the rights of citizens, as well as for formulating an initiative to amend the legislation

Keywords: domestic violence; legal mechanisms of appeal; empowerment of the police; judicial practice; acts of law enforcement

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Introduction

Globalisation processes, which result in the blurring of international borders and the unrestricted dissemination of information, have led to the realisation that the solution to the issue of gender equality, and therefore the regulation of institutions that are linked to it (primarily the family institution), differs between different communities substantially. This has become an urgent problem for a modern, "mixed" society, wherein more radical cultures are trying to "push" their point of view, ignoring others. The problem has been exacerbated by the COVID-19 pandemic, which has caused forced social isolation and exacerbated interpersonal (and especially family) relationships. The principle of gender equality as a political and legal principle has been recognised in modern constitutional systems in Europe. Its implementation requires the adoption of laws to prevent discrimination, as well as changes in legal, social, and political practices in the respective countries. Through the adoption of various directives and policies, the European Union has emphasised the importance of gender equality in the EU. Furthermore, it has become one of the political criteria for countries wishing to become members of the community. The Council of Europe has also adopted documents in this area. The question of how the adopted international and domestic regulatory documents interact with each other, what conflicts and gaps in legal regulation exist, is currently relevant. Of particular significance in this regard are the legal mechanisms related to the use of state coercion.

Purposeful measures to combat domestic violence have signs of coercion. Their application must be carried out in strict compliance with the law. However, the existence of a detailed procedure does not exclude mistakes on the part of authorised actors. Furthermore, Ukrainian legislation guarantees the right of everyone to apply to the court for protection of their violated, unrecognised, or disputed rights and legitimate interests. The issue of legislative regulation of the mechanisms for appealing against the application of purposeful measures to combat domestic violence is relevant and requires in-depth scientific investigation.

N. Pfitzner and J. McGowan (2023), using the method of interviewing respondents from Australia, found substantial difficulties with face-to-face accessibility and remote access to services for victims of domestic violence during COVID-19. The principal issue was identified as "loss of privacy": the victim of violence, being isolated with their abuser, was unable to safely seek help. K. Bracewell *et al.* (2022) similarly considered the issue of state protection of persons from domestic and gender-based violence during the pandemic, focusing specifically on procedural issues of protection, such as the constant postponement of court dates, indifference of the police and prosecutors to a considerable number of reports, and the failure to apply temporary (pending court hearings) measures to restrict the perpetrator to ensure the protection of the victim. E. Williamson *et al.* (2020) emphasised that in times of crisis, such as the COVID-19 pandemic, the increase in domestic violence is mistakenly perceived as a reaction to this particular event. The researchers argued that domestic violence is a manifestation of long-term patterns of violent behaviour and the result of gendered social and cultural stereotypes. These and many other studies in recent years have highlighted the issues of domestic and gender-based violence in relation to the COVID-19 pandemic.

Some researchers have actively focused on the coverage of state policies and programmes in the field of overcoming violence against women and children. K. Beavis (2024) highlighted Norway's progress in combating gender-based violence, including the establishment of administrative (public) responsibility, the implementation of specialised state policies, the introduction of funding and the expansion of services for victims. S. Banarjee (2024) examined the gaps between Bangladesh's domestic legal instruments and international legal instruments. S. Banarjee's (2024) findings revealed major gaps and limitations in the conceptualisation of sexual violence, the judicial process, medical tests, and victim protection in this area.

Ukrainian researchers O. Moroz and Y. Khatniuk (2023) investigated the issue of police competence in the field of preventing and combating domestic violence. These researchers identified the powers of various police units and services and made recommendations for their legislative consolidation. L. Sukmanovska (2023) studied the powers of the national police to apply purposeful measures to combat domestic violence, as well as the competence of the court to consider cases of prosecution of minors, protection of their personal, property, housing, and other rights and interests. R. Kiuntsli *et al.* (2024) analysed the elements of the administrative offence of "committing domestic violence" under Article 173-2 of the Code of Administrative Judicial Procedure of Ukraine (2005) by reviewing the rulings of first instance judges in this category of cases. The researchers found the inconsistency of judicial practice caused by gaps in legislation.

