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Illustration: photographs of children, women who have been beaten or victimized…

LEGAL AND PRACTICAL ISSUES IN CIVIL LEGAL PROCEEDINGS REGARDING THE ENFORCEMENT OF THE PROTECTION AGAINST DOMESTIC VIOLENCE ACT (PADVA)*

Nature of the proceedings. Enforcement and related difficulties. Necessary measures.

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The adoption of the Protection against Domestic Violence Act is indicative of the continuing harmonization of Bulgarian law with the law of developed countries and the Community Law in respect of human rights protection. Judicial practice regarding the enforcement of the Act is not extensive as the Act is relatively new, but the results are hopeful and the effect is versatile: for domestic violence victims, for the aggressors and for the society as a whole. Before analysing this practice and pointing out the problems arising therefrom and the options for their solving, the nature of the legal proceedings under the Act should be clarified.

Criminal procedures, civil procedures, administrative procedures and constitutional procedures are different branches of the law (*citation Zh. Stalev*). In view of some ideas to criminalize the concept of "domestic violence", it should be noted that the proceedings pursuant to PADVA

have no elements of criminal procedures

and even fundamentally differ therefrom. Their court phase is preceded by a pre-court phase. Their implementation takes longer. Criminal proceedings start *ex officio* at the prosecutor's request. Not all domestic violence manifestations are crimes within the meaning of the Penal Code. If the concept of "domestic violence" is criminalized, PADVA will be deprived of any application and the "domestic violence" violation will be penalized only under the procedures of the Criminal Procedure Code (CPC) with its objectively conditioned relative slowness. There are no obstacles to both the violence victim receiving protection under PADVA and claiming criminal liability from the perpetrator in case of a crime committed. The proceedings under PADVA has a specific purpose: stopping domestic violence, including preventing any crimes relating thereto through protective measures of exceptional swiftness and efficiency. The proceedings under PADVA have no common grounds with administrative proceedings related to public administrative legal relations, and even less with constitutional proceedings.

Civil proceedings implement protection: sanction aiming at restoring the legal development of the civil legal relations. The variety of civil rights imposes that the protective methods of civil proceedings should be adjusted to the peculiarities of the protected rights' legal status. Civil proceedings depend on substantive law and vice versa. (*Bulgarian Civil Procedure Law*, Dr. Zh. Stalev)

The proceedings under PADVA develop with all elements of civil proceedings

in their part of adversary proceedings (civil administration of justice). They concern impaired civil rights and cannot arise *ex officio* but start with a request for protection. The matter is disputable, bilateral and the principles of adversary proceedings and provisional origin are in force: the person's protection depends on his/her will. The idea of ignoring the provision that refers to the Civil Procedure Code (CPC): paragraph 1 of the Final Provisions of PADVA, would leave the same without application as the proceedings come to: dropping the claim, correction of apparent factual error in the ruling or its supplementing, joining and splitting cause of action and any other things under the procedure of CPC. One comes to the unambiguous conclusion that the proceedings under PADVA are special adversary civil proceedings.

No other civil proceedings realize

such swiftness.

The timely intervention and assistance provided in the law is a guarantee for the success and positive effect therefrom. In order to determine the problems and the ways to solve them, the Act enforcement mechanism should be followed.

On the day of filing the application under Section 18 of PADVA in the presence of direct and impending threat for the life and health of the victim, an emergency protection order is issued (EPO). This measure is provided for the purpose of preventing any possible adverse consequences and separation of the parties. For that reason the application without any evidence or opinion of the respondent provides sufficient grounds for issuance of the order. The order is temporary and effective until pronouncing the final judgement (order or denial) after conduction of adversary proceedings. As early as the day of issuance of EPO or, if there are no grounds therefor, on the day of filing the application with the court, the hearing is set for a date 20-30 days later. For the purpose of stronger effect on the parties, the judgement is announced in a public hearing.

The procedures described above are implemented if the application is admissible and has no defects. According to CPC which is currently effective and Sections 129 and 130 of the new CPC (effective 01.03.2008) the court checks the application and the admissibility of the claim. If the claim is found to be inadmissible it is denied and the case is dismissed. If the claim is admissible but the application has defects hindering the progress of the proceedings, the court gives instructions for remedying the defects. This slows down the proceedings but is inevitable.

Applications are often defective.

They frequently claim violence in general without specifying the circumstances and the time of its occurrence. Claims are frequently withdrawn. This shows that victims of domestic violence still do not have enough courage, trust in the judicial institution and support in society, or are threatened, or have unreasonably trusted the oppressor again. Dismissal of the case follows in such situation.

