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GENESIS OF LEGAL REGULATION OF DOMESTIC VIOLENCE IN UKRAINE

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Abstract: The relevance of this study is due to the lack of an effective mechanism to combat domestic violence in Ukraine and an insufficiently effective system of prevention and protection against domestic violence, which creates an atmosphere of impunity and leads to the spread of this phenomenon in Ukraine. The purpose of the article is to analyze the genesis of legal regulation of domestic violence in Ukraine and determine the problems Ukraine faces during this process. The article dwells on the historical aspect of domestic violence phenomena and considers former legal regulations of it. The article also reveals some problems deriving from the historical aspect of combating domestic violence, which is still in place nowadays. Their detrimental impact on combating domestic violence is as well considered.

Keywords: Domestic violence; Istanbul Convention; crime; gender-based violence.

1. Introduction

The problem of domestic violence has accompanied mankind throughout its history. For a long time, however, domestic violence was not seen as a problem to be tackled. At various times in human history, domestic violence was encouraged, considered acceptable, limited (but not prohibited), and was considered a private affair of the family that was not accepted or even reprehensible to take out of the family. In fact, a person who has experienced domestic violence was left alone with his or her suffering and problems. Has the situation changed now in independent Ukraine? In order to address this question, it is necessary to consider the evolution of the legal regulation for combating domestic violence in Ukraine.

In 2017, the national regulation of domestic violence was radically changed. 2017 was marked by the adoption of a package of laws aimed at preventing and combating

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domestic violence in Ukraine. Despite some legislative changes in the field of domestic violence in Ukraine, practice shows that the number of cases of domestic violence is growing every year, but the state is not always able to identify such offenses and bring the perpetrators to justice, thus ensuring adequate protection of victims of domestic violence. The imperfection of both legal regulation and the practice of combating domestic violence results in the victim's inability to protect his or her rights. Due to the state's inaction, the victim is often forced to remain in such a violent relationship. Therefore, it is important to study the problems of combating domestic violence in Ukraine and find ways to solve them. In June 2022, Ukraine ratified the Istanbul Convention, but national legislation has not yet been brought into line with international standards. Many existing problems in the field of domestic violence have their roots in the Soviet past. The purpose of this study is to identify ways to improve the contradictory and ambiguous legal regulation of prevention and countermeasures against domestic violence in Ukraine.

2. First attempts at domestic violence legal regulation

It is worth starting with the fact that domestic violence has its roots in ancient times, as soon as people began to unite to start families. At a time when social relations were dominated by brute force, domestic violence was the only way to assert one's power and resolve disputes. The family was dominated by the right of the strong, while the weaker (usually women, children and the elderly) were constantly oppressed and abused. The first of the known attempts to legally regulate family relations dates back to the eighteenth century BC, when a legal code was developed in Babylon - the Laws of Hammurabi. In this legal memo, a separate part was devoted to the regulation of marital and family relations. Certain provisions regulated both the property and non-property rights of family members, and special attention was paid to the protection of the rights of children who experienced domestic violence. However, more severe punishments were still provided for violence against the head of the family. Thus, inflicting physical pain on the father was punished on the principle of talion - cutting off the hand. Among other things, the Hammurabi Laws regulated the mutual rights and obligations of women and men, the violation of which entailed criminal liability for women and the payment of monetary compensation for men. Even with such inequalities in the definition of punishment, consolidating a man's responsibility for violations in family life has been a progressive step. In this case, not only the husband was entitled to a divorce, in the presence of justified grounds, which were regulated in Articles 137-141 (The Code of Hammurabi), the wife had the right to divorce. At the same time, despite the partial regulation of certain rights, the husband, as the head of the family, retained the opportunity to give the woman and/or children in debt bondage for a certain period in case of inability to repay the debt. In fact, "enslaved" family members, as

well as certain things, could be a way to secure a debt obligation. This state of affairs can be explained by the peculiarities of the slave-owning social system that dominated at that time. Thus, analyzing the above provisions, it can be argued that already at that time the legal regulation of certain aspects of domestic violence is gradually beginning to be outlined.

