Problems of Application of Bulgarian Law on Protection from Domestic Violence

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Abstract:

This report addresses only the most important problems arose from the application of the LPDV. Of course, the shortcomings of this law can be seen in almost all of its provisions. Moreover, in the frames of the present scientific study all the controversial issues addressed by the courts are not include, and they are many of them. Imperfections of the law and its use for different purposes than the one included in its scope lead to inefficiency in its application. This requires a thorough rethinking of the concept of the LPDV or even the development of entirely new legal document on protection against domestic violence.

Rezumat:

Acest articol privește doar cele mai importante probleme ce au apărut de la intrarea în vigoare a legii privind prevenirea și combaterea violenței în familie. Desigur, neajunsurile acestei legi pot fi observate în aproape toate dispozițiile sale. Mai mult decât atât, în cuprinsul acestui studiu științific, toate aspectele controversate abordate de instanțele de judecată nu au fost incluse, și sunt destule. Imperfecțiunile legii și utilizarea sa pentru diverse scopuri decât acel aflat în domeniul de aplicare conduce la ineficiența în aplicarea legii. Acest lucru necesită o regândire aprofundată a conceptului de prevenire și combatere a violenței în familie sau chiar dezvoltarea unjui document juridic complet nou privind protecția împotriva violenței în familie.

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1. Introduction

Domestic violence is a social phenomenon that goes back many centuries ago, but still exists today. Although in recent times the phenomenon is combated heavily from the state, NGOs, campaigns, etc., domestic violence remains a serious problem in relations between relatives who live together. Although this type of violence takes place in the majority of cases with no witnesses, its effect can have a strong antisocial effect.

The reaction of the government is particularly active in the legislative measures taken to protect victims and to impose appropriate sanctions to punish the offenders. In our country, the legislature reacted at the beginning of 2005, when was adopted the *Law on Protection from Domestic Violence*[485] (LPDV). It should be mentioned that the idea of ??adopting such a regulation is entirely borrowed from foreign legislation, as well as international instruments of protection against domestic violence[486,487]. Perhaps such mechanical transfer of provisions in force in another legal system among different social and economic conditions lead to problems in practice of application of the law on which we will focus in this brief survey.

For the purpose of classification of the problems presented beyond, they are divided into four separate groups: common issues of the law, issues of participation of children in the procedure; problems of proof; problems of protective measures against domestic violence.

§. I. Common issues of the law

2. Concept of "domestic violence"

The law gives a very detailed definition of what is domestic violence. According to Art. 2, para. 1 LPDV domestic violence is "... any act of physical, sexual, mental, emotional or economic violence, and the attempt of such violence, forced restriction of privacy, personal freedom and personal rights, committed against persons who are in relationship that is or has been a family relationship or is a marital cohabitation". Art. 2, para. 2 LPDV considered to mental and emotional violence any act committed in the presence of a child.

Trying to define the domestic violence, the legislator is not completely consistent, because it is trying to explain a phenomenon, through several of its varieties. For example, the law is does not give a definition of the terms "economic violence" and "sexual violence" and makes no

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[485] Prom. State Gazette (SG), No. 27, of 29.03.2005 with subsequent amendments. Till 22.12.2009 the name of the law was Law on Protection against Domestic Violence.

[486] In its *Recommendation (2002) No. 5 of 30.04.2002 on the protection of women against violence*, the Committee of Ministers of the Council of Europe stated that States should introduce, develop and/or improve where necessary, national policies against violence in connection with the maximum safety and protection of victims, support and assistance, with amendment of criminal and civil law, raising social awareness, training for professionals confronted with violence against women and its prevention. In terms of domestic violence the Committee of Ministers recommends that member-states should classify all forms of domestic violence as criminal offenses and to provide for the judiciary to take prompt measures to protect the victims, to forbid the offender to make contact, to communicate or to approach the victim or to reside or to enter certain places, to punish any violations of the measures imposed on the offender, and to establish a compulsory protocol for operation by the police, medical and social services.

distinction between "psychological violence" and "emotional violence". It is unclear whether some form of the domestic violence consumes other of its varieties. Because any form of sexual violence is at the same time physical and mental, as well as emotional violence.

3. Type of liability of the perpetrator of domestic violence

According to Art. 1, para. 2 LPDV, the liability under this law does not preclude civil, administrative and criminal liability of the perpetrator. This fact calls into question what is the nature of the procedure itself. It is obvious that it is a special kind of responsibility. On the other hand, § 1 of the final provisions of LPDV stated that the provisions of the *Code of Civil Procedure*[488] (CCP) shall apply *mutatis mutandis* to any matters not explicitly covered by the law. However Art. 21, para. 3 LPDV provides that in the event of failure to comply with the court order, the police authority having found such failure shall arrest the offender and shall notify forthwith the prosecutorial authorities[489].

