CIVIL REMEDIES FOR VICTIMS OF DOMESTIC VIOLENCE: THE INNOVATIONS INTRODUCED BY THE LEGISLATIVE DECREE NO. 149/2022.

RECURSOS CIVILES PARA LAS VÍCTIMAS DE LA VIOLENCIA DOMÉSTICA: LAS INNOVACIONES INTRODUCIDAS POR LA EL DECRETO LEGISLATIVO NÚM. 149/2022.

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ABSTRACT: Being aware of the exponential growth of the phenomenon of domestic and gender-based violence, this essay analyzes the innovations introduced - such as the implementation of law n. 206/2021 - by Legislative Decree n. 149/2022. The legislator, in particular, has provided the judge of family disputes with broader and more effective powers to intervene promptly to protect the victims, and to avoid secondary victimization phenomena as well.

KEY WORDS: Domestic and gender-based violence; vulnerable individuals; secondary victimization.

RESUMEN: *Consciente del crecimiento exponencial del fenómeno de la violencia doméstica y de género, este ensayo analiza las innovaciones introducidas -como la aplicación de la ley n. 206/2021- por el decreto legislativo n. 149/2022. El legislador, en particular, ha dotado al juez de los litigios familiares de poderes más amplios y eficaces para intervenir rápidamente con el fin de proteger a las víctimas y evitar también los fenómenos de victimización secundaria.*

PALABRAS CLAVES: *Violencia doméstica y de género; personas vulnerables; victimización secundaria.*

SUMMARY.- I. CIVIL PROSPECTIVE ORDER AGAINST FAMILY ABUSE. A FIRST REFLECTION.- II. GENDER VIOLENCE AND PROCESS IN THE LIGHT OF THE REFORM.- III. THE OTHER PROVISIONS ON VIOLENCE CONTAINED THE REFORM. REFUSAL OF THE CHILD TO MEET PARENTS AND DIRECT LISTENING TO THE CHILD.- 1. FINDINGS MADE BY SOCIAL SERVICES AND TECHNICAL EXPERTISE OF THE OFFICE.- IV. SHORT CONCLUSIONS.

I. CIVIL PROSPECTIVE ORDER AGAINST FAMILY ABUSE. A FIRST REFLECTION.

In this essay I will analyze civil remedies in favor of victims of domestic violence and, in particular, about the innovations introduced by legislative decree n. 149/2022 implementing the Law n. 206/2021 of Reform of the civil process. This subject is very sensitive and of stringent actuality. Moreover, during the pandemic crisis, the domestic violence has increased sharply.

Over the years, as Coordinator of the Legal Clinic in "Protection of Weak Individuals and Handling of Family Conflicts" I had the opportunity to verify - thanks also to the collaborative relationship with anti-violence centers - the transversal nature of the phenomenon: that does not belong only to degraded contexts, but also to high social class family. Moreover, there are many cases of family abuse even in contexts where there are no individuals with mental problems or alcoholism or drug addiction. Therefore, it is necessary to take note of the social and cultural "transversality" of the phenomenon.

It should be mentioned that, back in 2001, the Italian legislator - amending the Civil Code by inserting Articles 342 *bis* and 343 *ter* - introduced some protective measures to suppress domestic violence[1]. These measures are now placed, following the Reform, in the ritual code in a specific title dedicated to proceedings concerning persons, minors and families[2].

1 It should be remembered that the Italian legislator, after the law n. 154/2001, has not tackled violence in the process and in particular in family disputes.

2 As part of the new Title IV bis, in Chapter III ("Special Provisions"), a Section entitled "Of Domestic and Gender Violence" has been inserted (Art. 473 *bis*.40 - 473 *bis*.46). In particular, it should be noted that the legislature has provided for a very broad scope of the special provisions that apply «in proceedings in which family abuse or conduct of domestic or gender-based violence perpetrated by one party against the other or minors is attached» (art. 473 *bis*.40). More specifically, the regulation "Protection orders against family abuse", originally contained in articles 342 bis and 342 ter of the Civil Code, was transfused into articles 473 bis.69 – 473 bis.70 of the Code of Civil Procedure. Incomprehensibly, the legislative decree No. 149/2022 has not expressly provided for the repeal of articles 342 bis and 342 ter of the Civil Code, which must be considered tacitly repealed, having been "overcome" and "absorbed" by the new articles 473 bis.69 and 473 bis.70 of the Code of Civil Procedure. Compared to the previous discipline, the new provisions contained in the c.p.c. present some marginal elements of novelty. For example, the art. 473

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These norms - given the exponential increase in cases of domestic and gender-based violence recorded in our country over the last few years - are aimed at giving the judge of family disputes broader and more effective powers of intervention to protect victims, from secondary victimization caused by the process[3].