3. Legal regulation of domestic violence in Ukraine before 1918

Since the Hammurabi Laws, references to certain forms of domestic violence have gradually emerged in legal sources from different eras. In the territory of modern Ukraine, the criminalization of certain manifestations of domestic violence dates back to the times of Kievan Rus`. In the "Russian Truth" (Statute) of Prince Yaroslav the Wise, which operated on Ukrainian soil in the XI-XII centuries, Article 33 prohibited the prevention of children from wanting to marry. The fight between the wife and the husband was considered a crime under the "Statute" of Prince Vladimir. At the same time, criminal prohibitions on the use of other forms of domestic violence were not enshrined in law at that time. Moreover, the separation of domestic violence into one complex problem that requires opposition from society has not taken place. There have been no fundamental changes in the enslavement and dependence of the weak in the family. Domestic violence was considered the norm and served as an effective means of consolidating the authority of the head of the family and disciplining other members.

The provisions of the Statutes of the Grand Duchy of Lithuania of 1529, 1566 and 1588 also outlined the issue of conviction and punishment for domestic violence: there were severe sanctions for crimes, committed against family members (for the murder of one of the family members provided for the death penalty). It was forbidden to marry against a woman's will. But domestic violence against women was mostly punished only for particularly serious crimes.

In the Middle Ages, the sources of contemporary law enshrined the possibility of violence against family members at the level of legal norms. For example, in 1654 the British Parliament passed the "Act of Punishment of a Stubborn Child." According to this Act, the father had the right to file a complaint with the magistrate against his child. The magistrate could impose various punishments, including the use of the death penalty on a child. Similar provisions were in force in Ukraine at that time. In the Conciliar Code (Sobornoye Ulozheniye), which came into force in 1649, Article 6 enshrined the right of parents to physically punish their child. However, it should be noted that the list of criminally punishable acts committed in the family was expanded in the Conciliar Code. In particular, the criminal responsibility for the murder of a child was innovated (Art. 3), and the duty of children to care for their parents in their old age was also enshrined (Art. 5) (Conciliar Code, 1649).

In the XIX - early XX centuries society's attitude towards domestic violence and its legal status were gradually changing. The use of violence by the head of the family against other members of the family began to be limited by certain generally accepted norms. In other words, the possibility of using domestic violence was recognized, but its extreme forms were limited and possible cases of use were regulated. In particular, in 1833 the Digest of Laws of the Russian Empire was adopted, which was in force in the Ukrainian lands too. For the first time, the above-mentioned Digest enshrined systematic legal measures to combat crimes in the field of family relations. They were enshrined within the first part of Chapter VIII "On Punishment for Crimes Against Marital Rights", entitled "On Exceeding the Rights of Parental Authority". Some changes in the composition of crimes involving responsibility for certain forms of domestic violence were introduced with the adoption of the Criminal Code in 1903. This Code confirmed the criminal responsibility of parents for child abuse, involving them in poverty or other immoral activities.

Similar trends have taken place in other countries. For example, in 1924 in the United States, in some states, men were officially released from liability for physically abusing their wives in cases of "emergency." At the same time, the so-called "thumb" rule was officially enshrined in England, i.e. a man was recognized as having the right to physically punish his wife if the thickness of the stick he used was not greater than the thumb of his hand. This legal regulation of domestic violence effectively legitimized it: any beating of an outsider was considered a crime and prosecuted while beating in the family was considered a permissible act subject to certain requirements.

Given the above facts, it can be argued that before the revolutions of 1917, attitudes toward domestic violence and the criminalization of some of its forms in the Ukrainian lands were formed in line with global trends.

4. Legal regulation of domestic violence in Soviet Ukraine

At the same time, since the establishment of Soviet power in Ukraine, the situation with legal regulation and public attitude to domestic violence has changed dramatically. With the advent of Soviet power, the topic of domestic violence, as well as any topic related to violence against the individual, was banned. It was declared that there was no basis for violence in the USSR. Some of such cases, of course, took place, but they were explained by the fact that in any society there is a certain percentage of antisocial elements. The first Criminal Code passed in the Soviet Union in 1922 abolished the responsibility of parents for child abuse, misappropriation or embezzlement of child property, and involvement of a child in the commission of a crime provided for in the Imperial Criminal Code. Only Article 158 of the Criminal Code of 1922 enshrined the criminal responsibility of parents

for "Leaving minor children without any support, as well as forcing children to become beggars".