It is clear that the law constitutes a hybrid procedure whose main purpose is rather to provide protection at any cost but not to punish the guilty person. In practice proceedings under LPDV are defined as litigious judicial administration – "[t]hese decisions [decisions under Art. 12-19 LPDV] are dispositive and are a manifestation of judicial administration of civil relations. Despite the fact that these court acts are aimed at changing the civil legal relations, they are ordered by the court not by transform right of one of the parties to another. Therefore, acts of litigious judicial administration do not have the force of *res judicata*. These acts do not have transform effect that is the subject of *res judicata* and the new legal situation which these acts take cannot carry the force of *res judicata*"[490].

Although it is about of a special kind of liability; breach of the imposed order can result in realization of the criminal liability of the offender – art. 296, para. 1 of the *Penal Code*[491] (PC).

4. Individuals having suffered from domestic violence

The law introduces uncertainty also concerning the range of persons who may be victims or perpetrators of domestic violence. This confusion arises even in the definition of domestic violence – art. 2, para. 1 LPDV where a limit is placed on the relation between the victim and the defender. However, the next provision – art. 3 LPDV, expands the potential parties in committing of domestic violence. The law still contains a loophole, since at the moment can not be realized the liability under the special law of certain persons for whom there are close to family

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[487] In its practice the European Court of Human Rights (ECHR) has repeatedly pointed out that the state may have a duty to interfere in the relations of private and family life, and these obligations may involve the adoption of measures in the sphere of the relations of individuals to each other – see *case of X and Y v. the Netherlands, judgment from 03.26.1985*, *case of August v. the United Kingdom, judgment from 21.01.2003*, *case of Bevacqua and S. v. Bulgaria, judgment from 13.06.2008*.

Some judgments even indicated that protection against domestic violence is a natural obligation of the state – see *case of Osman v. the United Kingdom, judgment from 28.10.1998*.

[488] Prom. SG, No. 59, of 20.07.2007 with subsequent amendments.

[489] It should be noted that nearly four years after the entry into force of LPDV neither police nor prosecutors were aware of what action should be taken against the offending detainee.

[490] See *Decision No. 1713 of 15.03.2010 on civil case No. 1654/2009, IV civil division, Supreme Court of Cassations (SCC)*.

It is clearly stated that it is a competitive procedure – *Decision No. 403 of 10.03.2009 on appellate civil case No. 410/2009 of Plovdiv District Court*.

[491] Prom. SG, No. 26 of 02.04.1968 with subsequent amendments.

relationships – for example, parents of persons living in marital cohabitation.

It was necessary several times the law has had to be amended through corrective and broad interpretation – e.g., it is assumed that the perpetrator of domestic violence can be a person who is cohabiting with a person descending of kin to the victim[492].

Moreover, the practice considers a broad approach, according to which "[t]he list in art. 3 LPDV contains basic types of relationship in which it can be implemented emergency protection in accordance with the purposes of the law, as prevention for encroachment in the family and home. Art. 3 LPDV covers the main groups of relations, with possible cases of domestic violence, including next of kin and persons in a family relationship or relationship of cohabiting. Equating hypotheses – spouses, ex-spouses or persons in cohabiting which are included in the persons under art. 3 LPDV, and the relatives by marriage, indicates that committed violence against a parent of a person with whom the offender is in actual cohabitation should be penalized under LPDV. This conclusion follows both from the comparison of the number of persons involved in art. 3 LPDV in order to achieve the objectives of the law, and the content of art. 2 LPDV under which text domestic violence is "…any act [...] made to persons who are in a relationship that is or has been a family relationship or *de facto* marital cohabitation..."[493]. It is obvious that such an interpretation, that gives priority to the general provision instead of special one, and it is based mainly on expediency.

In our opinion, a serious problem is the inability to be held liable under the special law of the employees in specialized institutions for children. It is true that between them and the inmates there is no family relationship, but the purpose of accommodation out of the family is to provide an environment close to the family one.

Trying to define the domestic violence, the legislator is not completely consistent, because it is trying to explain a phenomenon, through several of its varieties.

The law provides a possibility the domestic violence was carried out by a receptive parent (art. 3, p. 8 LPDV *in fine*), but does not include the situation where the child is placed in accordance with the *Law on Child Protection*[494] (LCP) with a family of relatives or friends, and for which relatives it is entirely possible to be outside of the circle of persons referred to in Art. 3 LPDV, while friends are always outside this circle. Of course, there is the possibility of a broad interpretation of the term "receptive parent" but LCP which regulates the placement outside the biological family of the child makes difference between "receptive family" and "family of relatives or friends" – art. 26, para. 1 LCP.

Another obstacle of the law denies protection of children who have witnessed domestic violence outside their family. For example, should a child was a subject of violence by his parents during a family celebration, which was attended before other children, only that child can receive protection under LPDV, but not others, even though they witnessed the act of domestic violence.

[492] See *Ruling No. 397 of 29.05.2012, on civil case No. 221/2012, IV civil division, SCC.*

[493] See *Decision No. 676 of 25.09.2009, on civil case No. 3175/2008, IV civil division, SCC.*

[494] Prom. SG, No. 48 of 13.06.2000 with subsequent amendments.