What has been said, however, does not exempt us from recognizing that the intervention of the 2001 legislature has, even today, appreciable aspects due to the flexible and functional nature of protection orders, both from a personal and patrimonial point of view. The discipline - in line with what happens in other European legal systems - is characterized:

- by the separation between the civilistic measure of protection and the criminal measure of repression.

- by flexible procedural forms aimed - while respecting the principles of due process - at the celerity of the decision and the effectiveness of its implementation.

- for the shortness of protection measures (until 12 months, extendable for serious reasons limited to the time strictly necessary).

- for the variety the protection measure: order to stop violent conduct; removal order; prohibition of approach[4]; economic measures against the violent person and in favor of the family unit that - as a result of the removal order - remains without adequate means of support[5].

Innovative aspect of the Reform is to have provided a "fast track" suitable for the family dispute judge to give timely protection to victims of violence within the family unit[6]. Moreover, the Reform provides expressly the coordination between civil and criminal judges, imposing a formal circulation of act in order to make

bis.69, expands the scope of application of the institute, admitting that the adoption of measures containing protection orders can be requested even after the end of cohabitation between spouses or cohabitants.

3 The need to prevent the process from turning into another form of violence for the victim appears to be a priority. This situation, in fact, may lead women not to report the violence they have suffered. Moreover, it cannot be overlooked that violence in the context of family units has serious repercussions on the victim's physical and mental health: in fact, women victims of violence often display inability to work, care for their children or severe depressive phenomena. In this regard, WHO has stressed that violence against women «a health problem of enormous global proportions» (https://www.salute.gov.it). Moreover, child victims of witnessing violence often experience behavioral disorders and suffer from emotional disturbances.

4 The judge, in this regard, may order the spouse or cohabitant who has engaged in the prejudicial conduct not to approach the places habitually frequented by the beneficiary of the protection order and in particular the place of work, the home of the family of origin, or the home of other close relatives.

5 The judge, in particular, will determine the manner and terms of payment of the allowance, prescribing, where appropriate, that the sum be paid directly to the beneficiary by the obligor's employer, deducting it from the remuneration to the same obligor.

6 According to the provisions of Article 473 *bis*.42, paragraph 1, «The judge may shorten the terms by up to half» and may carry out all the activities provided for in the new domestic violence regulations «even ex officio and without delay». In addition, in order to assess the attached conduct, «he may dispose of means of evidence even outside the limits of admissibility provided by the Civil Code, while respecting the cross-examination and the right to contrary evidence».

effective the principle granted by the Istanbul Convention[7]. Another aspect of importance involves the realization that the right to bigenitoriality may be restricted whenever children who are victims of violence, including witnessing violence, may be seriously harmed by association with the abusive or battering parent.

II. GENDER VIOLENCE AND PROCESS IN THE LIGHT OF THE REFORM.

That said, in order to stem the phenomenon and protect vulnerable individuals the Reform - seeking to provide adequate protection, in terms of speed and effectiveness - has dedicated some specific provisions to cases of domestic violence during family disputes. Several are the issues to be considered with reference to the recalled normative datum (Law n. 206/2021 of Reform of the civil process and by the implementing legislative decree n. 149/2022).

First of all, it should be noted that the Reform legislator - in line with the Article 48 of the Istanbul Convention - excludes the possibility of resorting to mediation in the presence of cases of domestic violence. It is believed, in fact, that violence does not allow for a condition of balance between the parties in the construction of the mediation setting[8].