In Ukraine, the issues of the legal nature of special measures to combat domestic violence, the grounds for their application, and the possibilities for restricting the rights of the perpetrator were raised in public discourse after the adoption of the Law of Ukraine "On Prevention and Counteraction of Domestic Violence" (2017) and over the next two years. As of 2024, there are practically no discussions on these issues. In this regard, the purpose of this study was to identify and analyse certain problematic issues related to the determination of the scope of application of an urgent restraining order. A prominent aspect of the study was the identification of the shortcomings of legal mechanisms for challenging the legality of such orders.

Literature review

In the scientific literature on the powers of law enforcement agencies to respond to domestic and gender-based violence, administrative legal mechanisms to ensure the safety of the victim occupy a prominent place (Zuhdi *et al.*, 2024). In most of the countries that recognise these types of violence as punishable, it is the police who are responsible for risk assessment and urgent preventive measures.

Researcher from Indonesia S. Choirinnisa (2022) addressed domestic violence as a social problem that involves law enforcement agencies, advocates, and courts. The researcher provided only a general overview of the powers of these actors, without specifying what concrete measures can be taken to protect victims of violence. S. Annisa (2020) also noted that in Indonesia, the forms of legal protection against violence in criminal proceedings include 1) rehabilitation; 2) measures to protect and conceal the identity through the media; 3) provision of security guarantees for

witnesses; 4) provision of victims with access to information on the progress of the investigation. R. Alimi and N. Nurwati (2021) added spiritual support for victims to this list.

S. Marković (2019) examined the urgent measures used in Serbia to combat domestic violence: a ban on approaching the victim, objects or place of the offence and requirements for the potential abuser to leave the victim's place of residence. Furthermore, the researcher drew parallels between immediate measures and long-term protection measures taken under family law. S. Marković's (2019) opinion, immediate measures are often insufficient without further support from family protection measures, which include long-term measures aimed at supporting victims on a long-term level, such as orders for mandatory rehabilitation programmes or restorative courses. Thus, the researcher emphasised the need for coordination and cooperation between law enforcement agencies and family protection services to ensure effective and complete protection of victims of domestic violence in all aspects of their lives. This is also related to the issue studied by M.J. Neunkirchner and P. Herbinger (2021) in the context of the need to develop strategies and programmes for coordination between different agencies with responsibilities in the field of combating domestic and gender-based violence.

A.P. Noer and RD. Agustanti (2024) identified several measures to counteract violence in the United States, including restraining order mechanisms: 1) emergency protective order, which is granted for immediate protection of the victim; 2) temporary restraining order, which is valid for a certain period until the court makes a final decision; 3) permanent restraining order, issued by the court for a longer period after the case is heard; 4) criminal protective order or "stay-away", which is issued within the framework of a criminal case and obliges the offender to stay away from the victim at a certain distance and for a certain time. The researchers also provided a general description of restraining orders in Finland and Belgium. The researchers concluded that the lack of protection for victims both during the pre-trial investigation and after the trial is a deficiency of legal regulation in some EU countries.

Materials and method

The study included a review of the practice of general and administrative courts of Ukraine in cases of prosecution under Article 173[2] of the Code of Administrative Judicial Procedure of Ukraine (2005) and appeals against an urgent restraining order issued against a person. The study was based on a system of general scientific and sectoral (jurisprudential) methods and techniques. The systemic and comparative methods represented the general scientific level of research. The systematic method was employed to summarise the judicial practice on combating domestic and gender-based violence to identify the problematic aspects of issuing and appealing against an urgent restraining order. The findings obtained were systematised, the legal positions of the courts were summarised, and the trends in resolving court disputes regarding the protection of persons whose rights/legal interests were violated within the framework of the above-mentioned jurisdictional proceedings were analysed. The method of comparative analysis was used to identify commonalities and differences in the approaches of courts to decision-making in analogous factual circumstances in this area. Sectoral (jurisprudential) methods of interpreting legal provisions and analysing judicial acts were employed to determine the approaches of judges to solving problematic situations of law enforcement when issuing and appealing against an urgent restraining order, and to analyse the regulations of Ukraine, namely, the Code of Administrative Judicial Procedure of Ukraine (2005), the Law of Ukraine No. 2866-IV (2005), the Law of Ukraine No. 2229-VIII (2017).