5. Priority status of victims in the proceedings

Another major problem of the LPDV is that the procedure for the protection of victims is covered entirely in favor of the claimant, as the defendant actually hard and always late can realize his or her limited right of defense. This kind of "inquisition" procedure leads to hearing the case under the strict rules of proof.

6. Contradiction between the dispositive and *ex officio* principle

As was indicated above, proceedings under LPDV are a litigious judicial administration and deciding the dispute, the court intended only to give the most favorable protection of victims, but not bound by their specific claims. The law states that the court "shall impose one or more protective measures" (art. 16, para. 1 LPDV), under its discretion. Even the claim does not contain a request for the imposition of a particular measure, it is regular, and the final outcome of the case depends only on the evidence gathered, inner conviction and judgment of the court.

To issue an order of immediate protection, for the judge does not need to have a particular request to do so by the applicant, but it is sufficient, the court to determine that the application contains "data concerning a direct and impending threat to the life or health of the victim" – art. 18 LPDV.

7. Contradictory rulings on the application of the law

Further confusion is caused by the lack of uniformity in practice, due to the fact that the decision of the district court (second instance) is not subject to cassation control – art. 17, para. 6 LPDV. In this way the courts create a so-called "local practice" and the various courts ruled the case under one law in a different way.

§. II. Problems of participation of children in the procedure

8. Participation of children in the procedure

Before considering the controversial points in the participation of children in the procedure, it is necessary to pay attention to the very concept of "child". As well as international treaties – art. 1 of the *Convention on the Rights of the Child*[495] (CRC), as well as national legislation – art. 2 LCP, a child means every human being below the age of eighteen years. This means that such age is regarded a sole and fundamental criterion for determining whether a person is a child or not. Moreover, there is no matter the degree of physical or intellectual growth of the individual. No matter also that he or she entered into a marriage or not[496].

Where the claim for protection of domestic violence contains information that violence is committed in the presence of a child, under art. 2, para. 2 LPDV the child is a victim of domestic violence in its two forms – mental and emotional. This raises the question of whether children should be involved in the procedure and in what capacity.

The majority of court-practice takes the view that in such cases, it is only necessary to immediately notify the

[495] Adopted by the General Assembly of the United Nations on 20.11.1989, prom., SG, No. 55 of 12.07.1991.

[496] This distinction needs to be made because the Bulgarian legislation allows, under certain conditions, and minors to get married. In those cases, the marriage leads to the so-called "emancipation" as the minor becomes competent (art. 6, para. 4 of the Family Code (FC) – prom., SG, No. 47 of 23.06.2009, with subsequent amendments) with a very few exceptions, treated as adults (those over 18 years).

Director of the competent Directorate "Social Assistance" (DSA) to take measures in accordance with the requirements of LCP (the idea is that DSA is the body that should filed on behalf of a child under art. 8, p. 4 LPDV if it considers that there is a direct and immediate danger to his or her life and health). This argues is based on the provision of art. 18, para. 3 LPDV. This view, in our opinion, is not only wrong, but it is a prerequisite that children will not receive adequate protection. This is because the duty of the court to refer to the DSA does not exhaust its powers in protecting the rights and interests of the child. In our opinion, if the request contains information for direct, immediate or delayed danger to the life or health of a child, the regional court must in all cases without calling parties, ordered the immediate protection within 24 hours of receiving the claim. It does not matter whether the application is seeking the protection of the child. It is enough just to indicate that violence is committed in the presence of the child (art. 2, para. 2 LPDV). In these cases, the court acts on its own initiative, assessing whether there is a possible danger to life and health of the child.

The philosophy of the special law is aimed at prompt, adequate and effective protection. If we accept the prevailing view in the court practice that the court has a duty only to refer DSA in the presence of information in the claim of violence committed against a child, then we will ignore the purposes of the law. Transfer of responsibility from courts to specialized administration would deprive the child of his immediate protection needed, which in many cases can be a detrimental both his health and his psyche. Even in the best of circumstances, from a technical point of view, the court should send a letter to the DSA, which in any case would not take less time within 24 hours, after which time the child would receive adequate protection from the court. Moreover, after the court was informed of the administrative authority, the body should approach àgain the court with the same information that it has been approached by the original applicant. There would be a paradoxical situation in the same court to be artificially formed two identical cases with same facts, but with different victims. In these cases there is a real danger to rule with two legal acts with the opposite result.

Furthermore, last but not least, there is a possibility if the application for protection was submitted at the end of the limitation period of one month, it is highly likely until the court refer DSA and the administrative body perform the same respective survey under the LCP at the time of filing the application by the court the term under art. 10, para. 1 LPDV may expire. In that case, the court will leave the application without consideration as inadmissible and, in any case it would be contrary to the interests of the child. No matter that the original application for protection (e.g. submitted by the mother victim of domestic violence) was filed in legally obtained period because the second application submitted by the DSA would not be considered as continuation of the first one.