The new Soviet Criminal Code of 1926 removed all references to any family ties in cases of beatings. That is why it is almost impossible to find statistics on domestic crime during the Soviet era. Moreover, a few years after the revolution, statistics on beatings began to be kept in the abstract, without specifying who did them. In Stalin's time, the general law on hooliganism was applied in cases of domestic beatings. Several special circulars were published on hooliganism in various spheres and industries, one of which was on the persecution of hooliganism in apartments (Circular № 158 of July 14, 1935 "On Combating Hooliganism in Apartments"), and thus all manifestations of domestic violence (at that time it was only about physical violence) fell under this composition of hooliganism. Quite often such cases of domestic violence were considered at party meetings and the sanction for such actions was public condemnation. In the case of more serious consequences that were clearly not covered by hooliganism (such as death or serious injury to the victim), such cases were dealt with in accordance with the general provisions of the Criminal Code, without detailing that the act was committed against a family member. Thus, criminal responsibility was provided for a narrow range of serious acts against family members, while the problem of domestic violence was not recognized globally at the state level. There was not that separate legal regulation or punishment for domestic violence, even the terms "domestic violence", "family violence" or other analogs, were not mentioned in the legal acts of the Soviet era. This is quite understandable because domestic violence could not be recognized as a social problem in a country where in the criminal law doctrine the priority objects of protection were state interests and state property.

Soviet propaganda created for the West an ideal image of the Soviet family as the most advanced and best in the world. In turn, this ideal image of the Soviet family ruled out any possibility of domestic violence. The Soviet government sought to create a new type of family, and violence was considered a relic of the imperial past. At the same time, it was believed that a new type of family, with equal, non-violent relations, was formed simultaneously with the overthrow of imperial power and the founding of the USSR. And the real situation in the families, in which the relations that had developed over the centuries could not change in an instant - with the creation of a new state formation, did not worry the authorities at all. Thus, the existence of domestic violence in Soviet families was completely denied in official rhetoric. Therefore, there was no question of separate criminalization of domestic violence and persecution for its commission in Soviet times.

In the international arena, special attention has been paid to domestic violence (initially in the context of violence against women) since the 1970s. It is important to note that until now, domestic violence has been considered only in the context of

physical violence against family members. As the issue of combating domestic violence in the international arena becomes more relevant, the international community was gradually realizing the existence of other forms of domestic violence, namely psychological and economic violence. At the end of the twentieth century, four world conferences on women's rights were held under the auspices of the United Nations. The last one took place in 1995 in Beijing. It was attended by representatives of independent Ukraine. Ukraine declared its independence in 1991. The collapse of the USSR left a significant ideological and cultural legacy for independent Ukraine, while at the same time opening opportunities for building its own independent state.

5. Legal regulation of domestic violence during the independence of Ukraine

With independence, Ukraine gradually entered the international discourse on women's rights and the fight against domestic violence. As a result, Ukraine was the first of all Eastern European countries to adopt a Law on Domestic Violence in 2001. It should be noted that the adopted Law "On Prevention of Domestic Violence" was developed on the basis of model legislation on combating domestic violence developed by the UN. Thus, with the adoption of the Law on Prevention of Family Violence, domestic violence was recognized at the legislative level as a separate complex problem that requires special measures to respond and counteract.

Among the positive aspects of the adopted Law that should be noted is the consolidation of the complex concept of "family violence" and the definition of its individual forms. Namely, it was stated that family violence is defined as any act of physical, sexual, psychological, or economic orientation (Article 1 of the Law). Also in Article 1 the concept of physical, sexual, psychological, and economic violence was detailed. It was also important to identify the range of bodies and institutions entrusted with the implementation of measures to prevent domestic violence (Article 3) (Law, 2001).

Among the shortcomings, the narrow scope of this Law immediately draws attention. The range of family members defined in Article 1 of the Law does not cover the full range of persons who may also commit domestic violence. The Law generally duplicated the provisions of the Family Code in the context of defining family members. Such persons included persons who were married; lived in the same family but were not married to each other; their children; persons under guardianship or trusteeship; were relatives of a direct or indirect line of kinship provided they lived together (Law, 2001). A significant drawback was the condition of living together. In fact, the law did not include in the category of domestic violence any acts of violence against family members who do not live together for certain reasons. For example, adult children living separately from their parents, etc. Also, the law did not cover violence perpetrated by ex-spouses or partners.

