
Теорія та історія держави і права

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DOMESTIC ABUSE IN ENGLAND AND WALES

The necessity of implementing effective legislative and institutional mechanisms to prevent domestic abuse in modern states is driven by several important reasons, reflecting the desire to ensure fundamental rights and freedoms of citizens as well as the need to address social, economic, and legal issues. This issue is particularly significant due to its profound impact on the social structure of society, especially on women and children. Establishing an effective system to prevent domestic abuse not only promotes gender equality and social justice but also helps to prevent negative impacts on the physical and mental health of victims.

Regarding the United Kingdom, the development of legislation and a system to prevent domestic abuse has undergone several key stages, representing a gradual transition from ignoring the problem to recognizing its societal significance and the need for comprehensive measures to protect victims. In the 1970s, feminist movements began to draw public attention to this issue. In subsequent years, several laws addressing domestic abuse were enacted, notably the Family Law Act 1996, which defined various forms of victim protection, including occupation orders and non-molestation orders. This law allowed victims to independently seek protection from the court. Equally important was the Domestic Abuse Act 2021, one of the most comprehensive laws in this field, which includes definitions of various forms of violence (physical, sexual, economic, emotional). Significant steps towards resolving these issues also included the establishment of the position of Domestic Abuse Commissioner and the ratification of the Istanbul Convention.

It is worth noting that although significant progress has been made over the past few decades in this area, and certain judicial practices have been established, many problematic aspects remain due to the specificity of this field, which we address in this article. Nonetheless, we hope that studying this experience can assist legal scholars and legislators from other countries, particularly Ukraine, in implementing and developing the most effective tools: various forms of court orders such as occupation orders and non-molestation orders; domestic abuse protection notices/orders; defining the actions of police and other law enforcement agencies in domestic abuse cases; and collaboration with community organizations.

Therefore, studying the British experience in combating domestic abuse can be an important step for Ukrainian legal scholars towards improving national legislation, implementing effective legal protection mechanisms, and creating a safer and more just society.

Keywords: *domestic abuse, forms of domestic abuse, occupation order, non-molestation order, domestic abuse protection notice/order.*

Domestic abuse is defined in English law under s.1, Domestic Abuse Act 2021 as the abuse of a connected person over the age of 16. The Act defines ‘abuse’ as physical or sexual in nature, but also specifically covers controlling or coercive behaviour, economic and emotional abuse [1]. The use of the term ‘abuse’ is intended to expand the legal understanding of the nature of harm occurring within the home. Focusing on physical violence risks ignoring or failing to recognise the impacts of other forms of abusive behaviour on its victims. This also reflects increasing awareness of the role of abuse in familial relationships, and the difficulties of using the law to combat this behaviour.

Domestic abuse differs from other forms of inter-personal violence because the perpetrator is known intimately by the victim, and the abuse frequently occurs entirely in private, often in the family home. As a result, domestic abuse is recognised by the existence of a ‘personal connection’ [1] between the parties. The consequences of the relationship underpinning the abuse cause significant issues for the legal system. In terms of evidence available, there may be no independent witness to the abuse. The elements of the abuse may be cumulative, particularly in the context of coercive or controlling behaviour, abuse which affects the victim over a longer period of time, rather than at one moment of violence [2]. This may inhibit both police investigation and the decision to prosecute the alleged perpetrator [3].

However, the most difficult challenge created by this personal connection is the impact it has on the victim in the context of the abuse. It may be more difficult to report incidents to anyone, even friends and family, but in relation to the police, it is possible that there will be concern regarding the risk of further abuse or criminalisation of the perpetrator. Research into domestic abuse has demonstrated that the relationship between the victim and the abuser significantly affects the experience of the abuse and the response of the victim. The victim, abused in their home, may have no other place to live, or to shelter even temporarily. Their feelings towards their abuser may well be complex, and there is often shame associated with the experience of being abused by an intimate partner. Despite domestic abuse often being dismissed as somehow lesser than other forms of violence and not effectively policed for a long time in the UK, it represents a fundamental breach of trust in relationships that are anticipated to be characterised by love and affection.