In our perception court shall *ex officio* to protect the interests of children. Therefore, in any case, if there is nay data in the application for protection from domestic violence committed in the presence of minors, the court shall *ex officio* be constituted by the same parties (victims) in the procedure and to take appropriate measures to protect them. It should be noted that the applicant's request is not binding on the court subjective limits of defense. For example, if the request specifies that the violence is committed by a husband against his wife in the presence of their children and that protection is claimed only for the

mother, then the court should consider the allegations made in the application, and if there is a clear and present danger for the life and health of the children to take the necessary measures for their protection. Another argument against the opposite theory that the court is only required to notify the DSA, but not to constitute minors who are victim as parties to the court procedure, is based on the law itself, which in art. 8, p. 4 LPDV enables DSA to act as a special representative only to injured minors. Thus, minors who are victim of domestic violence committed can not receive adequate protection, since the law has limited the DSA to the group of persons in whose name may be requested protection (only juveniles). Despite this provision is subject to serious criticism (see the text below), there is a serious limitation on the protection of children from violence committed.

9. Providing protection by request of DSA

According to art. 8, p. 4 LPDV, the director of DSA, can submit a request for protection from domestic violence, if the victim is a minor, if it is under guardianship or disabled.

In our opinion, the provision contains a significant omission which is basis that this legal possibility can be used very rarely in practice. There is no logic the legislature to give protection only to the minors and not to the juveniles. Moreover, while the law protects all persons under interdiction (full and limited), as the fully interdict persons are treated as juveniles – art. 5 para. 3 of the *Law of Persons and Family*[497] (LPF). In order to make logic in the respective provision it should be assumed that the legislature referred to all persons under the legal age, not just minors. Moreover, the DSA is designed to protect the rights and interests of persons with disabilities, including minors[498]. There is an existence of a court practice that allows the director of DSA to request protection for juveniles. The exact meaning of art. 8, p. 4 LPDV should interpret correctively in its scope in order minors to be included.

An important specification here is that although the application is submitted by the director of DSA, it is not a party in the procedure with the respective rights that should have as such. Defendant in the application procedure is the perpetrator of domestic violence and as a supplicant is constituted the victim – the juvenile child.

§. III. Problems in proving

10. Difficulties in proving

Traditionally, both in civil[499] and in criminal proceedings, the testimonies of a single witness are not sufficient to prove the claim, respectively – to convict the defendant. This is because these testimonies can not be verified and compared with the rest of the case evidences. During the procedure under LPDV an often result is there are evidences presented only by the victim.

Another typical feature of domestic violence is that it usually takes place in private, away from the possible eyewitnesses and often witnessed violence are children. The amendment of the LPDV[500] introduces a new para. 2 in art. 2, which stipulates that when violence is committed in the presence of children, they *ex lege* should be qualified as victims. In these

[497] Prom. SG, No. 182 of 09.08.1949, with subsequent amendments.

[498] See *Decision No. 261 of 11.09.2012, on civil case No. 1248/2012, Dimitrovgrad Regional Court*.

[499] See *Decision No. 1279 of 16.05.1996, on civil case No. 2229/1995, civil division, SCC*.

[500] SG, No. 102 of 2009, effective 22.12.2009.

cases, the law automatically excludes children from the category of witnesses.

In practice, the only data that are gathered in this procedure are based mainly on the applicant (victim) and the defendant on the application (the perpetrator of the violence). To this category of persons, practice and the legislation always demand for careful and thorough analysis of their testimonies, since both parties are equally interested in the outcome of the case.

Common practice in court decisions is to point out that both explanations of the accused and to the testimonies of the victim, the court should be particularly cautious, because despite as source of relevant data, they are also source of protecting of their interests in the case[501]. This fact makes the task particularly difficult for the judge because during the process opposed the contradictory thesis of the parties involved in the procedure. It is therefore particularly important when assessing the information presented by the applicant and the defendant, except the logical, coherent and internally balanced exposure to be compared, as well as to take into consideration their external behavior. The aforementioned shows that the process of proving within the procedure for the imposition of measures for the protection of domestic violence can be successfully performed not exclusively based on procedural rules and restrictions but to the work and life experience of the judge hearing the case.

11. Admissible evidences

The law does not introduce restrictions on the use of evidences and means of proof. This is quite understandable, since in that case the procedure is aimed to obtain only protection. Apart from this, the procedure against the offender is quite restrictive, and any limitation on the burden of proof would create unjustifiable discrimination between parties with particular emphasis on the rights of the victim.

However, art. 13, para. 2, p. 1 LPDV allows for the usage during the procedure as means of proof, records, reports, and any other acts issued by the DSA, by medical doctors, as well as by psychologists having provided counselling to the victim. The purpose of this evidence is to assist the court to establish the objective truth, but their evidentiary value is minimal, because related to a particular case, the data are entirely derivative in nature (because they are based on information submitted by the victim) and do not even have indirect effect on the process of proof.

