

Issue of the Comment to Article 93 of the Administrative Offense Code of the Republic of Tajikistan

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Abstract—Domestic violence is a destructive social phenomenon, which is somewhat observed almost in every fourth family. Women, children, aged parents, disabled relatives most often are the victims of such offences. The paper tries to reveal some problems of the comment to Article 93 of the Administrative Offense Code of the Republic of Tajikistan and makes some suggestions to eliminate these problems. The main problem is that the current legislation specifically does not distinguish between the crime and the administrative offense, which belong to domestic violence. Therefore, the author suggests to include certain chapters into the Criminal Code of the Republic of Tajikistan and the Administrative Offense Code of the Republic of Tajikistan, which would list specific crimes and administrative offenses in the sphere of domestic violence since the problem of domestic violence in the Republic of Tajikistan still remains one of the burning issues in the society.

Keywords—family; domestic violence; crime; administrative offense; law; Tajikistan

I. INTRODUCTION

The relevance of this paper is that the problem of domestic violence in the Republic of Tajikistan still remains one of the burning issues in the society. Today the analysis of a legal mechanism aimed to prevent domestic violence is not internally critical for the Republic of Tajikistan. It also gains huge international importance since our country is the member of the UN Human Rights Council and regularly reports to the international community for the compliance of human rights.

Within the considered article we will try to briefly analyze the situation with the current legislation of the Republic of Tajikistan on the prevention of domestic violence and to reveal some problems interfering with the corresponding administrative actions of law-enforcement bodies.

The reason for this brief study was the Comment to the Administrative Offence Code of the Republic of Tajikistan [1], which was published this year. Unfortunately, we did not find any specific explanations concerning Article 93 of the Administrative Offence Code of the Republic of Tajikistan of 31 December 2008 (further to be referred to as the AC RT) – Violation of requirements of the legislation prevention of domestic violence of the Republic of Tajikistan, which could

help law enforcement agencies with their activity in this sphere.

We consider that such situation when there are no corresponding comments to explain the meaning of a very important norm of the law may not only fail to solve the existing problems, but make the situation even worse.

1.2. PROBLEM STATEMENT

Article 93. Violation of requirements of the legislation on prevention of domestic violence of the Republic of Tajikistan.

Violation of requirements of the legislation on prevention of domestic violence of the Republic of Tajikistan, i.e. commission of deliberate acts of physical, mental or economic character or threat of their commission in family relations if such actions violate the rights and freedoms of a family member in the absence of elements of crime shall be subject to fines on natural persons in the amount from two to five indicators for calculation.

The present paper for the first time establishes the administrative responsibility for the violation of requirements of the legislation on prevention of domestic violence of the Republic of Tajikistan.

Proceeding from the name of Chapter 6 of the Administrative Offense Code of the Republic of Tajikistan (AOC RT) – “Administrative offenses related to the rights and freedoms of a man and citizen”, the rights and freedoms of a man and citizen shall be the **object** of this administrative offense. However, the specified object shall be considered common for all administrative offenses stipulated in this chapter of the AOC RT.

The requirements of the legislation of the Republic of Tajikistan governing public relations connected with the prevention of domestic violence shall be the direct **object** of this offense.

According to Article 3 of the Law “On prevention of domestic violence” of the Republic of Tajikistan of 19 March 2013, the legislation on prevention of domestic violence of the

Republic of Tajikistan is based on the Constitution of the Republic of Tajikistan of 6 November 1994 (further to be referred to as the RT Constitution) and on the prevention of domestic violence (further to be referred to as the RT Law “On prevention of domestic violence”), other regulations of the Republic of Tajikistan (for example, AOC RT, Family Code of the Republic of Tajikistan of 13 November 1998 (further to be referred to as the FC RT), Instruction on the organization of activity of internal affairs bodies on the prevention, elimination of the facts of domestic violence and response to them approved by the order of the Ministry of Internal Affairs of the Republic of Tajikistan on 20.04.2016 (further to be referred to as the the Instruction), etc.), as well as the international legal acts recognized by Tajikistan (for example, Universal Declaration on Human Rights of 10 December 1948, International Covenant on Economic, Social and Cultural Rights of 16 December 1966, International Covenant on Civil and Political Rights of 16 December 1966, Convention on Elimination of all Forms of Discrimination Against Women of 6 October 1999, Convention on the Rights of the Child of 20 November 1989, etc.).

