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Dilemmas about the scope of the Act on Prevention of Domestic Violence from a human rights perspective***

Abstract

The adoption of the Act on Prevention of Domestic Violence was driven by the creation of a more effective legal framework for the protection of victims of domestic violence, and, therefore, also by the alignment of the legal system of the Republic of Serbia with international obligations. The main novelties include multi-sectoral cooperation and primarily preventive nature of the law. However, from its very adoption, it has been pointed to its noticeably repressive character, as well as to provisions with potentially harmful impacts. Hence, this paper represents a contribution to the dis-

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discussion on the importance and scope of the solutions provided for in the Act on Prevention of Domestic Violence. On the one hand, it points to major novelties intended to contribute to a more effective prevention of domestic violence. On the other hand, it questions the constitutionality and appropriateness of some of the legal solutions, arguing that, in particular respects, the lawmaker had to use a wiser and more subtle approach to conceptualising the provisions of this law.

Key words: violence, family, constitutionality, human rights, gender equality.

Introduction

Taking into account the already largely proven ineffectiveness of the previous legal framework, and the obligations assumed by acceding to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the so-called Istanbul Convention)¹, the Republic of Serbia adopted the Act on Prevention of Domestic Violence². This Act represents a *lex specialis* in relation to previous regulations governing this matter. From the envisaged legal solutions, it can be inferred that Serbia opted for the model most similar to the so-called legal-prosecutorial model existing in the US (Bugarski 2018: 99). As it provides for some novel, noticeably radical solutions, this Act has attracted much attention from its very outset, not just from professional community. While some have uncritically glorified it and mechanically speculated that the great number of imposed urgent measures indispensably means decrease in the rate of violence against women, others, on the other hand, have been warning of its harmful solutions and one-sided and primarily feminist approach to defining them (Ristivojević, Samardžić 2017). Divided opinions about the Act, more than one year of its

- 1) Serbia signed the Istanbul Convention in 2012, and on 31 October 2013, the National Parliament of Serbia adopted the law ratifying it (Act ratifying the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 2013; Official Gazette of RS, International Agreements 12-13).
- 2) Zakon o sprečavanju nasilja u porodici, Službeni glasnik RS, br. 94/2016. (*Act on Prevention of Domestic Violence, Official Gazette of RS, No 94/2016*).

application, and frequency of domestic violence reports, provide sufficient incentive for a comprehensive analysis of its provisions, particularly those concerning new powers of the police in preventing domestic violence. The need for analysis becomes even more important in light of the fact that in 2018, more than 30 women were victims of domestic violence (Lacmanović 2018). Statistics have shown that the number of murdered women has increased in comparison to 2017, and is close the number of feminicides in 2016 (Lacmanović 2017). These facts may lead to a conclusion that instead of being reduced, domestic violence has remained at its usual level, making therefore the concern about the efficiency and appropriateness of new solutions fully justified. However, another problematic aspect of the Act on Prevention of Domestic Violence that should also be examined is its constitutionality, because of the dilemma that some of its provisions comply neither with the Constitution, nor with international human rights protection standards (Tubić 2018).

Main features of the Act on Prevention of Domestic Violence

Major novelty introduced by the Act on Prevention of Domestic Violence is establishment of ‘multi-sectoral cooperation’ that constitutes a necessary condition for ensuring a more effective protection of victims of domestic violence. It concerns the attempt to establish, by virtue of single law, certain new powers for multiple authorities and public services, or to establish legal coordination and cooperation among all subjects involved in domestic violence prevention, one without which the efficient and effective control of domestic violence is impossible. Public authorities whose conduct is regulated by this Act include the police, public prosecutor’s office, courts of general jurisdiction, misdemeanour courts and social work centres.