At the same time, the definition in the Law of the grounds for taking measures to prevent domestic violence can be called vague and unclear. Article 4 defines the following three grounds: 1) an application for assistance to a victim of domestic violence or a family member in respect of whom there is a real threat of violence; 2) the desire expressed by the victim of domestic violence or a family member to take measures to prevent domestic violence if the message or statement was not received from him personally; 3) receiving notification of the use of domestic violence or the real threat of its commission against a child who is a member of this family or an incapacitated family member. As for the first ground, its application seems quite understandable. With regard to the second ground, it is not clear in what form such a wish should be expressed in order for the competent authorities to take appropriate measures. Finally, with regard to the third ground, it is unclear from the text of the article whether an outsider can report domestic violence or the threat of domestic violence, or whether the victim or other family member has the right to do so. Also, none of the grounds mentioned the possibility of combating domestic violence at the initiative of the authorities, when they became aware of the commission of domestic violence. Thus, it can be concluded that the grounds for taking measures to combat domestic violence were unclear, which created difficulties in protecting the rights and interests of victims of domestic violence and in general made the fight against domestic violence inconsistent. and fuzzy.

The law also introduced special measures to prevent domestic violence. In particular, there were an official warning about the inadmissibility of domestic violence (Article 10), preventive registration of a family member who committed domestic violence (Article 12), protective order (Article 13), recovery of funds for the maintenance of victims of domestic violence in specialized institutions for victims of domestic violence (Article 14) (Law, 2001). However, despite the positive fact of consolidating such measures, their legal regulation remained imperfect.

For example, consider the relationship between an official warning and a protective order. Thus, a family member who has committed domestic violence is issued an official warning about the inadmissibility of domestic violence, which is notified to him in writing upon receipt. Article 10 of the Law states that such a warning is issued by authorized police units, provided that the actions of such a person do not constitute a crime. On the same grounds, including the absence of signs of corpus delicti, the Law in Article 13 put forward for the application of a protective order (Law, 2001). In other words, there are no differences in the grounds for applying these two measures, but the protective order was a stricter measure, as it provided for the possibility of imposing certain prohibitions on the offender, in particular: 1) committing acts of domestic violence; 2) receive information about the whereabouts of the victim; 3) search for the victim, if the victim is in the place of an unknown offender at his own request; 4) visit the victim, if he/she is temporarily not at the

place of cohabitation with the offender; 5) conduct telephone conversations with the victim (Law, 2001). The similarity of the grounds for the application of the two measures in fact left the choice to the authorized bodies of the state, which jeopardized the effectiveness of the protection of the rights and interests of victims of domestic violence.

The most problematic issue of the adopted Law was the issue of legal responsibility for domestic violence. Article 15 of the Act established only the general provision that family members who have committed domestic violence were criminally, administratively or civilly liable under the Act (Law, 2001). There are no details on specific provisions. The only norm that provided for liability for domestic violence was Article 173-2 of the Code of Administrative Offenses of Ukraine, which was adopted in 2003 (Code, 1984). It should be noted that until then, cases of domestic violence, by analogy with the Soviet period, were classified under Article 173 of the Code of Administrative Offenses as petty hooliganism. In 2003, the newly introduced Article 173-2 of the Code of Administrative Offenses established administrative liability for family violence or failure to comply with a protective order. Family violence in Art. 173-2 was defined in the same way as in the Law (Code, 1984). From this consolidation, it could be concluded that physical, economic and psychological violence in the family was administratively prosecuted. In addition, it should be noted that Art. 173-2 of the Code of Administrative Offenses provided only a formal punishment: a fine of one to three non-taxable minimum incomes or correctional labor for up to one month.