Thus, the requirements of the legislation on the prevention of domestic violence of the Republic of Tajikistan, which violation leads to administrative responsibility implied by the commented article are stipulated in the above normative legal acts.

According to **Article 1 of the RT Law “On Prevention of Domestic Violence”**, the domestic violence can only be committed within the family relations.

Therefore, family relations connected with realization of the rights and freedoms of family members are considered the **additional object** of the given offense [2].

According to Article 2 of the FC RT, the following main groups of family relations are considered the subject of the family law: a) marriage conditions and procedure, termination of marriage and avoidance of marriage, b) personal non-property and property relations in a family between spouses, between parents and children, between other family members, c) relations due to adoption, guardianship and custody, foster placement, order of civil registration and other family relations.

According to Article 4 of the RT Law “On Prevention of Domestic Violence”, the operation of the given law extends to citizens of the Republic of Tajikistan, foreign citizens and persons without citizenship living in the Republic of Tajikistan and being married and members of their families, as well as cohabitants sharing a common household.

Thus, this provision of the RT Law “On Prevention of Domestic Violence” allows expanding the concept of family relations defined by the family law. Therefore, it is wrong to apply limited interpretation of family relations according to the family law within the requirements of the legislation on prevention of domestic violence of the Republic of Tajikistan as some authors do [3, pp. 207].

The current legislation of the Republic of Tajikistan sets a clear list of the rights and freedoms of a man and citizen, which can be realized within the family relations.

Objective aspect. Physical, mental or economic action or its threat in the absence of elements of crime serves the objective aspect of the offense.

This illegal act, i.e. violation of requirements of the legislation on prevention of domestic violence of the Republic of Tajikistan, may be committed as an action (active form) or inaction (passive form). In the second case the administrative responsibility comes into force only on the condition that a person had to act in a definite way (due to legal provision or other regulations), but did not perform the corresponding obligatory operations though was able to do it.

According to **Article 1 of the RT Law “On Prevention of Domestic Violence”**, the domestic violence is understood as a deliberate illegal act of physical, mental, sexual and economic nature made within family relations by one family member in relation to another, which infringes his rights and freedoms, inflicts physical pain or harm to his health or threat of causing such harm to health.

Thus, the responsibility for domestic violence is implied by administrative, criminal and civil laws.

In cases when physical, mental or economic act or threat of their commission can be a component (necessary feature) of any criminal offense, for example, causing grievous bodily harm (Article 110 of the RT Criminal Code), offences of medium severity (Article 111 of the RT Criminal Code), beatings (Article 116 of the RT Criminal Code) or tortures (Article 117 of the RT Criminal Code), incitement to suicide (Article 109 of the RT Criminal Code), hooliganism (Article 237 of the RT Criminal Code), etc., the guilty person shall be held criminally liable.

As B.V. Rossinsky fairly notes, “the understanding of the structure of administrative offense is important to ensure law enforcement when a person is imposed of administrative sanctions, to distinguish administrative offenses from other types of offenses, in particular from similar crimes” [4].

However, it shall be noted that considering the lack of the corresponding study in our country, it is very difficult to divide physical acts into administrative offenses and crimes. For example, beatings (Article 116 of the RT Criminal Code), i.e. infliction of beatings or other violent acts causing physical pain, but did not entailing the consequences specified in Article 112 of the RT Criminal Code, namely offences of low severity resulting in short-term injury to health or becoming the reason of insignificant permanent disability, as we believe excludes the possibility of physical administrative offense according to the commented article. Therefore, in case a physical act is committed, it can be qualified only as a crime, even if it is made for the first time since in case of systematic beatings, such act is qualified as torture (Article 117 of the RT Criminal Code).