Similar to the abovementioned conclusion can be drawn with respect to the admissible in this procedure as means of proof documents issued by legal persons providing welfare services and entered in a register at the Social Assistance Agency – art. 13, para. 2, p. 2 LPDV. The information that the court receive from these documents is related to the fact that the victim had been previously looking for help, and as for what its status had been in other cases of domestic violence. In most cases these documents are used to determine the specific measures and the amount of fine under art. 5, para. 4 LPDV, and not as evidence of proving the existence of domestic violence – subject of the relevant case.

Other commonly used evidences in this kind of procedures are medical protocols, which only can serve as evidencing the caused injuries, but not the commitment of the *corpus delicti*.

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[501] See *Decision No. 624 of 18.12.2008, on criminal case No. 640/2008, criminal division, SCC*.

In some cases, At the request of the applicant the court shall seek *ex officio* in respect of the respondent a criminal record certificate (art. 9, para. 4 LPDV), and in some rare cases, applicants take the opportunity to request an information concerning any measures imposed under this Act, and a certificate showing whether or not the respondent is registered at any psychiatric establishment. The purpose of these evidences again aims establishing a probability, character of the offender, etc.

Means of proof, however, can not prove the commitment of the relevant unlawful act by the person pointed by the applicant. In this respect, it will not be exaggeration to be said that LPDV creates the impression that the procedure for imposition of measures of protection against domestic violence, the assumptions may have a key outcome for the final decision of the case. This legislative approach is extremely dangerous and should not be taken literally, because despite the fact that there is no criminal liability, no one should be convicted solely on the basis of assumptions.

Perhaps most important for proving commitment of domestic violence is the declaration under art. 9, para. 3 LPDV. This is because the law provides that where no other evidence exists, the court shall issue a protection order solely based on that declaration.

12. Legal meaning of the declaration under art. 9, para. 3 LPDV

There is some certain level of contradiction within the practice where answer of the question of the importance of outgoing declaration submitted by the victim under art. 9, para. 3 LPDV is given. Many courts agree that the submission of this document is mandatory[502], which, according to this view, means that the declaration is an element of regularity of the application.

In our opinion the aforementioned can not be shared. Confusion is obtained in the interpretation of art. 9, para. 3 in conjunction with para. 1, in conjunction with art. 8, p. 1 LPDV. The legislative technique used in art. 9, para. 3 LPDV gives the impression that the victim has no choice whether to submit a declaration or not. However art. 13, para. 2, p. 3 LPDV, clearly indicate that the declaration is mean of proof within the procedure. As all the evidence, this one in its essence, a private document concerns the merits of the application.

Moreover in our opinion, the perceived thesis that the declaration concerns the regularity of the application leads to vicious practice that the deposed requests are left aside with no administrative assistance but only with instructions for submitting the document under art. 9, para. 3 LPDV[503]. Even if this process under LPDV does not have the specific features of a criminal it is competitive and every instruction of submitting of one or other evidence preliminary obtained value of proof can be considered as impermissible interference by the determining authority in favor of one of the litigants in the case – the victim. In our opinion, in such hypothesis the defendant has the right to challenge the judge and the request would be reasonable. In addition to the abovementioned, the declaration under art. 9, para. 3 LPDV has predetermined force by the law[504]. According to

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[502] See *Decision No. 403 of 10.03.2009 on civil case No. 410/2009, Plovdiv District Court*, *Decision No. 422 of 25.03.2010 on civil case No. 668/2010, Plovdiv District Court*, *Decision of 01.04.2008 on civil case No. 486/2009, Varna District Court*.

[503] See *Decision No. 56 of 10.01.2009 on civil case No. 2936/2008 Plovdiv Regional Court*.

[504] These are called "formal evidences" typical of inquisitorial system of criminal trial where the evidential value is predefined in the law. According to *Decision of 01.04.2008 on civil case No. 486/ 2009, Varna District Court*, the declaration does not have evidential value.

art. 13, para. 3 LPDV where no other evidence exists, the court shall issue a protection order solely based on the declaration. Thus the absurd result of prejudging the outcome of the case will be reached based on the instructions of the judge himself/herself for overcoming of the irregularities.

Additional arguments of our thesis can be found in the provisions of art. 13, para. 3 LPDV where the declaration is seen as part of the evidential materials, moreover when correlated with other evidence it loses its predetermined value. For example, if in the application the plaintiff has indicated that there are eyewitnesses of the committed act, their testimonies would have prior and even exceptional manner in the process of proof. Moreover, if the application is showing that there were eyewitnesses of the incident, but the applicant does not require the collection of evidences, but rely solely on information provided in the declaration under art. 9, para. 3 LPDV, the application would be unreasonable, as the logic of the law is that its declaration has exclusive meaning only when domestic violence is committed face-to-face[505]. Where the declaration can not use its evidential value, the applicant should conduct a full and major proof[506]. Another controversial issue resolved in practice is related to the content of the declaration. In some courts, is considered as sufficient enough only to be indicated that the defendant has committed an act of domestic violence against the victim. In our opinion, such a quantity of information is insufficient. This is because to allow the defendant to organize its defense against the "charge" given in the process, specified by time, place, manner of commitment, to which persons, in the presence of which persons and the consequences of the act [507].