Popularization of the Act and preventive actions with violence victims are of utmost importance. At this point the practical application of the provisions of Section 6 is static. The measures provided therein should be implemented effectively.

The procedure started properly under PADVA ends quickly.

Emergency protection orders

are issued within several hours and the 24-hour period provided for in Section 18, paragraph 1 of the Act is reasonable in view of allowance and possibility for the issuance and technical preparation thereof. Upon the issuance of the final order or denial, the effect of the EPO ends, and the court order pronounced is subject to immediate and preliminary execution irrespective of any appeal procedures in respect thereof. The temporary order is not used in all cases but only in those specified in the Act. Regarding the statement under Section 9, paragraph 3, PADVA provides that in the absence of any other evidence, only based thereon the court shall issue a protection order (Section 13, paragraph 3). This is undoubtedly in favour of violence victims.

Some specific problems arose in the practice concerning the

enforcement of PADVA in relation to its use for wrong purposes.

This should not be allowed irrespective whether it is done in good faith or not. Section 3 of the new CPC provides that the persons involved in the legal proceedings and their representatives should, bearing criminal liability for damages, exercise procedural rights granted thereto in good faith and in accordance with good morals. Two main phenomena may be pointed out in respect of the problem specified above. One is filing applications for protection orders, including for EPO, for the purpose of “removing” the respondent from the home occupied jointly with the plaintiff which is also matrimonial within the meaning of Section 107 of the Family Code (FC), for the use of which a dispute already exists in divorce proceedings which are already underway or are forthcoming. Such cases do not remain unnoticed by magistrates and cannot become obstacle for enforcement of the law. It is not difficult for judges working on matters regarding the application of family law such as divorce, children custody disputes, etc., to assess during the proceedings whether the plaintiff is actually a victim of domestic violence or aims at using the Act for the wrong reasons.

The other, graver phenomenon relates to the interpretation of Section 2 of PADVA. That provision fails to successfully define the term of "domestic violence", which is also the reason for the contradictory judicial practice in this respect. The law cannot explicitly list all manifestations of domestic violence, but if the provision is broadened the enforcing party may assume them. Apart from being impossible, such listing is unnecessary as something not listed may become the reason that the "letter of the law" could prevent the implementation of the "spirit of the law", and the latter prevails. Still, it could be pointed out that domestic violence is not only physical, psychological or sexual,

it could also be emotional, spiritual or economic

(reference: website of the US Justice Department). Physical violence is considered every act of violence from initial physical contact to murder through the use of physical strength with expected result against the victim's will. Apart from the usual forms, physical violence is also restricting the access to medical aid and forcing the victim to use alcohol or drugs. Sexual violence includes attempts of fulfilment of enforced sexual intercourse with the victim against his/her will or without the victim's awareness (child, person under legal disability), attacking sexual parts of the victim's body. Emotional violence may be objectified in decreasing the victim's self-confidence and self-respect, causing fear through threats for aggression on the victim, people close to the victim or the victim's pets, insults, humiliation, control, isolation. Economic violence may be exercised through control on the victim's means, placing the victim under direct financial dependence, creating obstacles for education or work. Psychological violence is considered deliberate molesting and underestimating, derision, threats, coercion. Spiritual violence is using the victim's religion or faith for manipulating the victim, mocking the faith, impeding following the faith. This type of violence is especially dangerous in view of family education to the extent of beliefs which may lead to terrorist behaviour. There is a great variety and frequent interweaving of domestic violence forms, so that often one action contains several of them. All this should be considered when specifying the provision of Section 2 of the act through grouping domestic violence in basic forms.

Every judge applies the law according to his/her personal beliefs and decides if the alleged action may be qualified as an act of domestic violence. In view of the current incomplete provisions of Section 2, it is normal to