In addition, no separate criminal responsibility for domestic violence was provided. This has become one of the most important problems in combating domestic violence. In fact, due to such imperfect legal regulation, acts of domestic violence were either ignored altogether or prosecuted administratively with a purely declarative sanction. Only the most severe cases of domestic violence, which resulted in the death of the victim or other serious consequences, were prosecuted. In other cases, if there was a prosecution, then only administrative. At the same time, this state of affairs not only did not allow for proper punishment for cases of domestic violence, but also did not allow to prevent the continuation of violence, to break its "cycle". This assumption most vividly illustrates the following absurdity of legal regulation. According to Part 2 of Article 110 of the Family Code of Ukraine, a lawsuit for divorce may not be filed during the wife's pregnancy and within one year after the birth of the child. An exception is the case when one of the spouses has committed illegal conduct that contains signs of a criminal offense against the other spouse or child. Thus, due to the lack of criminalization of domestic violence, a woman who was subjected to such violence if she was pregnant or had a child under the age of one could not divorce her abuser and was forced to remain in such a violent relationship. It is no exaggeration to say that the only option for a woman to stop

domestic violence in such a situation was death or injury. Only then did she have legal grounds to divorce her husband.

Analyzing the content of the Law, in particular measures to prevent domestic violence, and declarative administrative liability, along with the absence of criminal responsibility, it can be stated that little has changed since Soviet times. Of course, a positive development was the recognition of family violence as a separate issue that requires some counteraction. However, the general legal regulation has remained almost unchanged. The law did not introduce effective means of ending domestic violence, influencing the perpetrator and assisting victims. There has been no separate criminal responsibility for domestic violence, and only the most serious manifestations of domestic violence have been prosecuted. And legal measures to prevent domestic violence, including a warning or protective order prohibiting acts of violence, were very similar to the consideration of domestic violence at party meetings and public condemnation of the Soviet era. Thus, the adoption of the Law "On Prevention of Family Violence" instead of real actions to protect and combat domestic violence, legitimized the declarative Soviet provisions.

Such imperfections and negligence in legal regulation, exacerbated by Soviet-era attitudes toward domestic violence by government officials, have created many practical problems in protecting victims of domestic violence. For example, police officers, as well as other authorities, often did not accept women's allegations of rape by their husbands. After all, it was believed that rape could take place only in the case of a crime against a stranger, in marriage such acts were not considered rape. In fact, law enforcement continued to reinforce the notion that “domestic violence is not a crime”. Such misconceptions, rooted in Soviet times, effectively deprived the victim of the opportunity to defend his/her rights and stop the violence, which in such cases tended to continue.

In order to analyze the difficulties of protecting the victim's rights, let us consider the case that has passed through all national instances before the European Court of Human Rights - Levchuk v. Ukraine (Case of Levchuk v. Ukraine, 2020). It should be noted at once that the consideration of this case reveals the systemic problems of practical protection of the rights of victims of domestic violence. After all, this case became known through an appeal to the European Court of Human Rights, and how many such cases when victims stop fighting because they face inaction and indifference, or out of fear decide to withdraw their applications. A significant number of such cases will never be known.

Therefore, in the case Levchuk v. Ukraine, a woman repeatedly suffered various acts of violence from her husband. However, her appeals to the authorities were simply not investigated. According to the case file, on January 13, 2011, an acquaintance of the victim filed a complaint with the Rivne police alleging that the man had hit the victim during an argument at home. The police refused to open a criminal case on

the grounds that the man's actions did not constitute a crime. In this case, it is possible to trace how the police used the legally provided opportunity for inaction. As domestic violence was not criminalized, such complaints were simply not considered. After all, despite the harm and obvious violation of the rights of the victim, the Criminal Code did not contain a separate act of "domestic violence".

In 2015, the victim lodged a complaint with the police about the beatings. However, she later withdrew her statement. The police decision stated that although the offender's conduct was covered by Article 125 of the Criminal Code ("Intentional minor bodily harm"), given the applicant's decision as a victim not to continue her complaint, the case was sent to another police station for a decision. whether the offender should be prosecuted for an administrative offense. However, no further decision on bringing the offender to administrative responsibility was made. Everyone forgot about the case. Due to the inaction of the authorities, the woman was forced to remain in such a violent relationship, and the state authorities did not care about her. All applications remained without consideration.

Inaction took place not only by the police but also by the courts. Based on the circumstances of the case, in early 2016 the police officer described the applicant's insults and threats, as well as tearing the blanket with a knife in her presence, as psychological violence. The perpetrator was charged with domestic violence under Article 173-2 of the Code of Administrative Offenses and the case was sent to court. No further decision on the police charge was made.