The second novelty is the primarily preventive nature of the Act. Prevention of domestic violence comprises a set of measures aimed at identifying the immediate threat of domestic violence and a set of measures to be taken once the immediate threat has been identified (Article 3). The Act specifies that the immediate threat of domestic violence exists when the behaviour of a potential perpetrator and other circumstances indicate that they are ready

either to commit for the first time or repeat domestic violence in the imminent future. The liability of the abuser thus moves ‘back’, before the criminal procedure or the violence protection procedures under the Family Act is instituted (Stajić 2017: 668). ‘With this focus of the Act, the focus of actions of the police and other domestic violence prevention authorities and institutions essentially shifts from traditionally preferred evidence gathering and clarification of violence committed – in the past (repressive action) to the preferred prevention of violence that might occur – in the future (preventive action)’ (Stevanović, Subošić, Kekić 2018a: 156; Stevanović, Subošić, Kekić 2018b: 131-146).

This novelty, while intended to ensure more effective protection of victims of domestic violence, also provokes serious criticism. Specifically, the criticisms are levelled at the legal formulation of immediate threat of domestic violence. Article 3, paragraph 2, states that: ‘Immediate threat of domestic violence shall exist in case when behaviour of a potential perpetrator and other circumstances indicate that he/she is ready either to commit for the first time or repeat domestic violence in the immediate upcoming period’. This definition of immediate threat carries many unknown meanings, in a conditional sense ‘what would happen if...’ (Jugović 2018: 965). The formulations ‘potential perpetrator’ and his ‘readiness to commit violence for the first time’ are nomotechnically problematic. Obviously, the lawmaker intended to emphasise the preventive nature of the Act and make it possible for the police to intervene and prevent violence even before it occurs. It just should have been formulated differently. As it is known, no law applies before facts are determined. A law enforcer always gives a particular factual situation (facts) a particular legal qualification. A formulation that could have been used here is one from the German police law - a kind of general clause vesting in the police the all-times authority to take measures to eliminate immediate threats to the safety of people and property. It simply reads: if facts justify the assumption of safety threat. Therefore, it could be predicted *de lege ferenda* that the immediate threat of domestic violence exists if facts exist that justify the assumption of immediate domestic violence, or that indicate the possibility of immediate violence. These facts must exist for the police to be able to intervene - their absence creates the opportunity for fraudulent reports and misuse

of the whole mechanism for the preventive protection against violence. Indeed, in its Article 15 (paragraph 1), the Act does require that all relevant facts be established before urgent measures are imposed, but omits to explicitly require them when it comes to determining the immediate threat of domestic violence, which is a failure by the lawmaker.

The Act provided an extensive definition of violence; hence, for its purposes, domestic violence means any act of physical, sexual, psychological or economic violence. This wording makes the legal solution consistent with the Istanbul Convention (Article 3). Undoubtedly deserving affirmation is the legal definition of violence that explicitly includes the acts of sexual and economic violence, because in traditional and patriarchal environments, these forms of violence are often not recognised as an unlawful impairment of physical and psychological integrity of women. Understandably, the more extensive concept of violence can also raise some practical concerns. Unlike physical abuse, which is more easily established, psychological or economic violence is hard to identify. Another issue of particular concern is that in instances of economic violence, temporary separation of partners by means of urgent measure can give rise to new issues if partners are economically dependent on each other. Also to be borne in mind is that in relatively poor societies, such as Serbian, situations may be common where drawing clear lines between the necessary savings measures and rational family behaviour and the acts of economic violence is difficult or almost impossible.

This aspect can be criticised for inappropriately broad determination of family, which becomes a ‘shoreless ocean’ under this law. Specifically, the legal solution stipulates that domestic violence can be committed against a ‘person with whom the perpetrator is either presently or has previously been in a matrimonial relationship, common-law relationship or partner relationship, or with a person he/she is blood-related in the direct line, or side line up to the second degree or with whom he/she is in an in-law relationship up to the second degree or to whom he/she is an adoptive parent, adopted child, foster parent or foster child or with another person with whom he/she is living or has lived in a common household’ (Article 3, paragraph 3). Hence, the Act defines family

indirectly and too broadly, identifying that domestic violence can exist between former partners who lived (in the past) in the shared household, which is an anomaly. Therefore, family, in the traditional meaning of the word, “represents just one potential setting for ‘partners’ to meet and violence to emerge. Beside family founded on marriage, it may extend to a common-law marriage, and wider, to the so-called ‘partner relationship’” (Ristivojević, Samardžić 2017: 1445).