13. Challenging the declaration

It is a manner of practical importance whether it is permissible procedure under § 1 of the final provisions of the LPDV, in conjunction with art. 193, para. 1 CCP to be started in order of contesting the truthfulness of the declaration under art. 9, para. 3 LPDV.

In our opinion, such a contest is inadmissible because the declaration is a private document without binding any value for the court and therefore it is admissible only to contest its authenticity. Even if that opinion is not shared by some of the jurisprudence, it should be taken into consideration that the eventual starting of procedure of contesting the truthfulness of the document, not only would disqualify the evidential value of the declaration, but according to art. 193, para. 3 CCP would reverse the burden of proof at trial[508]. In the case of domestic

[505] We fully share the arguments written in *Decision No. 4396 of 14.07.2011 on civil case No. 6175/2011, 2nd appellate panel, Sofia City Court*, which held that the declaration "...shall be submitted with the application for protection and that is sufficient for the issuance of a protection order for the victim only when there are no other evidences...". In the same sense, see *Decision No. 22 of 31.03.2009 on civil case No. 53/2009, Razgrad District Court*.

[506] See *Decision No. 22 of 31.03.2009 on civil case No. 53/2009, Razgrad District Court*.

[507] *Decision No. 4396 of 14.07.2011 on civil case No. 6175/2011, 2nd appellate panel, Sofia City Court* accepted that the declaration has its evidential value "..so far as it contains a clear description, and an indication of the date, place, time, specific actions whit which the act of domestic violence was committed". Opposite view, arguing that it is not necessary to repeat the same data, submitted in the application, is written in *Decision No. 422 of 25.03.2010 on civil case No. 668/2010, 10th Chamber, Plovdiv District Court*.

[508] In our opinion, the right thesis, based in the case law says that the defendant must rebut the evidential value of the declaration – *Decision No. 403 of 10.03.2009 on civil case No. 410/2009, Plovdiv District Court*, *Decision of 20.02.2009 on civil case No. 863/2008, Ruse District Court*, *Decision of 21.04.2010 on civil case No. 541/2010, Plovdiv District Court*, etc.

violence committed face-to-face it would resulted that the victim would not receive its defense in this particular procedure.

14. New facts, circumstances and evidences before the appellate court

An interesting question can be raised whether in case of appeal the first instance decision the restrictions on bending new circumstances and the presentation of new evidences under art. 266, para. 1 CCP would apply.

In our opinion, regardless of the text of § 1 of the final provision of the LPDV, this limitation should not apply. This is because LPDV contains special requirements related to the evidence (art. 13, para. 1; art. 17, para. 4 LPDV), and this part of the law is not incomplete, so to be necessary the "relevant" reference to the general provisions of CCP to be made.

It is correct that art. 17, para. 4 LPDV speaks of "new evidences" before the appeal, but unlike art. 266, para. 1 CCP, there is no requirement that such evidence could not be presented to the first instance court[509]. An additional argument for this thesis could be extracted based on the quasi criminal nature of the procedure under the LPDV.

§. IV. Problems of protection measures against domestic violence

15. Implementation of the measure under art. 5, para. 1, p. 4 LPDV

According to art. 5, para. 1, p. 4 LPDV the court may temporarily relocating the residence of the child with the parent who is the victim or with the parent who has not carried out the violent act, on terms and conditions and for period as specified by the court. The court should implement this measure if it is not inconsistent with the best interests of the child. This measure is necessary in any case when there is a direct, immediate or delayed danger to life and health of the victim. For its imposition is not required in all cases the child to be injured. However there is no dispute that living with a parent who committed domestic violence poses a risk to the child. The main criterion for determining this measure is the interest of the child itself[510] – art. 5, para. 1, p. 4 LPDV *in fine*. If the request for protection against domestic violence does not contain evidence for children in the family, then the court has no official obligation to collect this information. If, however, the application contains any information that the violence was committed against a child or in its presence, then the court shall immediately take measures for its protection.

16. Adequacy of the prohibition to determine the child's residence during divorce proceedings or custody dispute

According to art. 5, para. 3 LPDV this measure does not apply during divorce proceedings or custody dispute, determining the child's residence or the regime of personal relationships. In our opinion, this measure is always and without exception applicable when it is

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[509] Opposite view is shown in *Decision of 21.11.2011 on civil case No. 650/2011, Vratsa District Court*, *Decision of 28.08.2009 on civil case No. 689/2009, Pazardjik District Court*.