The study was also based on the review of scientific literature, legal sources, legislation, and documents related to domestic and gender-based violence. The Unified State Register of Court Decisions (n.d.) was searched for court decisions on gender-based violence using the keywords "ensuring equal rights and opportunities for women" and "preventing and combating domestic violence". Other court decisions were selected contextually in the register of court decisions for January 2023 – May 2024 (with some exceptions) in the subsection of the register "Committing domestic violence, gender-based violence, failure to obey an urgent restraining order or failure to report the place of temporary residence". Overall, out of 267 court decisions analysed under the keywords "urgent restraining order" and "absence of an administrative offence", proceedings in 47 (or 17.62%) of the total number of cases analysed were closed due to the failure to establish in court the existence of family ties, mutual rights and obligations to support and maintain a common household between the offender and the victim.

Results

Distinction between domestic violence and gender-based violence to establish whether or not a police officer is authorised to issue an urgent restraining order. The current legislation of Ukraine in the field of preventing and combating domestic violence, as well as ensuring equal rights and opportunities for women and men, and eliminating gender discrimination, prescribes almost identical measures to influence perpetrators: a programme for perpetrators, a restraining order against the perpetrator, and preventive registration. At the same time, an urgent restraining order, which has proven to be effective in combating domestic violence, is not prescribed as a measure to combat gender-based violence (Code of Administrative Judicial Procedure of Ukraine, 2005; Law of Ukraine No. 2866-IV, 2005; Law of Ukraine No. 2229-VIII, 2017). Specifically, in 2023, 98,947 urgent restraining orders were issued against perpetrators; in 2022, 43,341 orders were issued (JurFem, 2024).

This situation requires legislative intervention to expand the powers of the National Police to issue urgent restraining orders in cases of gender-based violence. The objective need for this is caused by the fact that the victims in such cases are mostly people who have been in relationships or are former family members, including former spouses. Even though the Law of Ukraine No. 2229-VIII (2017) defines most of the above-mentioned persons as perpetrators of domestic violence, not gender-based violence, the current judicial practice law proceeds from the fact that these persons are perpetrators of domestic violence only when they fall under the term "family member" – the victim lives with the perpetrator or is united with them by legal rights or obligations for maintenance. In cases where the court does not see the possibility of considering the persons as family members (mainly if it establishes that the persons do not

live together), it closes the proceedings, regardless of the evidence of violence (Decision of Berislavsky District Court of Kherson Region in Case No. 647/1273/19, 2019; Decision of Bilokurakynsky District Court of Luhansk Region in case No. 409/719/20, 2020; Decision of Shevchenkivsky District Court of Chernivtsi City in Case No. 727/3995/23, 2023; Decision of Nadvirnyansky District Court of Ivano-Frankivsk Region in case No. 348/2762/23, 2024; Decision of Zalishchytsky District Court of Ternopil Region in Case No. 597/495/24, 2024)

Article 173[2] of the Code of Administrative Judicial Procedure of Ukraine (2005) prescribes liability for both domestic violence and gender-based violence. The offence of these two types of violence is quite analogous, and most cases of bringing a person to administrative responsibility for domestic violence can easily be transformed into cases of gender-based violence. This situation is dictated primarily by underdeveloped judicial practice: the lack of conclusions on the application of these provisions by the Supreme Court, which leads to major differences/lack of unity in the judicial practice of lower courts. For instance, when bringing to liability under Article 173[2] of the Code of Administrative Judicial Procedure of Ukraine (2005), the courts refer to the Law of Ukraine No. 2866-IV (2005) and the Law of Ukraine No. 2229-VIII (2017), even without specifying what kind of violence is taking place (Decision of Haisynsky District Court of Vinnytsia Region in Case No. 129/2514/21, 2021; Decision of Slavutsky City District Court in Case No. 682/147/24, 2024; Decision of Shevchenkivsky District Court of Lviv City in Case No. 466/366/22, 2022). The register of court decisions contains only one ruling in an administrative offence case concerning gender-based violence itself (Decision of Shchorsky District Court of Chernihiv Region in Case No. 749/695/20, 2020).