The Act provides for two types of urgent measures for protection against domestic violence: 1) temporary removal of the perpetrator from the place of residence; and 2) temporary prohibition for the perpetrator to contact or approach the victim of violence (Article 17). Thereby, an order may impose both measures at the same time. Undoubtedly, urgent measures should contribute to the attainment of the preventive function of the Act. However, the manner prescribed for doing so points to the extremely repressive nature of the law in respect of the potential perpetrator of domestic violence. Examination of the content of urgent measures, regardless of the title used as a guise, reveals that they are, in fact, criminal sanctions, (Ristivojević 2018: 142). They limit human rights (repressive) of the perpetrator, they are expected to have special preventive effect; they are imposed to protect some values (suppress crime), and they are instituted by law (*nula poena sine lege*) (*Ibid.*). Only lacking are the formal elements of a criminal sanction: procedure for issuance (criminal procedure) and issuing authority (court). Hence, in the substantive sense, they constitute criminal sanctions, but, given that our current criminal legislation already has a protection measure of *Prohibition of Approaching and Communicating with the Injured Party*, a dilemma remains why the lawmaker has prescribed conceptually the same criminal sanction twice (*Ibid.*).

One should not overlook the fact that the conceptual apparatus of the Act, or its definitions and institutions are not complementary with their respective counterparts from the legal system, provided primarily in the Family Act, Police Act, Criminal Procedure Act, and other acts. This condition to a certain extent disrupts the unity of the legal order (Article 4, para 1 of the Constitution of Serbia, and Article 194, para 1), which is (should be) safeguarded by the

Constitutional Court. When applying the above constitutional provisions on the single legal order, the Constitutional Court assesses mutual compatibility of individual laws from the perspective of uniformity of the legal system. Non-uniformity primarily refers to the lawmaker's tendency toward the issuance of urgent measures (in almost all cases) that run counter to the spirit of the Family Act, whose equivalent measures are strictly restrictively ordered by court. Next, there are legal definitions of family, immediate threat of violence, detention of the potential perpetrator of violence, etc. Although it is a separate law (special law), its institutions must conform to the spirit of their counterpart institutions from other laws, hence it should have only regulated the particularities, or features deviating from the general characteristics of legal concepts from other laws. The Act on Prevention of Domestic Violence is a *lex specialis* by virtue of its Article 5, which determines that, unless otherwise stipulated by this same Act, prevention of domestic violence in cases against perpetrators of criminal offences defined under this Act and protection and support to victims of domestic violence and victims of criminal offences defined under this Act will be subject to the Criminal Code, Criminal Procedure Act, Civil Procedure Act, Family Act and Police Act. The Act, thus, has precedence over the stated acts in preventing domestic violence, in accordance with the maxim *lex specialis derogat legi generalis*. It applies as a primary law, and, beside or in conjunction with it, depending on the outcome of the specific case, other stated laws also apply (subsidiarily), including thus the Criminal Procedure Act. Therefore, if domestic violence qualifies at the same time as a criminal offence, the criminal law regime will apply accordingly, whilst it is a factual question whether or not urgent measures under the examined Act will be imposed first, whereby it is legally possible, given its preventive nature.

Dilemmas about constitutionality and appropriateness of particular provisions of the Act on Prevention of Domestic Violence

Considering that primacy is given to preventive action, the appropriateness of this Act should not be questionable. A simple and efficient mechanism for protection against domestic violence

has been put in place. However, at the same time, the mechanism is noticeably repressive in character with potential to also violate human rights.

With the provision for two types of urgent measures that meet all the substantive law criteria of criminal sanction, the question arises whether they will suffice for all domestic situations that only life itself can create. Repressive action and elimination of the potential abuser from family puts the very existence of the family at risk. Urgent measures should undeniably be used in combination with family law institutions, whose primary goal is reconciliation and overcoming of the existing conflict. Applying merely urgent measures can result in even greater conflict potential that, once the measure expires, can fuel even greater violence. Also, family must be enabled to recover from each conflict incident, which instance the solutions of the Act on Prevention of Domestic Violence fail to acknowledge. Hence, considering that Serbian Constitution provides for special protection for family (Article 66), it is clear that the lawmaker disregarded this constitutional guarantee, giving primacy to other values, and absolutely neglecting the interest of the family. Therefore, it is not an overstatement to theoretically claim that: 'Family, under this regulation, is not only unprotected, but also absolutely diluted in terms of form and structure' (Ristivojević, Samardžić 2017: 1447).