[510] According to § 1, p. 5 of the Additional Provisions of LCP, "the best interests of the child" is the assessment of:

a) the wishes and feelings of the child;

b) the physical, mental and emotional needs of the child;

c) age, sex, past and other characteristics of the child;

d) the danger or harm caused to the child, or it is possible to be caused to it;

e) the ability of parents to care for the child;

f) the consequences which when the change of the consequences occur;

g) other circumstances relating to the child.

related to protecting the interests of the child. This is because the legal limitation is not based on a deep sense, but is rather result of a formal approach, which the legal framework is providing when giving the immediate protection.

It is also true that the simplified procedure for protection against domestic violence is often used by the parties for other purposes – for example during the divorce process, the party seeking protection under LPDV to be able to prove the guilt of the deep and irreparable breakdown of the marriage; to receive the usage of the family real estate property; to be provided with custody of the children, etc. However it should be noticed that the main purpose of the special law is to provide immediate protection to victims and to react promptly against perpetrators of domestic violence.

Firstly the LPDV is the only legal document that provides regulation of the procedure for executing an immediate protection of children within 24 hours of receipt of the request in court. Such a rapid and appropriate response can not be achieved with the adoption of interim measures during a divorce proceedings or custody dispute. The court shall pronounce on any such petition during the hearing during which the said petition is submitted, unless additional evidence has to be taken. In such case, a new hearing shall be scheduled within two weeks – art. 323, para. 2 CCP. Since it is a general procedure, submission of the application require its serving to the opposing party, which means a long period of time and the inability of the court to respond appropriately to the required protection for the child. Because children are highly vulnerable physically, emotionally and mentally, an untimely response of the request for their protection may have irreversible consequences for their future development.

Secondly, we should consider the following hypothesis: there are a pending divorce proceedings or child custody dispute in which the court upon request of either party, held a provisional measure (e.g. – parental rights to be given to the father). In the same time, the father performed an act of domestic violence against the mother in the presence of the child (and violence against it under the scope of art. 2, para. 2 LPDV). After receiving a request from the mother for protection against domestic violence, the court shall issue an order for immediate protection (art. 18 LPDV). With the same court order the father is obliged not to approach victims (mother and child) at a certain distance. The question that arises is what is the situation of the child in respect of whom there is a functioning provisional measure for the custody of an abusive father, when there is an existence of prohibition under art. 5, para. 3 LPDV[511]? In this case scenario there is a contradiction between the LPDV and the CCP, because in both procedures there is a legal possibility the same outcome to be reached. In the LPDV however, there is an explicit provision prohibiting the application of this measure (this result) in case of pending divorce proceedings or child custody dispute. The court which is seised with a request for protection from domestic violence, which follows both the claim for divorce, and the ruling of ordering interim measures, virtually placed it in objective inability to provide immediate protection to the fullest extent. Moreover, when providing protection of the child, the court removed the only parent who has been granted with provisional custody.

Thirdly, the measure under art. 5, para. 1, p. 4 LPDV can be a natural extension

[511] The case is discussed in civil case No. 139/ 2013 (divorce proceedings) and in civil case No. 179/2013 (request for protection from domestic violence), both of Belogradchik Regional Court.

of other measures imposed – for example of this within the scope of art. 5, para. 1, p. 3 LPDV – prohibition of the offender from approaching the victim. In the last case, the measure given in art. 5, para. 1, p. 4 LPDV would be direct consequence of the other imposed measure. When applying of these limitations, the court should assume from the highest priority interest – the one of the child. If the respective measure is not taken, it would have reached the absurd hypothesis for the child police protection to be imposed under *Ordinance No. I-51 of 12.03.2001 On the terms and conditions for the provisions of police protection of the child*[512], which would be inconsistent with the child's best interest. The provision of art. 5 para. 3 LPDV protects the interests of the parents and the purpose is to protect them from undue procedures. Nevertheless the implementation of the measure would ensure the interests of the child, according to art. 3 CRC – "the best interests of the child shall be primary consideration in all actions concerning children, without any difference if they are undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies".

The abovementioned gives reasons to believe that even if there is an explicit legal prohibition, the court should be guided entirely by the interest of the child, and if the respective one includes the application of this measure, the court shall, where appropriate, determine the child's residence with the victim parent or the one who has not committed domestic violence. This outcome raises an interesting question – which measure takes priority – the one determined with the order for immediate protection (art. 18 LPDV) or the interim measure (art. 323 CCP). In our opinion, the order for immediate protection should be always with priority over other measures imposed.