The choice made by the legislator in 2001 was different. The adoption of the protection order, in fact, did not provide for the absolute exclusion of a mediation course for the violent party. The judge, therefore, could order the intervention of social services or a family mediation center. That said, it is necessary to consider whether the tout court exclusion of mediation, in the presence of acts of violence, is the best choice. Indeed, doubt arises as to whether the path followed by the 2001 legislator distinguishing between cases - of habitual and episodic violence - is more correct. In particular, the idea of excluding any attempt at conciliation in cases of allegations of acts of violence, without any provision for a full judicial ascertainment, is not fully convincing. An urgent, "omitted all formalities" ascertainment in the

7 According to the provisions of Article 473 *bis*.42, paragraph 5, «In the decree setting the hearing, the judge shall request information from the prosecutor and other competent authorities about the existence of any proceedings related to the attached abuse and violence, whether defined or pending, and the transmission of the relevant documents not covered by the secrecy referred to in art. 329 c.p.p.».

8 The article 473 *bis*.43 provides for an express prohibition on the judge proceeding with mediation «when a conviction has been pronounced or sentence applied, even at first instance, or criminal proceedings are pending [...] but also when such conduct is attached or otherwise emerges in the course of the case». Article 472 bis.42, moreover, in its last paragraph, provides that «The parties are not required to appear in person at the hearing referred to in art. 473 bis.21. If they do appear, the judge shall refrain from proceeding with the attempt at conciliation and from inviting them to contact a mediator or to attempt conciliation. [...]". This last paragraph, however, provides that the judge may "invite the parties to approach a mediator or attempt conciliation, if in the course of the proceedings he or she finds that the conduct alleged does not exist». According to this provision, therefore, a kind of corrective to the absolute ban on family mediation is introduced.

context of precautionary proceedings does not guarantee the appropriateness of the measure, which, moreover, could severely affect the parent-child relationship[9].

The Directive Principles elaborated by the Reform appear to be in line with the regulatory provisions in force in the Italian legal system - and in particular with the novelties introduced by the "Red Code" (Law n. 69/2019) - also with reference to the transmission by the criminal judge to the civil judge of the acts relating to criminal proceedings for crimes of violence, in which precautionary measures have been taken against one of the parties to the ongoing proceedings having as their object: the separation of spouses; the custody of children; the parental responsibility.

Also, from the standpoint of coordination between the civil and criminal courts, it is appropriate to highlight that the reform. In order to allow the judge to carry out an immediate check with regard to the merits of the allegations of violence, provides that the introductory complaint must contain-in addition to the general requirements of Articles 473 *bis*.12 and 473 *bis*.13 of the Code of Civil Procedure-an indication of «any defined or pending proceedings related to the abuse or violence» (art. 473 *bis*.41 c.p.c.)[10].

When the validity of the allegations is recognized, the judge must adopt «the most suitable measures to protect the victims and the younger, including those stipulated in art. 473 bis.70» (art. 473 *bis*.46). The judge can also order, with a motivated provision, the intervention of the social service and the health care service[11]. That said, legislator's choice to explicitly mention - art. 473 *bis*.46 -

9 The concept of "allegations" could have a very broad scope, as it could refer not only to violence alleged or reported but also to facts of violence merely reported or referred to. In this regard, it should be noted that it may be dangerous to exclude a meaningful relationship between the allegedly violent parent and the minor in the presence of merely reported or referred facts. Without a full investigative inquiry, ascertainment and scrutiny by the judge there would be an unacceptable fallout on the principles of due process. The issue is sensitive. Also, with a view to protecting the "parent-child" relationship. Full judicial ascertainment, in fact, is indispensable where measures are to be taken concerning: the custody or placement of children; the regulation, the limitation or termination of parental responsibility. From this perspective, it is advisable that the provision should not be applied by the court in the case of general allegations, but only if at the outcome of the preliminary investigation - albeit summary - the possible unfoundedness of the allegations can be ruled out after careful screening.

10 According to the second paragraph of the rule, the appeal «shall be attached to the appeal» a copy of the findings made and the minutes relating to the taking of summary information and testimonial evidence, as well as orders relating to the parties and the child issued by the judicial or other public authority. Although the provision refers only to the appeal, it seems consistent to assume that this burden is to be understood to be on both the appellant and the respondent. Both defense briefs will have to indicate any pending proceedings and the findings of investigations that relate to abuse or violence concerning the family unit and the partners or children of the parental couple. This solution is in line with the express provision of a general duty on the parties to cooperate loyally (art. 473 *bis*.18 c.p.c.).