Despite that the most common victims of domestic violence are women (Turanjanin, Ćorović, Čvorović 2017: 76; Bugarski 2018: 96), from examining the legal solutions in general, it appears that the Act, although concerned with domestic violence, failed to provide for special protection of children in such situations. While intended to protect vulnerable family members, by omitting to address children and their particularities, the Act actually accords main protection to a woman as an individual instance (Ristivojević, Samardžić 2017: 1448). Given that the Constitution explicitly proclaims special protection for any child (Article 66), the Act seems to have failed to include solutions that would comprehensively protect all family members. Imposing urgent measures even in some more trivial instances of conflict that could be overcome by institutions of family law can, at the same time, mean irreversibly destructing the family, which can lead to a child being deprived

of a normal psycho-physical development, and, consequently, also economically threatened.

One particular failure of the lawmaker concerns the incomplete provisions on detention of persons. The only reference the Act makes to detention is found in the provisions relating to the maximum duration of detention of eight hours (Article 14, para 2) and to the constitutionally and legally guaranteed right of individuals to a defence counsel and legal assistance (Article 14, para 3). It makes no provision for a formal ruling or an act (decision, conclusion, etc.) ordering the detention; instead, the Act applies directly (without passing of an individual act). Thus, police detention was left unaccompanied by direct legal protection, that is, without the right to a legal remedy to review the lawfulness of the detention, or the judicial review, which is in contravention with the constitutional guarantee of the existence of a legal remedy against any decision on one's rights, obligations or lawful interest (Article 36, para 2 of the Constitution). Another issue is the appropriateness of detaining a person who is merely a possible perpetrator of domestic violence, and whose freedom of movement is restricted during the domestic violence risk assessment process. It concerns the provision allowing deprivation of liberty without offering adequate legal protection. According to the existing case-law of the European Court of Human Rights, being brought to the police station against one's will and being kept in custody amounts to deprivation of liberty, even if it lasts a short period of time and even if not being held in a cell, or not actually limited in movement or handcuffed (*Ostendorf v Germany* (2013)).

The Act leaves practically no possibility for nuances in the actions of police officers, thus making the envisaged solutions inconsistent with the principle of proportionality in restricting human rights (Simović, Stanković, Petrov 2018: 287-288; Simović, Petrov 2018: 120). Specifically, any restriction of human rights should be the minimum possible in given circumstances, and, certainly, not all situations will require keeping the potential abuser in custody for up to eight hours. Pursuant to the Constitution, 'when restricting human and minority rights, all public authorities, particularly the courts, shall be obliged to consider the substance of the restricted right, pertinence of restriction, nature and extent of

restriction, relation of restriction and its purpose and possibility to achieve the purpose of the restriction by less restrictive means' (Article 20, para 3).

Urgent measures are the key to the Act, and the number of measures imposed makes it appear that the Act was passed precisely for that purpose. Specifically, according to Biljana Popović Ivković, State Secretary of the Serbian Ministry of Interior (MoI), in the period from June 1st, 2017 to July 15th, 2018, a total of 37,572 urgent measures were issued (Popović Ivković 2018)! This figure continues to rise progressively, not only undeniably reflecting the huge (increased) number of domestic violence reports, but also potentially indicating that the issuance of measures is driven by fear of liability, or by ensuring the so-called 'police coverage', in accordance with the lawmaker's intention from Article 15 of the Act. When imposing an urgent measure, a police officer is formally and legally less likely to make a mistake, while in instances of omitting to do so, where domestic violence results in a lethal or other consequences, the police officer will almost certainly be legally sanctioned for this omission. Hence such large number of issued measures. However, urgent measures should only be imposed in the event of immediate threat of domestic violence, hence, not in all instances and never without a proper thought. Nevertheless, expert legal drafters wanted to vest that striking instrument precisely in the hands of the police and they succeeded in that intention. Urgent measures are a complete novelty in our legal system, barely suitable for our conditions. Urgent measures ordered by the responsible police officer are effective 48 hours from the order being served on the perpetrator. Their extension is decided by an individual judge, without a hearing, therefore in a summary proceeding, and may last for 30 days. Additionally, there is no legal limitation on the number of extensions; the Act is not explicit about their being extendable just once, so they can be extended multiple times. The respective provisions are characterised by ambiguities, absence of mechanisms for their implementation, control and the like.