On the one hand, the purpose of the applicable measures during the procedure for assuring shelter from domestic violence is to provide protection against actions with the highest strength and imminent danger. Unlike the measure under art. 5, para. 1, p. 4 LPDV, the interim measure may not even intent to ensure the physical and psychological protection of the child but only to secure their needs (maintenance, housing, etc.). On the other hand, the law provides that the order for immediate protection has an effect until the conclusion of the case, i.e. until a court decision took place, which grant or reject the application. The legislature has taken into consideration that domestic violence is a serious offense to which should be reacted in the shortest possible time frame as to be given an adequate and timely protection as well as to prevent any potential negative effects. Therefore the proceedings under LPDV allow the court to provide immediate protection as in the procedure under art. 323 CCP such can not be granted and such purpose is not sack with the interim measures. Immediate protection order has the character of an urgent provisional measure that takes into consideration the equal rights of the parties but prioritize the significant interest – to protect endangered life and health of the victim[513]. In order not to reach the paradoxical situation when children victims of domestic violence not receive protection during a pending divorce proceedings or child custody dispute, the court is required to ignore the explicitly introduced in art. 5, para. 3 LPDV

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[512] Issued by the Minister of Interior, prom. SG, 30 of 28.03.2001, with subsequent amendments..

[513] See *Ruling No. 298 of 12.06.2009 on civil case No. 313/2009, III civil division, SCC.*

prohibition and in any case where the interests of the children require, to apply the measure of art. 5, para. 1, p. 4 LPDV.

17. Competence of the police to monitor the implementation of the measure under art. 5, para. 1, p. 4 LPDV

Another gap in the law is contained in the provisions of art. 21, para. 1 LPDV, which stipulates that the police bodies should monitor for the implementation of the court order, when it impose measures of art. 5, para. 1, p. 1, 2 and 3 LPDV. It is clear that the listing is exhaustive, and it is notable that beyond of the police control is the measure under art. 5, para. 1, p. 4 LPDV. In our opinion, if the measures under art. 5 para. 1, p. 4 LPDV might be a consequence of another imposed restrictions the police actions, under art. 21, para. 1 LPDV should include also control over its implementation. It is illogical that police authorities can monitor whether the defendant approaches or not the injured child but not to be able to assist in the removal of the child and its giving to the other parent.

Furthermore, the failure of imposed order can be followed with the realization of the criminal liability of the offender – art. 296, para. 1 PC. According to art. 6, p. 2 and 3 of the *Law on Ministry of Interior*[514] (LMI) – the main tasks of the Ministry of Interior (MoI) are combating the crime and maintaining the public order; protection of the rights and freedoms of citizens as well as the protection of their life, health and property. The abovementioned gives solid grounds to assume that the responsibility of the police to monitor and promote the implementation of the measures imposed under art. 5, para. 1, p. 4 LPDV can be extracted directly from the special legal act which constitutes the powers of the MoI. The provision of art. 21, para. 1 LPDV concerns only control on the implementation of the measures imposed, but not the assistance that the police is obliged to perform under another legal document.

18. Recovery programs

The conditions for execution of the measures (inclusion in specialized programs) under art. 5 para. 1, p. 5 LPDV have not been created yet, although the ambitious idea of the legislature to introduce not only discontinuing violence measures but also preventive ones.

19. "Accumulation" of measures imposed under LPDV

The question whether it is possible that kind of "accumulation" of the measures imposed with the order for immediate protection under art. 18 LPDV with those determined by the final judgment, has often arises in practice. For example, the court has been issued an order under art. 18 LPDV, with which the offender has been removed from the together occupied home with the victim and the same measure, be imposed after with the final act of the court, and with a period of application required by law. The question would be if the time during which the perpetrator has been removed from home with the order for immediate protection should be included? In our opinion, such an "accumulation" of measures is inadmissible. Firstly because, the order for immediate protection has a very specific purpose and shall be issued under certain specific conditions. Next, a requirement is with special purpose given in the law a deadline not to be determined for the measures imposed with the order of art. 18 LPDV. The immediate protection has interim character until the final

[514] Prom. SG, 17 of 24.02.2006, with subsequent amendments.

measures are imposed after a thorough clarification of the facts and assessment of the need for their application. Moreover, since the two orders pursue different objectives there are no obstacles for the court to apply one certain kind of measures for immediate protection, and quite different type in already proved act of domestic violence.

20. The fine as a mandatory punishment

As far as domestic violence in most cases is committed within the relatives, who live in one and the same home, the requirement for mandatory imposture of a fine to the offender might be considered either as indirect sanction on his family, as it can negatively reflect of the household budget. For example, if a woman submits a request for protection against domestic violence committed by her husband and the court gain the request, inevitably, under to art. 5 para. 4 LPDV fine will be imposed with a minimum amount of at least 200.00 BGN (approximately 100 EUR). In families whose budget does not exceed the minimum salary rate in the country, this fine would negatively effect the motivation of the victim to submit a request in the court in subsequent act of domestic violence. Figuratively speaking, in this case, the state is executing an economic violence against the victim because of his/her wish to receive protection.

21. Conclusion

This report addresses only the most important problems arose from the application of the LPDV. Of course, the shortcomings of this law can be seen in almost all of its provisions. Moreover, in the frames of the present scientific study all the controversial issues addressed by the courts are not include, and they are many of them. Imperfections of the law and its use for different purposes than the one included in its scope lead to inefficiency in its application. This requires a thorough rethinking of the concept of the LPDV or even the development of entirely new legal document on protection against domestic violence.