Thus, when preparing materials in cases of administrative offences in this area, police officers prefer to qualify a person's actions as domestic violence, which ultimately leads to the closure of proceedings by the courts due to the absence of an offence, namely due to the lack of a special subject of the offence, which is a person who is related to the victim, if not by family ties, then at least by domestic relations, shared responsibilities, and rights of support. However, this situation has a positive aspect. By qualifying a person's actions as domestic violence, an authorised official of the National Police may apply a special measure to counteract this type of violence – an urgent restraining order.

However, as of mid-2024, there are no effective mechanisms for challenging the legality of such an order. On the one hand, it serves as a quick and effective police response to violence (legal uncertainty results in discretionary powers for police officers to classify almost any violence as domestic violence) and, on the other hand, it leads to a situation where a person who believes that the order issued against them is unlawful cannot appeal against the police officer's actions.

As opposed to the legal impossibility to file an administrative claim with the court, this refers to the factual impossibility to use the relevant procedure. This is dictated by two circumstances. Firstly, when filing an administrative lawsuit to challenge the legality of an order and its cancellation, the court can only assess the procedural component: the correctness of the order, the availability of a risk assessment, etc. However, the court cannot determine whether or not the person's actions constituted domestic violence, as the relevant issue must be resolved during the consideration of an administrative offence case under Article 173[2] of the Code of Administrative Judicial Procedure of Ukraine (2005) by a general court. Therefore, the formal correctness of the order makes it impossible to cancel/recognise it as unlawful, even if such an order is issued in circumstances that clearly do not correspond to the circumstances of domestic violence. Secondly, an urgent restraining order refers to individual acts/acts of law enforcement, which means that it expires after the expiry of the period for which it was issued. In such a case, it is presumed that it no longer produces legal effects and therefore does not need to be cancelled.

Thus, the existing legal mechanism does not make provision for urgent restraining orders as a remedy in cases of gender-based violence. This calls for expanding the powers of the police to issue such orders in cases of gender-based violence to effectively protect victims and prevent violence. The primary reason for increasing the scope of police powers in this area is the fact that as of 2024, there is no unity of interpretation of the law and, accordingly, their application on the issue of determining the offence of gender-based violence. Considering the above, in many cases, police officers do not view the perpetrator's actions as gender-based violence, but rather classify them as domestic violence, referring to the fact that the victim is a person who is/was related to the perpetrator by close (or even family) relations. This is done, specifically, to ensure prompt protection of the victim through an urgent restraining order. On the other hand, by classifying an act as domestic violence, the police actually create grounds for releasing the perpetrator from public liability if the court does not find sufficient grounds to consider the perpetrator and the victim to be related by common household.

Appeal against an urgent restraining order as an act of law enforcement. Paragraph 16 of Article 1 of the Law of Ukraine No. 2229-VIII (2017) establishes that an urgent restraining order against an abuser is a special measure to combat domestic violence, which is taken by authorised units of the National Police of Ukraine as a response to the fact of domestic violence and is aimed at immediately stopping domestic violence, eliminating the danger to the life and health of the victims and preventing the continuation or recurrence of such violence. The legislators presume that if the police have been issued with this order, domestic violence has occurred. This circumstance is not refuted by the issuance of an "acquittal" in a domestic violence case that was initiated simultaneously with the issuance of an urgent restraining order. Violation of the restrictions imposed by the order is an independent offence. Considering the above, the only way to cancel the negative consequences of the order is to appeal against it to the court in the general procedure provided for appealing against decisions, actions, or inaction of an employee of the authorised police unit that issued the order, following part 9 of Article 25 of the Law of Ukraine No. 2229-VIII (2017).

Pursuant to Article 122 of the Code of Ukraine on Administrative Offences (1984), a six-month period is established for applying to an administrative court for the protection of the rights, freedoms, and interests of a person, which, unless otherwise stipulated, is calculated from the day when the person learned or should have learned of the violation of their rights, freedoms, or interests. An urgent restraining

order is by its nature an individual act – a decision of a public authority issued (adopted) in the exercise of its administrative functions or in the provision of administrative services, which concerns the rights or interests of a person or persons specified in the act, and whose effect is exhausted by its execution or has a specified term – Article 4(19) of the Code of Ukraine on Administrative Offences (1984).