11 The framework is structured in such a way as to allow the judge-both at the preliminary and decisional stages-to make use of experts, technical consultants with specific expertise in the field. It is also possible to acquire intervention and service reports drawn up by law enforcement agencies, if not covered by secrecy. In addition to the intervention of social and health services, the possibility of secrecy of the residential address is provided. Indeed, it is the duty of the court and its auxiliaries to protect the personal sphere, dignity and personality of the victim and to ensure the victim's safety, using these proceedings in the manner most suitable for the victim.

"protection orders" for the victim's protection of violent conduct within family units seems appreciable[12].

Finally, while it is not clear which judge will adopt protective orders, it seems reasonable to assume - also for reasons of procedural economy and speed of decision-making - that this task falls to the court of merit.

In order to ensure effective protection for victims of violence, the provision under consideration is appreciated for:

- specific and substantive procedurals to prevent secondary victimization.

- the shortening of procedural deadlines. This aspect is very important: being able to provide adequate responses quickly to victims of violence is crucial.

The Reform aims to give - also in civil court - greater protection to victims of violence to avoid hateful secondary victimization. The circulation of acts from the criminal to the civil court - in implementation of the principle of Article 31 of the Istanbul Convention - requires the civil judge to consider the family context in which the acts of violence took place, to know as much as possible about the family's history and to take this into account when taking custody measures for minors[13]. If this is not the case, the victim of violence risks being put on the same level as the violent party and being a victim for the second time, as the recipient of a measure that is highly restrictive of the "parent-child" relationship.

The minor child in turn, very often forced to witness the violence of one parent against the other, may remain a victim for the second time within the framework of the process: it is enough to think, the hypotheses in which his or her hearing is ordered several times and in different venues.

III. THE OTHER PROVISIONS ON VIOLENCE CONTAINED THE REFORM. REFUSAL OF THE CHILD TO MEET PARENTS AND DIRECT LISTENING TO THE CHILD.

A first issue relates to a minor child's refusal to meet one or both parents. It often happens in the courtroom experience that a minor child refuses to meet one of the parents. Behind this refusal generally lurks a - sometimes irreparable - impairment of the "parent-child" relationship.

12 This dissolves a much-debated issue, on which judges of merit have given different interpretations.

13 The legislature imposes a real dialogue between judicial offices that is closely related to the provisions of the European Parliament Resolution of April 5, 2022, on the protection of children in civil, administrative and family law proceedings. In particular, a close link between criminal, civil and administrative proceedings is recognized in order to coordinate judicial action and avoid discrepancies between decisions.

The issue takes on particular relevance with respect to minors of preadolescent or adolescent age: in these cases, the child expresses his or her refusal very clearly but, very often, is unwilling or unable to explain the underlying causes of the refusal, which are usually very deeply rooted in the emotional relationship. In such situations, it turns out to be very important - as we shall see better - for the judge to listen directly to the child in order to understand the situation leading to the refusal[14].

The fact takes on particular relevance with respect to minors of adolescent age: in these cases, the child shows his or her refusal very clearly but, very often, is unwilling or unable to explain the reasons of the refusal. In such situations, is very important for the judge to listen directly to the child.

In this regard, the Reform excluded listening delegated to the technical consultancy, social services as well as to honorary judges. According to art. 473 *bis*.45, headed "Listening to the child" the legislature expressly provides that «the judge shall proceed personally and without delay to listen to the child» taking care to avoid having the child meet and have any direct contact between the child and the perpetrator of violence[15]. The aforementioned norm, moreover, provides that there is no need to proceed with the hearing when the minor has «already been heard in the context of other proceedings» it being sufficient that the results of the hearing be acquired in the records[16].

That being said, it is appropriate to turn the attention to the sensitive issue of listening. In this regard, it should be noted that direct listening by the judge is already indicated as preferable in Law n. 54/2006. However, judges have often shown that they "fear" listening. It is certainly not easy:

- finding the right approach in order to verify the child's trustworthiness.

- to distinguish the "true" from the "false". The child, in fact, does not lie, but describe a lived derived by his imaginative process within which it is necessary to select the typifying data of the narrative, managing to capture the child's "assertive beliefs".

14 Specifically, art. 473 *bis*.6, paragraph 1, provides that «when the child refuses to meet with one or both parents, the court shall proceed to hear the child without delay, take summary information on the reasons for the refusal and may order the shortening of the procedural time limits».