It is also the case that the majority of victims of domestic abuse are women, perpetrated by their male partner. Whilst violence perpetrated by women on men, and in same-sex relationships, in Europe it is estimated that 1 in 4 women will experience some form of intimate violence in their lifetime. In response to the high incidence of gender-based violence against women, the Council of Europe has promulgated the Istanbul Convention [4] which obligates states to undertake preventative measures to protect women, and prosecute perpetrators of violence. The Ukraine signed this Convention before the UK, but they both ratified it in 2022. It operates by requiring states to develop legislation and policies to combat

such violence, and monitor enforcement through data collection. The European Court of Human Rights has also recognised that a failure to enforce the law protecting women from domestic violence may constitute a breach of Article 2 ECHR if it results in the death of a victim [5]. It is not sufficient to have laws in place that seek to prosecute perpetrators, the law must also be enforced in practice by state agencies.

In England and Wales, the concerns regarding the lack of engagement by the police with domestic violence in the 1970s motivated a feminist campaign to expand the scope of the law and use it in different ways to protect women and children from violence. Alongside a grassroots engagement with providing shelters for women to enable access to safe housing after leaving a relationship, they sought to use the civil law system to control the behaviour of the perpetrator without necessarily involving the criminal law [6]. Two forms of court order were developed, occupation orders and non-molestation orders, now available under Part IV, Family Law Act 1996. For both these types of order, the victim themselves applies to the civil Family Court for the order to be granted, rather than a state agency applying on their behalf. This was designed to give the victim autonomy over their application and their decisions in responding to the violence they experienced. The order is also granted on a lower standard of proof, the civil law standard of ‘balance of probabilities’, rather than the criminal law standard of ‘beyond reasonable doubt.’

A non-molestation order is a form of restraining order that, if granted contains specific provisions to limit the behaviour of the perpetrator in ways designed to ensure the safety of the victim. So, for example, if the perpetrator has harassed the victim by repeated online and telephone contact, a non-molestation order can restrain attempts by the respondent perpetrator to contact the applicant victim. A non-molestation order is granted under s.42, Family Law Act 1996. The concept of ‘molestation’ is interpreted broadly so that it can adapt to changing forms of abuse and is not restricted to evidence of physical violence [7]. The application must be made against an ‘associated person’ [8] to identify the personal relationship affected by the abuse. There is a list of categories of associated person under s.62(3), Family Law Act 1996, and it includes married (opposite- and same-sex) couples, cohabitants [9], relatives [10], and persons in an intimate relationship of significant duration. The nature of the application means that the state cannot apply for a non-molestation order. In *R v Kirby* [11], where local government sought to protect an elderly victim from abuse by her son with a non-molestation order, it was unable to make such an application as the court did not have jurisdiction.

For a non-molestation order to be granted, the ‘health, safety and well-being’ of the victim (including any relevant child, i.e. a child within the household) must be affected by the behaviour of the respondent. This behaviour must be more than trivial, or that to be expected in the ending of a relationship [12]. If an order is granted, breach is contempt of court, which can result in imprisonment [13]. However, since the Domestic Violence, Crime and Victims Act 2004, the breach of a non-molestation order can constitute a criminal offence [8]. This was intended to increase the deterrent effect of a non-molestation order and improve their enforceability. Despite these goals, there has since been concern expressed that the potential criminal consequences attached to a non-molestation order is affecting the willingness of victims to apply for one [14].

Occupation orders are far less commonly sought or granted than non-molestation orders. If granted, they allow for control over the occupation of the family home and are complicated by reference to the nature of the ownership and property rights of the parties over the home. The best chance of obtaining an occupation order is as an 'entitled applicant', holding property rights in relation to the home (s. 33, Family Law Act 1996, either as legal owner, owner of a beneficial interest in the property, or as a holder of matrimonial home rights under s. 30, Family Law Act 1996) [8]. Even in these circumstances, the limitation on the respondent's rights if the occupation order is granted has led to these orders being described as 'draconian' and only suitable where the violence is physical and substantial [15]. This approach has undermined the use of occupation orders and restricted their application to only the most severe cases.