Paragraph 4 of item 1 of the reasoning part of the Decision of the Constitutional Court of Ukraine in Case No. 3/35-313 (1997) states that "...by their nature, non-regulatory acts, unlike regulations, establish not general rules of conduct, but concrete prescriptions addressed to an individual or legal entity, are applied once and exhaust their effect after implementation". Paragraph 5 of the Decision of the Constitutional Court of Ukraine in Case No. 9-rp/2008 (2008) states that in determining the nature of a "legal act of individual action", the legal position of the Constitutional Court of Ukraine is based on the fact that "legal acts of non-regulatory nature (individual action)" relate to individuals, "are designed for personal (individual) application", and exhaust their effect after implementation.

Individual legal acts as the results of law enforcement are addressed to concrete persons, i.e., they are formally binding on personified (clearly defined) subjects; contain individual prescriptions that set out subjective rights and/or obligations of the addressees of these acts; are designed to regulate only a concrete life situation, and therefore their legal effect (formal binding) is exhausted by a single implementation. Furthermore, such acts cannot have retroactive effect in time, and their external manifestation is not only in written (documentary) but also in oral (verbal) or physical (conjunctive) forms.

Referring to the above conclusions, the Supreme Court also assumes that an act of application of legal provisions regulates a concrete life situation, and its effect expires due to the termination of a concrete legal relationship (Decision of the Supreme Court of Ukraine in Case No. 640/29515/21, 2023). An act that has expired after its execution cannot be cancelled, as its cancellation will not create/cancel any legal consequences for the parties concerned, i.e., will not affect the rights and interests of the plaintiff in any way. Since when applying to the court, it is necessary to prove which right of a person was violated, the court will be able to satisfy the claim only if such violation exists at the time of the dispute consideration in court.

Considering the above, the order may be challenged not within the six-month period, but within the period of validity of the order itself. However, considering the procedure for consideration of the case in court, at least one and a half months will pass before the date of the first hearing on the merits of the dispute, which is significantly longer than the maximum period of validity of the order. Therefore, if the term of the urgent restraining order has expired at the time of consideration of the administrative case on recognition as unlawful and cancellation of the urgent injunction, there is no basis for satisfying the claim. This has been repeatedly confirmed by the current court practice (Decision of Cherkasy District Administrative Court in Case No. 580/4608/22, 2023; Decision of Ivano-Frankivsk District Administrative Court in Case No. 300/2425/23, 2023).

At the same time, there are cases when the adoption of an individual act not only resolves the situation for which it was adopted, but also generates new legally significant consequences. The latter may negatively affect the person in respect of whom the individual act was issued, even after the expiry of the act/its implementation. For instance, the fact that the National Agency for Prevention of Corruption published on its official website a certificate on the results of a full inspection containing conclusions on the detection of inaccurate information in the declaration of the declarant (plaintiff), given the legal status of the person, the legal status of a person holding a particularly responsible position, negatively influences the right to work guaranteed by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which covers the field of labour activity, as it causes interference (negative impact) on the business reputation of the plaintiff (declarant) as a public figure (Decision of the Supreme Court of Ukraine in Case No. 640/29515/21, 2023).

The above can be projected by analogy to a person against whom an urgent restraining order has been unlawfully issued. Since an urgent restraining order is one of the core pieces of evidence in jurisdictional cases of domestic violence, the fact that such an order is found to be unlawful in court directly affects bringing a person to justice under Article 173^2 of the Code of Administrative Judicial Procedure of Ukraine (2005) (Decision of Ternopil City District Court of Ternopil Region in Case No. 607/8361/23, 2023; Decision of Starosambirsky District Court of Lviv Region in Case No. 455/921/24, 2024; Decision of Teofipolsky District Court of Khmelnytsky Region in Case No. 685/1278/23, 2023). In some cases, courts, having found deficiencies in the procedural design and issuance of an urgent restraining order, still dismiss an administrative claim for its cancellation, citing the fact that such a restraining order does not have any legal consequences that would violate the rights, freedoms, or interests of the plaintiff, and therefore does not require additional cancellation in court (Decision of Lviv District Administrative Court in Case No. 380/11299/22, 2023).