The practice of imposing urgent measures by police may interfere with some other constitutionally guaranteed human rights. The measure of temporary removal from the place of residence may also mean the restriction of property rights of the potential abus-

er. Depriving a person of the possibility to use own possessions, while not necessarily needed in some instances of imposing the measure of temporary removal, constitutes a violation of the constitutionally guaranteed peaceful enjoyment of property and other lawfully acquired property rights (Article 58, para 1). Moreover, if the person performs a business activity in own home, it can at the same time amount to the restriction of the right to work, potentially affecting not only the economic interests of the potential abuser, but also, existentially, the family itself as a whole.

Finally, another right that could be affected by imposing an urgent measure where no actual violence occurred is the parental right. The Constitution protects the right and duty of parents to support, provide upbringing and education to their children, recognising their being equal in doing so (Article 65, para 1). All or individual rights of either or both parents can be revoked or restricted merely by a court order, if it is in the best interest of the child, in accordance with law (Article 65, para 2). When an urgent measure is imposed, the restriction of parental rights of the potential abuser is inevitable, and it is a measure that is neither ordered by the court, nor does it considers the best interest of the child in the given situation.

Instead of conclusion

The attempt to create a more effective legal framework for public authorities' response to situations of domestic violence should be praised. The Act provides an extensive legal basis for imposing urgent measures, leaving the impression that it was the main intention of the lawmaker. Its application thus far undoubtedly proves this point. At the same time, this broadly defined legal basis for imposing urgent measures made this law a repressive mechanism, easily employed, even where not necessarily needed. The reverse side of simplicity and efficiency is high susceptibility to abuses. Undoubtedly necessary therefore are the solutions that will recognise more nuances of dealing with delicate family relationships so as to allow the taking of the most appropriate measures. Poor wording of the provisions on risk assessment disturbs the much-needed equilibrium which is the imperative of every legal system. Those provisions almost always lead either to the imposi-

tion of urgent measures or to the liability of police officers if they fail to impose them. Instead, the lawmaker should have provided for an objective assessment of domestic violence situation, using the nomotechnical diction of discretionary assessment, and only made it possible to impose urgent measures in instances of actual immediate threat of domestic violence.

It is fully justified to challenge the pretentious attempt of the lawmaker to make future criminal behaviour predictions possible and effective (Ristivojević 2017: 18). 'If these criteria are truly reliable in predicting future instances of domestic violence, why is the lawmaker not using them to predict all other criminal behaviours, or all other criminal offences?' Obviously, that is impossible, hence raising the issue of appropriateness of the Act's solutions as well.

The next issue arising is whether thus regulated urgent measures achieve the safety protection of victims of domestic violence. The answer seems to be negative, judging by violations of urgent measures and murders being committed while these measures are in effect. It is naïve to believe that a genuine abuser will adhere to the imposed measures. Measures can be effective with conscientious people, them being those who, as a rule, perform no violence. It means that legally conceptualised urgent measures, designed to meet the highest expectations, are, in fact, limited in scope.

In addition to the observed shortcomings primarily relating to the appropriateness of the legal solutions, the Act can also be challenged from the viewpoint of constitutionality. Hence, despite that a more efficient mechanism for the protection of victims of domestic violence has been in place, the lawmaker should have more wisely defined the solutions making sure that they do not at the same time violate fundamental human rights of persons who are merely potential perpetrators of violence. The Act should, therefore, be improved in such manner that will ensure its sustained effectiveness, and also avail the public authorities, primarily the police, with more measures that would, in a given situation, allow the choice of the optimal one against the potential abuser, which does not necessarily have to be repressive in nature.

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