According to K.Kh. Soliyev, the violence is understood as physical action on a victim or his relatives through infliction of blows, beating, torture, causing physical pain, causing offences of low severity or less grievous bodily harm, open kidnapping, involuntary use of drugs, psychotropic, strong or toxic agents to suppress the victim’s will, etc. In relation to article under comment, we believe it is advisable to use the

definition of threat suggested by K.Kh. Soliyev, in particular, “a threat is expressed by mental impact on a victim or his relatives by claiming the intention for physical abuse, up to the threat of murder, to inflict other harm, to destroy property, etc.

Using the example of economic violence, the threat of property destruction shall be quite significant (for example, a threat to fire a house, to destroy a car, etc.) [5].

II. RESULTS AND DISCUSSION

We agree that other ways of inducing a victim to submission, such as persuasion, bribery, fraud (except for blackmail) shall not form the structure of this offense.

It is important to note that the insult as a crime was excluded by the Law of the Republic of Tajikistan of 03.07.3012 from the RT Criminal Code. Therefore, any insult within family relations shall be qualified as the violation of requirements of the RT legislation on prevention of domestic violence (Article 93 of the AOC RT). As for the civil legislation, according to Article 171 of the Civil Code of the Republic of Tajikistan, a person injured as a result of domestic violence has the right to seek compensation for moral harm caused by domestic violence, namely psychological violence.

A K.Kh. Soliyev fairly notes, “violence and threat of violence can be addressed to both a victim and other persons – close relatives of the victim, other significant persons, for the sake of which rescue he is ready to sacrifice his health”.

In relation to the article under comment, it is necessary to treat other family members as “other persons”.

According to M.M. Vatanov (M.M. Vatanzod), in practice the torture, i.e. systematic infliction of beatings, is acknowledged when it is committed at least three times [6]. It shall be noted that some other leading scientists also hold the same opinion [7]. However, the legal literature illustrates examples showing that the torture may happen in case this act is committed for the first time. As the same authors fairly note, the main obligatory sign of objective aspect of beating shall be the infliction of physical pain. Mental suffering is not the basis for the prosecution of the guilty person according to Article 116 of the RT Criminal Code [8].

On 10 October 2017 during the round table discussion on the “Prevention of Domestic Violence – Basis of Stability of Young Families in Society” held in Dushanbe, the D.J.S. Sh. Gayurov noted that despite the fact that at the legislative level the state adopted many standards regulating this problem, its solution is only possible if the responsibility for family cruelty is equated to criminal liability.

According to Sh. Gayurov, “the RT Criminal Code includes an Article on Beating, but similar actions in a family are governed by the AOC RT. Beating and the cruel relations, no matter whether committed in a family or beyond its limits, is a crime and shall be qualified as a criminal offense” [9].

We do not agree with the above opinion and believe it would be right if the RT Criminal Code and the AOC RT imply the corresponding lists of crimes and offenses, which would not be deprived of any precautions.

For example, for the solution of this dilemma there is a need to include the following changes into the AOC RT and the RT Criminal Code: a) infliction of beatings for the first time shall be recognized as administrative offense; b) infliction of beatings the second time shall be recognized as a crime; c) infliction of beatings for the third time shall be qualified as systematic infliction of beatings – torture. Or, both the RT Criminal Code and the AOC RT shall include the certain chapters concerning crimes and offenses committed within family relations and belonging to the group of domestic violence.

At first sight it is much easier to differentiate crimes from administrative offenses using the example of coercion of a woman in abortion, i.e. coercion of a woman in abortion, due to which the abortion will be made (Article 124 of the RT Criminal Code).

If as a result of coercion of a woman in abortion the abortion is not made, then due to lack of evidence of this crime it can be believed that in this case there is administrative responsibility according to the article under comment (Article 93 of the AOC RT).