15 The intent of the norm is clearly to protect the child victim of direct or witnessing violence.

16 The intent of the legislature is to avoid forms of secondary victimization of the child. Therefore, the judge will be obliged to acquire ex officio the reports and video recordings of the listening that was conducted in the criminal court during the probationer incident, avoiding any direct contact between the child and the alleged perpetrator of violence and abuse, and especially avoiding duplication of the listening activity, which is tiring and detrimental to the child.

- check whether the child's narrative is "impermeable" to parental conflict, thus avoiding "declarative contagion".

Considering this - given the silence of the law on the point - it might be useful for the judge to be assisted at the time of listening by an experienced auxiliary: think of a child or developmental psychologist. There is no doubt that in domestic violence cases such accompaniment could be particularly important, given the difficulty of: bringing out the violence perpetrated within the family unit; understanding the family dynamics in a timely manner; grasping the often-uncertain boundary between conflict and violence.

1. Findings made by social services and technical expertise of the office.

The Reform stipulates that the judge, to endorse the assistance of a consultant, must proceed by reasoned order, indicating the «ascertainments to be made» and «the measures necessary to protect the victims».

The judge's consultant - once appointed - must adhere to «the protocols recognized by the scientific community without making assessments of personality characteristics and profiles unrelated to them».

This clarification appears important. Often, in fact, there are cases in which, without this being part of the judge's mandate, the consultant's report goes so far as to express judgments about the parents' personality or their parental suitability for the purposes of adopting the custody and/or placement of minor children. This practice, moreover, appears to be very dangerous since judges - despite the possibility of departing from the indications contained in the report - tend to uncritically accept the consultant's conclusions.

The legislator, therefore, appropriately requires the mandate given to the consultant be delimited, preventing the latter from "replacing" the judge. The consultant, in fact, must perform exclusively the role of the judge's auxiliary.

The provision under comment, moreover, also appears important with reference to acts of violence since through the expert operations or investigations carried out by the social workers, it will be possible to bring out - albeit still through a timely mandate - violent conduct.

In this regard, it should be mentioned that in the context of the family process, counseling is always psychological. The psychologist, as a consultant to the judge, will be assigned the difficult task of assessing relationships within the family also in order to bring to light any violence perpetrated by a parent. The task is not easy because:

- The perpetrator of violent conduct often succeeds in masking such behavior.

- Victims of violence often have difficulty reporting the conduct of the family member.

Behind the difficulty to denounce lies - in addition to the emotional bond, however insane it may be - also the fear of being placed on the same level as the perpetrator of violence (think of the accusation of holding oppositional behaviors against the other parent), with possible repercussions on the custody measures of minor children.

IV. SHORT CONCLUSIONS.

Moving quickly to the conclusion, one cannot help but express positive judgment for the provisions enacted by the reform on domestic violence. In particular, as already pointed out, it deserves to be appreciated:

- placing the gender narrative within family and juvenile proceedings and thus outside the area of criminal conflict.

- the express reference to protection orders as measures to be taken for the protection of victims of violent conduct.

- to give to family disputes marked by acts of violence, a fast track, with the shortening of procedural deadlines and the provision of specific provisions (procedural and substantive) to avoid phenomena of secondary victimization. In fact, as we have seen, the judge hearing the appeal will be able to benefit from a "deformalized" procedure. It will be able to shorten the time limits by up to half and, at the same time, promptly put in place the necessary measures, including *ex officio*, with regard to the investigative activities, it will be able to order means of evidence even outside the limits of admissibility provided by the Civil Code, within the framework of guaranteeing the adversarial process and the right to contrary evidence.

- having given-as punctually pointed out-appreciable answers with respect to delicate and long-standing issues such as the refusal of the minor to meet with one of the parents; the hearing of the child by the judge; the duties of the counselor; and the "perimeter" of the relationship.

- finally, through the reform it will be possible to provide more effective responses - while respecting the right to bigenitoriality - to the protection needs of victims of domestic violence, and this through a full judicial ascertainment, capable of going beyond mere allegations, entrusted to a specialized judge supported, where necessary, by expert aides trained on the subject of domestic violence.

In this regard, again, one cannot help but stress the importance of specialization. In the field of family law - today more than in the past - highly specialized judges, lawyers and counselors are also needed in order to be able to properly govern the complex family dynamics especially in the pathological phase of parental couple conflict. From this perspective, moreover, it is very important to be aware that imbalances and inequity often lurk well before violence.

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