The absence of an appeal against the order also affects the person's legal liability for violation of the restrictions imposed by the urgent restraining order (Decision of the Borznyansky District Court of Chernihiv Region in Case No. 730/574/23, 2023; Decision of the Borznyansky District Court of Chernihiv Region in Case No. 730/488/23, 2023). Thus, when appealing against an urgent restraining order, a person may refer to the existence of a legitimate interest, since failure to recognise the order as unlawful may have negative consequences for the person in the form of bringing them to justice for violating the order and/or for committing domestic violence. In this context, it is advisable to focus on the item 3 of part 1 of Article 236 of the Code of Ukraine on Administrative Offences (1984) regarding the suspension of proceedings in a case due to the objective impossibility of considering this case until another case is resolved (Decision of Rivne City Court of Rivne Region in Case No. 569/1977/22, 2022).

Furthermore, in its ruling of 20 February 2019 in Case No. 522/3665/17 (2019), the Supreme Court defined general approaches to determining the signs of a "victim" of a violation of a legitimate interest as follows: (a) the plaintiff directly owns the legitimate interest in defence of which the claim is filed; (b) is a direct negative impact of the violation on the plaintiff or a reasonable probability of a negative impact on the plaintiff in the future. Specifically, if the plaintiff is forced to change its behaviour or there is a risk of being

held liable; (c) the negative impact is significant (specifically, the plaintiff has suffered damage); (d) there is a causal relationship between the legitimate interest, the challenged act, and the alleged violation (Decision of the Supreme Court of Ukraine in Case No. 240/24844/21, 2023).

Notably, when appealing against an urgent restraining order in an administrative court, the court sometimes verifies not only compliance with the proper procedure for issuing such an act, but also its material basis – the fact of domestic violence (Decision of Cherkasy District Administrative Court in Case No. 580/4608/22, 2023). However, this is beyond the scope of the dispute. The presence of an offence in a person's actions should be established in the relevant jurisdictional proceedings. Therefore, the court's conclusions in such cases will be considered in further proceedings – Article 78 of the Code of Ukraine on Administrative Offences (1984).

Thus, an urgent restraining order cannot be cancelled automatically in connection with the closure of proceedings on an administrative offence or crime, and its appeal to the court is the only way to eliminate its negative legal consequences for the interests of the parties concerned. Ukrainian law defines an urgent restraining order as an individual act issued to perform governmental administrative functions or provide administrative services and has a specified period of validity. Such an act cannot be cancelled after its execution, as such cancellation will not have legal consequences for the parties concerned. It is possible to appeal against the order to the court during its validity period, but due to the lengthy procedure of considering the case in court, this may result in the cancellation of the order due to its expiry before the first hearing on the merits. In certain legal conflicts, it is possible to observe a situation where the adoption of an individual act not only resolves the current situation, but also generates new legally significant consequences. These consequences may negatively affect the person who is a party to the act, even after its validity or implementation expires. This principle can also be applied to persons who believe that an urgent restraining order has been unlawfully issued against them.

Discussion

Austrian researchers M.J. Neunkirchner and P. Herbinger (2021) investigated the powers of the police to impose an administrative ban on the abuser from contacting the victim or staying in the same room as the victim, as well as to investigate criminal offences related to domestic violence, such as bodily harm, dangerous threats, coercion, stalking, etc. At the scene, the police must identify the dangerous person and protect the victim, including by assessing risks and ensuring the preservation of evidence. The researchers also addressed the essence of the IMPRODOVA Training Platform, a training platform designed to improve the skills of police officers, healthcare professionals, and social workers in the field of domestic violence. It offers training materials, indicators for risk assessment, practical recommendations for cooperation between distinct professional groups, and tools for assessing dangerous situations to prevent violence effectively. At the same time, the study did not elaborate on the functioning of urgent measures used by the police as a response to violence. However, the introduction of a programme to regulate the interaction of the police, healthcare workers, and social workers in taking measures to prevent and combat domestic violence could bring positive results for Ukraine.