At the same time, the violence against the applicant continued. In April 2016 the Rivne Regional Bureau of Forensic Medicine testified that the applicant had hemorrhages in her right wrist, arm and leg, as well as sprains of the aponeurosis in her right foot. Based on this conclusion, the court found the offender guilty of committing domestic violence under Art. 173-2. However, the court ruled that the perpetrator could be released from administrative liability for domestic violence and only a verbal warning could be issued. Not only that, instead of criminal responsibility for bodily harm, the actions of the offender are formally qualified as an administrative offense, and even instead of the already declarative sanctions provided for in Art. 173-2, oral warning was instead issued. In fact, domestic violence left unpunished. However, when considering the complaint to the ECtHR, the victim noted that due to such hopelessness and disbelief that the authorities would be able to stop the violence, she was forced to withdraw her statements. According to her, the authorities to which she appealed forced her to withdraw the application under pressure. After all, they did not want to investigate the case and convinced the victim that it was in her own interest to reconcile with her ex-husband and close the case.

The case Levchuk v. Ukraine is illustrative, as it demonstrates the problems that existed in practice in Ukraine. These problems determined the need to amend the

Law, as well as the difficulties faced by victims of domestic violence each time they sought protection from such acts. Based on the analysis of the case, the following problems can be identified: 1) a significant number of cases related to domestic violence are closed due to the psychological pressure that the perpetrator may exert on the victim to withdraw his/her statement; 2) the authorities consider domestic violence as a "private matter"; 3) the legislation of Ukraine in terms of eviction did not provide an effective mechanism to ensure neither the right to life, safety and health of the victim, nor the property rights of the victim, if the offender is a co-owner of housing or lives in it; 4) the jurisprudence was to refuse eviction in such cases due to the lack of evidence of acts of domestic violence, which is an obstacle to access to justice for victims of domestic violence; 5) children are "invisible" victims of domestic violence. In most cases, the identification of child witnesses as a victim of domestic violence is not carried out by the court or by the applicants themselves and law enforcement agencies. As a result, the interests of children are not taken into account in bringing perpetrators to justice for domestic violence.

In general, Levchuk v. Ukraine reveals a systemic problem: domestic violence has not been investigated and has gone unpunished. Due to the lack of any response and protection from the authorities, the victims were forced to remain in such violent relationships, suffering constant violations of their rights. The Law on the Prevention of Family Violence, passed in 2001, proved to be an imperfect declaration of intent. No real action or effective means of combating domestic violence were envisaged. At some point, this state of affairs made it necessary to review the legal regulation of combating domestic violence. The issue of new legislation has become acute in connection with the development of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (Council of Europe Convention, 2011). Ukraine has signed the above-mentioned international instrument, but has not yet ratified it.

Since then, in cooperation with the structures of the Council of Europe, the process of drafting a new law has begun. In particular, such development took place within the project "Prevention and Combating Violence against Women and Domestic Violence in Ukraine". The explanatory note to the new draft law "On Prevention and Counteraction to Domestic Violence" noted that the legislation on prevention of domestic violence in 2001 was imperfect, so a change in legal regulation was necessary. One of the main and first proposals of the working group was the introduction of a separate crime in the Criminal Code of Ukraine - "Domestic Violence", as Article 126-1. Other proposals included expanding the scope of domestic violence law, addressing the victim's withdrawal, and criminalizing other acts of domestic violence, as provided for in the Istanbul Convention. In general, it should be noted that the Istanbul Convention was to become the basis for new legal regulation. This thesis was confirmed in an explanatory note to the new bill. In

particular, it noted that the purpose of the new law is to harmonize the contemporary legislation of Ukraine in the field of combating domestic violence and violence against women and adapt it to European standards that provide a basis for ratification of the Istanbul Convention. As a result of such painstaking work aimed at improving the legal regulation of domestic violence, on December 6, 2017, a new Law in Ukraine "On Prevention and Counteraction to Domestic Violence" was adopted.

6. Conclusions

Thus, through a historical lens, we have established that the legal regulation of domestic violence has historically had many problems. The Soviet legacy left a tangible ideological mark that is still visible today. Further reforms of domestic violence in Ukraine must be carried out in the context of bringing legal regulation to international standards and combating the Soviet past.

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