Although occupation orders and non-molestation orders use the civil law jurisdiction, there remains the possibility of a criminal prosecution for related offences where there has been abuse in a domestic context. There is no specific offence of domestic abuse, so prosecutions are undertaken based on standard criminal law offences including murder, and assault of varying degrees. Section 76, Serious Crime Act 2015 amended the criminal law to create an offence of controlling and coercive behaviour. A prosecution may be taken forward by the state in the criminal courts against the perpetrator as a defendant, at the same time as the victim seeks a restraining order under the Family Law Act 1996.

Despite these measures, incidents of domestic abuse, remain stubbornly high in England and Wales [16]. Since the turn of the 21st century, there has been renewed interest in the role of the police and the state as a prosecutor of offences on behalf of victims of domestic violence [17]. This is reflected in the amendments criminalising breach of a non-molestation order under the Domestic Violence, Crime and Victims Act 2004, the revisions to the criminal law in the Serious Crime Act 2015, and eventually, the passage of the Domestic Abuse Act 2021. This Act created a Domestic Abuse Commissioner, who is responsible for representing the interests of persons experiencing domestic abuse, and conducting research and promoting best practice in relation to the treatment of victims by the justice system. It also provides for additional support for families who have experienced domestic abuse, for example in relation to the accommodation of a family who have moved away from a violent parent [1].

The Domestic Abuse Act 2021 will create a new type of order, a Domestic Abuse Protection Notice / Order [1] alongside the existing measures under the Family Law Act 1996. These provisions are not yet in force to allow for them to be trialled before being used across all police areas in England and Wales. The order seeks to empower the police to intervene where there is evidence of domestic abuse and provide protection beyond arrest of the alleged perpetrator. Under section 22 of the Domestic Abuse Act 2021 the police may give a domestic abuse protection notice to a person if there are reasonable grounds for believing that they have been abusive towards a person over 16 to whom they are personally connected *and* there are reasonable grounds for believing that it is necessary to protect that person from domestic abuse. The notice may prevent the alleged abuser from contacting the protected person and prevent the entry of the perpetrator into the home. The notice will be issued by a senior police officer, but it enables the police to issue an immediate order to

prevent further violence. If the perpetrator was arrested, unless the violence is severe enough for them to be remanded in custody pending trial, then they can just return to the family home. The option of issuing a Domestic Abuse Protection Notice would prevent that happening. It is also the police acting on the victim's behalf, rather than the victim being required to seek legal advice and support to apply for a non-molestation order.

Once a domestic abuse notice has been issued, the police must apply to the magistrates' court within 48 hours for a full Domestic Abuse Protection Order under section 27 of the Domestic Abuse Act 2021. A Domestic Abuse Protection Notice would be issued without judicial oversight, and it controls the liberty of the subject, so it must have almost immediate judicial authority for the control on their behaviour to continue. The Order is intended to provide protection over a longer time and would contain a range of restrictions seeking to limit and restrict the perpetrator's behaviour. It could include restrictions on access to the family home, which is so difficult under an occupation order [18]. There are no specific types of restriction described by s. 27, so the court will be able to respond to the circumstances in providing suitable protections.

The Domestic Abuse Protection Order is anticipated as a standalone application, as well as being linked to a Notice issued by the police. Under section 28 of the Domestic Abuse Act 2021, the police may apply for an Order, but the victim themselves may do so, another person with leave of the court, or they may be issued as part of criminal or family law proceedings relating to a different substantive issue. The police would be able to seek an order without issuing a prior Notice, and another party may apply e.g. Local Authority. This is very flexible and accounts for situations where the state regards an individual as requiring protection, and seeks to act on their behalf.