The system of bodies and types of response to violence varies in national legislation from country to country. Researchers tend to recognise the following common features: 1) urgent/immediate measures include independent legal procedures that are distinct from coercive mechanisms, including public liability for domestic or gender-based violence; 2) such measures are taken by the police (if applicable, with the involvement of the prosecutor's office and the court) to protect the victim based on a risk assessment that is not related to the establishment of an offence/crime in the actions of the person; 3) such measures show effectiveness in combination with the use of civil law mechanisms that can be used by victims and administrative/criminal law and procedural measures to resolve the issue of bringing the offender to justice. G.V. Tolochko (2019) pointed out the following positive features of the introduction of such a measure as an urgent restraining order in Ukrainian legislation: 1) expanding the circle of persons who are recognised as victims of domestic violence, namely, recognising a child who witnessed violence as a victim; 2) maintaining a balance between the protection of the victim's right to life and health and the offender's property rights, in the case of applying such a measure as an obligation of the offender to leave the victim's place of residence (stay); 3) a successful legislative definition of the police's competence to ensure the victim's safety even if the victim, regardless of the reasons, refuses to give up power. Unfortunately, these conclusions of the researcher, despite their legal significance, do not contain detailed arguments. Still, the latter of these conclusions was confirmed and partially substantiated by A.B. Blaha (2019). The author draws attention to the police's powers to assess risks as a basis for issuing an urgent restraining order, as well as to the possibility of using administrative discretion in cases where the risk assessment does not fully cover the circumstances of the case.

O.V. Makukh (2019), analysing the legislative innovations regarding the introduction of an urgent restraining order in Ukraine, addressed the absence of any legislative provisions on the definition of entities responsible for monitoring the execution of the order. The researcher also believes that the legislative provisions defining the procedure for appealing against an urgent restraining order are unregulated. While agreeing with the O.V. Makukh (2019) position on the second problematic point, one cannot but address the fact that the regulations in force as of July 2024 designate authorised national police officers as an authority responsible for monitoring the execution of the order. Their competence includes recording in the register of notifications of the abuser's place of temporary residence, registering abusers for preventive registration, applying special coercive measures to evict the abuser from the dwelling, if such a measure is provided for, re-issuing an urgent restraining order indicating measures that were not previously applied, as well as drafting protocols in cases of administrative offences for failure to obey an urgent restraining order and/or committing domestic violence. Thus, control over the execution of orders in Ukraine is arguably within the powers of the police. This is in line with the findings of M. Bertsyukh (2020), L. Sukmanovska and M. Repan (2021), and O. Moroz and Y. Khatniuk (2023). The researchers pointed out that the control over the proper implementation of purposeful measures to combat domestic violence during their validity period is entrusted to the authorised units of the national police.

T. Rekunenko and N. Udolova (2021) also addressed the imperfection of legislative technique in the formulation of regulatory provisions for appealing against an urgent restraining order. Furthermore, the researchers provided their views on the similarities between an urgent restraining order and the detention of a suspect during or after the commission of a crime under criminal procedure law. The authors of the present study cannot unconditionally agree with the researchers that in the case of an urgent restraining order, a police officer is obliged to consider initiating jurisdictional proceedings (draft a report on an administrative offence under Article 173[2] of the Code of Administrative Judicial Procedure of Ukraine (2005) and/or notify an authorised police officer to initiate criminal proceedings). An urgent restraining order, as defined in the Law of Ukraine No. 2229-VIII (2017), is not classified by the legislator as either a preventive or coercive measure, nor is it among the measures to ensure the proceedings (although the order certainly has features of each of the above measures). The purpose of an urgent restraining order is not specified as ensuring the performance of the tasks of criminal or administrative proceedings. Furthermore, when drafting the order, the police officer does not preliminarily establish the potential presence of an offence in the person's actions, and the closure of proceedings on an administrative offence for domestic violence due to the court's finding that there is no offence does not affect the legality of the urgent restraining order. The position of Y.M. Horbunova (2023) appears more substantiated – the researcher considered an urgent restraining order as an independent decision of an authorised body with the issuance of an administrative act.

Thus, an urgent restraining order should be considered a decision of an authorised body with the issuance of an administrative act. Control over the execution of orders in Ukraine is the responsibility of the police, which is authorised to ensure the safety of the victim even if the victim recants their testimony at any stage of the proceedings. To use measures to prevent and combat domestic violence more effectively, it is potentially useful to introduce a programme to regulate the interaction between the police, medical workers, and social workers.

Conclusions

This study was aimed at identifying problematic issues in resolving cases of violence, including domestic and gender-based violence, and included an empirical analysis of court practice in Ukraine on prosecution under Article 173[2] of the Code of Ukraine on Administrative Offences of 1984 and appealing against an urgent restraining order. To this end, the study employed systematic and comparative methods to summarise court practice and identify trends in the resolution of such disputes and analysed the mechanisms for issuing and appealing against urgent restraining orders in cases of domestic and gender-based violence in Ukraine.