make mistakes or omissions

but it should be under no circumstances allowed the Act to be used (in good faith or not) for achieving any legal or actual status hindering the enforcement of another judicial act under any effective judgement or regarding any ruling in respect of interlocutory measures in a pending suit. The above may be illustrated by certain aspects of the practice of proper filing of applications requesting emergency protection or protection against a respondent who, under another case (finished or pending), has been provided by the court, through a judgement or ruling for interlocutory measures, with custody over a child and the plaintiff has been provided with a fixed schedule for personal contacts therewith. Plaintiffs under such cases pursuant to PADVA claim that the respondents have performed thereon acts of domestic violence by preventing them from implementing the personal contact schedule with their children on the dates fixed under the legal procedures. They request issuance of protection orders with the measure under Section 5, paragraph 1, sub-paragraph 4 of PADVA, according to which the residence of the child is temporarily placed with the parent who has suffered and who has not committed the violence. In both cases – where the legal dispute for parental custody has not finished yet and there are interlocutory measures imposed in respect therewith, or when it has finished with an effective ruling without any new proceedings having been initiated in case of subsequent change of the circumstances; regardless of the fact that the legal grounds of the custody claim differ from the legal grounds of the application under PADVA, finally, the suit initiated (whether in good faith or not) under this Act aims at or may result in a change of the actual situation imposed by another court ruling or despite it. Actually the application pursuant to PADVA and the requested measure for determining the child's residence, in this sense who will exercise the immediate care therefor, may lead to *reformatio in pejus* of a legal dispute or to its prejudgement by another court before the court hearing it rules. This is absolutely inadmissible.

Practice shows that Section 2 is interpreted in different ways. Some magistrates are of the opinion that the action reviewed is not domestic violence within the meaning of that provision, others are of the opposite opinion, and there is

contradictory judicial practice

at this point which should be made uniform after specification of the provision. In any case, children should not become hostages of the ambitions of their parents filing alternating claims under one procedure or another. In practice, the absurd situation occurs of seeking protection under PADVA due to the failure to enforce a court ruling pronounced pursuant to another Act. In the case described above, the legislator has not left the applicant without protection as the latter may attack the violator under the procedures of the executive civil proceedings.

In view of the priority of the children's interests, their defencelessness and dependence, a special chapter should be provided in PADVA for implementing their protection from domestic violence. The list of persons with independent right to claims should be enlarged to include persons who should be able to notify the court in case of children being abused by both parents or by one of the parents while the other takes no actions. A prosecutor should in all cases be involved in such proceedings concerning children.

A legislative change should be initiated for the non-compliance with any effective court ruling providing for greater criminal liability. Such explicit provisions should be there in cases of forging judicial documents. This matter is pressing regarding the orders under PADVA. They are often returned to the court by the police authorities with the explanation that the perpetrator was not found or refuses to comply with the order: for instance continuously returns to the home inhabited jointly with the victim from where the perpetrator has been removed. Such acts should be prevented by the legislative change mentioned above.

Another problem in the enforcement of PADVA is created by the provision of Section 4, paragraph 2. That provision states that in cases of direct and impending consequent threat to the health and life of the victim, where the latter has referred to the police authority, which authority sends the application to the court along with a certificate of the measures imposed under the Ministry of Interior Act (MIA) and explanations by the perpetrator. The issuance of EPO under the procedure specified is slowed down for objective reasons. There are different regulations and obligations of the police authority under MIA, under the Penal Code (when a crime has been committed), and now under PADVA. The police authority cannot and has no obligation to direct remedying faults in the applications and statements which are of procedural nature. MIA has not imposed any specific obligations to the police authority in relation to its responsibilities under PADVA including any terms and liabilities. Upon receipt of the application, the respective police officer first performs his/her tasks under MIA: intervenes in the corresponding situation, collects explanations, drafts warning minutes, possibly conducts a search or detention, makes reports. Finally the application is sent to the court, often with the entire original documentation under MIA, which is unnecessary, while the application itself is defective or the statement is missing. Taken the enormous amount of work in Sofia where two million people live, 15 to 30 days pass until the application is filed with the court. The faults specified above impose its immobilization and even more time is wasted. In the cases described the victims of domestic violence become totally disinterested in the suits initiated or file explicit applications for dropping their claims. All this is happening in the presence of the provision of Section 18, paragraph 1 of PADVA for issuance of EPO after direct filing of the application with the court (which happens in cases under a number of other laws). That provision is totally sufficient and makes pointless the provision of Section 4, paragraph 2. It should either be revoked or specified along with legislative changes in other laws.

Regarding Section 7 of PADVA, there is contradictory judicial practice and different interpretations of the provision: whether the same court or the same jury hearing another dispute between the parties under FC or the Child Protection Act (CPA) is competent of hearing the case under PADVA. This imposes specification of the provision.

Box:

The difficulties of one kind or another established regarding the enforcement of the Act may be overcome mainly through legislative changes. The creation of non-contradictory practice in respect of its application is also important, which practice should be used to stabilize the provisions, increase the Act's efficiency and ignore any illusions that the Act could be used for the wrong reasons.

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