Under section 32 of the Domestic Abuse Act 2021, the conditions for making a Domestic Abuse Protection Order are that the court is satisfied on the balance of probabilities that the respondent has been abusive towards a personally connected person and the order is necessary and proportionate to protect that person from domestic abuse. These are quite minimal requirements so that abuse behaviour must be demonstrated. However, the magistrates will be required to make a judgment in deciding whether the Order and its terms are necessary and proportionate to respond to the alleged abuse. If granted, enforcement of the order is only via police prosecution, making the whole process state-led, rather than victim-led, in seeking to address domestic abuse.

Whilst the impact of domestic abuse has been recognised through legal provisions in England and Wales since the mid-twentieth century, the persistence of this issue demonstrates that law alone is not enough to change behaviour. The privacy of the family and the shame often associated with abuse makes it difficult to report. The scope of behaviour falling within the concept of domestic abuse has broadened, but the evidential issues presented in proving its existence remain. The lack of resources available to charities and local authorities in responding to abuse remains a significant ongoing problem. With the adoption of the Domestic Abuse Act 2021, there has been a shift towards recognising that the state has to assume further responsibility for responding to evidence of violence, and addressing the consequences. How successful this is in the longer term remains an open question as abuse in the family continues.

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Ламонт Рут. ДОМАШНЄ НАСИЛЬСТВО В АНГЛІЇ ТА УЕЛЬСІ

Потреба в запровадженні дієвих законодавчих та інституційних механізмів запобігання домашньому насильству в сучасних державах зумовлене кількома важливими причинами, які відображають як прагнення забезпечити основні права та свободи громадян, так і необхідність вирішення соціальних, економічних і правових проблем. Зазначене питання є дійсно важливим, оскільки має глибокий вплив на соціальну структуру суспільства, особливо на жінок і дітей. Створення дієвої системи запобігання домашньому насильству сприяє не тільки досягненню гендерної рівності та соціальної справедливості, а й допомагає запобігти негативним впливам на фізичне та психічне здоров'я жертв.

Що стосується Великої Британії, то розвиток законодавства й системи недопущення сімейного насильства пройшов кілька ключових етапів і являв собою поступовий перехід від ігнорування проблеми до визнання її суспільної значущості та

Dr Ruth Lamont. Domestic abuse in England and Wales

необхідності комплексних заходів захисту жертв. У 1970-х роках почали з'являтися феміністичні рухи, які привернули увагу суспільства до цієї проблеми. У наступні роки було ухвалено ряд законів, які стосувалися домашнього насильства, зокрема Закон про сімейне право 1996 року, який визначив різні форми захисту жертв, включаючи ордери на проживання й ордери на заборону переслідування. Цей Закон дозволив жертвам самостійно звертатися до суду за захистом. Не менш важливим став і Закон про домашнє насильство 2021 року, що є одним з найбільш комплексних законів у цій сфері та охоплює визначення різних форм насильства (фізичне, сексуальне, економічне, емоційне). Також важливими кроками для забезпечення вирішення досліджуваних питань стало запровадження посади Комісара з питань домашнього насильства та Ратифікація Стамбульської конвенції.

Варто зауважити, що хоча за декілька десятиліть відбулися значні зрушення в досліджуваній сфері, сформувалася певна судова практика, але зазвичай залишається багато проблемних моментів, що обумовлені специфікою самої цієї сфери, на які звертаємо увагу в цій статті. Водночас сподіваємося, що вивчення цього досвіду може допомогти правознавцям і законодавцям з інших держав, зокрема України, запроваджувати й розвивати ті з інструментів, що виявили найбільшу ефективність: різні форми судових наказів, як-от ордери на проживання та ордери на заборону переслідування; повідомлення / ордер про захист від домашнього насильства; визначення дій поліції та інших правоохоронних органів у справі домашнього насильства, а також співпраця з громадськими організаціями. Отже, вивчення британського досвіду боротьби з домашнім насильством може бути важливим кроком для українських учених-правників, спрямованим на вдосконалення національного законодавства, впровадження ефективних правових механізмів захисту, а також формування більш безпечного та справедливого суспільства.

Ключові слова: домашнє насильство, форми домашнього насильства, припис про заборону проживання, припис про недопущення домагань, повідомлення / ордер про захист від домашнього насильства.

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