The study showed that these types of violence are interrelated, but existing legal provisions do not make provision for urgent restraining orders as a tool of protection in gender-based cases, which requires expanding the powers of the police. An analysis of court practice revealed a lack of uniformity in the understanding and application of gender-based violence, which can lead to uncertainty in the qualification and response to such cases. The need to improve legal mechanisms and protect the rights of victims was highlighted as key to strengthening the judicial system and guaranteeing equal rights for all citizens.

It was found that as of July 2024, there is no legislative regulation of the procedure for appealing against an urgent restraining order. Since it, as an act of law enforcement, exhausts its effect upon the expiry of the period for which it was established, and, according to the majority of judges whose cases were included in the sample of the study, does not give rise to any legal consequences, its appeal does not lead to the protection/restoration of any rights and interests of a person. The right to appeal in itself, in the absence of a real opportunity to use it, is not a sufficient legal guarantee and does not follow the principles of the rule of law and access to justice.

However, the analysis revealed that an urgent restraining order generates legal consequences not only during its validity, but also after it expires, namely, when a person is brought to criminal liability for an administrative offence or a crime related to the violation of restrictions imposed on a person by such an order, as well as domestic violence. In such cases, the order is a vital piece of evidence and affects not only the degree of liability, but also the very possibility of being found guilty. Thus, the dismissal of administrative claims for recognition of urgent restraining orders as unlawful and their cancellation, with reference solely to the fact that the term of the challenged order has expired, and therefore there are no grounds for cancellation of the order, as it no longer produces legal consequences, is illegal.

Future research on this subject could focus on developing mechanisms for effective appeals against urgent restraining orders; the substantiation for the existence of a "legitimate interest" in having an unlawful order cancelled; the breadth of discretion of police officers in issuing urgent restraining orders; and the possibility of using such orders in cases of gender-based violence.

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Conflict of interest

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Проблемні питання застосування термінового заборонного припису у справах про домашнє та ґендерно зумовлене насильство

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Анотація. Попри те, що чинне законодавство України передбачає певні заходи впливу на кривдників у справах про ґендерне насильство, терміновий заборонний припис не є частиною таких заходів, що вимагає розширення повноважень поліції щодо видачі термінових заборонних приписів у справах про насильство за ознакою статі. Метою статті було окреслення вказаного проблемного питання, а також виявлення недоліків у юридичних механізмах оскарження термінових заборонних приписів. Методологія дослідження ґрунтувалась на системному і порівняльному аналізі судової практики, а також на галузевому тлумаченні норм права та аналізі судових актів. Встановлено, що хоча законодавство визначає більшість осіб як суб'єктів домашнього насильства, судова практика встановлює, що такі особи можуть бути визнані такими лише у випадках, коли вони є членами сім'ї кривдника. Відсутність доказів останнього призводить до закриття справ, незалежно від наявності доказів насильства. Таким чином, факт того, що потерпілий і кривдник не проживають за однією адресою, є достатньою підставою для закриття провадження за відсутністю суб'єкта правопорушення. Вказане має свій вияв і при застосуванні термінового заборонного припису: відсутність доказів зв'язаності спільним побутом учасників конфлікту позбавляє поліцейського можливості швидкої реакції у вигляді винесення припису. Розширення повноважень поліції щодо винесення такого припису у справах про ґендерно зумовлене насильство усуне вказану прогалину. Було розглянуто зворотний бік ситуації, зокрема, відсутність належних юридичних механізмів оскарження винесеного припису. Оскільки терміновий заборонний припис є актом правозастосування, він не породжує правових наслідків та не може бути оскарженим. У той же час, неоскарження припису може мати негативні наслідки для осіб, включаючи притягнення їх до відповідальності за порушення припису та/або вчинення домашнього насильства. Практичне значення одержаних результатів полягає в можливості використати їх в якості аргументаційної бази для захисту прав громадян, а також для формулювання ініціативи внесення змін у законодавство

Ключові слова: домашнє насильство; юридичні механізми оскарження; розширення повноважень поліції; судова практика; акти правозастосування