However, some authors believe that even if as a result of coercion the abortion is not made, then irrespective of it, the actions shall be qualified as coercion of a woman in abortion since, according to them, the legislator the fact of coercion of a woman in abortion but not the corresponding consequences, i.e. abortion as a determining feature of a crime. Otherwise, such act may be qualified as a grievous bodily harm.

However, it is more correct to assume that in this situation due to the fact that as a result of coercion in abortion the injured person experiences mental sufferings, the responsibility may come according to Article 117 of the RT Criminal Code (Torture).

However, we believe that the main reason to qualify this case is that the interpretation of criminal norms shall correspond to the rules of interpretation of the criminal law according to Article 11 of the RT Criminal Code, which states that if the criminal norm seems ambiguous or it may be interpreted ambiguously, then the interpretation shall be made in favor of the accused person (defendant, convicted person).

The torture of a pregnant woman leads to the imprisonment of the guilty person from three to seven years (Part 2, Article 117 of the RT Criminal Code T), and the coercion of a woman in abortion if thereof the abortion was made, is punished by corrective works for a period of up to two years or imprisonment for the same term (Article 124 of the RT Criminal Code). The answer is obvious – the guilty person shall be held responsible under Article 124 of the RT Criminal Code.

In that case, what shall a law enforcement official do when facing the corresponding problems at the theoretical level?

In practice, in case of domestic violence in public places, sometimes the administrative cases are initiated under the Article 460 (Disorderly conduct) or 462 (Riot) of the AOC RT, which contradicts the state policy concerning the prevention of domestic violence. As a result the violence in

family remains without the corresponding reaction and prevention.

According to some authors, domestic violence can be committed away from the place of residence (i.e. apartment, room, number, etc.) [10]. Moreover, we believe that domestic violence can also be committed at a certain distance, for example, one of the family members, being in another location (in particular, in labor migration in Russia) by phone (or by other means of communication) is able to commit mental violence, i.e. to deliberately influence the mentality of another family member thus humiliating his honor and dignity by threat, insult, blackmail or coercion in offenses or acts threatening life and health as well as leading to violation of mental, physical or personal development.

Therefore, in a case of domestic violence away from the place of residence, i.e. in a public place, then in the presence of other administrative offenses the administrative case is initiated for the totality of the crimes committed, for example, according to Article 93 (Violation of requirements of the legislation on prevention of domestic violence of the Republic of Tajikistan), Article 460 (Disorderly conduct), Article 462 (Riot). Such approach allows solving the task on the prevention of domestic violence.

Any natural, responsible person that by the time of offense has reached 16 years of age can be the **subject** of the considered offense.

Besides, according to Part 3, Article 21 of the RT Law “On Prevention of Domestic Violence”, the domestic violence injunction as one of individual measures of its prevention is issued to the responsible person, which committed domestic violence and that by the time of offense has reached 16 years of age.

According to a common opinion, a person, being in the condition condition of absence of guilt at the time of offense, shall not be subject to administrative responsibility.

The important requirement for the subject of this offense is that he shall be one of the family members (a special subject).

According to Paragraph 3 of the above Instruction, a family is recognized as the community of people being married, being in close family relationship, connected with each other by property and non-property rights and duties as well as that are commonly, constantly or temporarily living with each other.

A similar definition is also given to the family member. Hence, the following can be the family members:

- spouses (husband and wife);
- parents (mother, father) and children;
- brothers and sisters (both from one and from different parents);
- grandmothers, grandfathers (both on the mother’ and the father’s side), grandsons (granddaughters), great-grandsons (great-granddaughters);
- aunts, uncles (both on the mother’ and the father’s side);
- cousins;
- adoptive parents / adopted children;
- guardians (trustees) of children;

- stepdaughters, stepsons, stepmothers, stepfathers;
- mother (father) of a husband (wife), daughter-in-law, brother-in-law, sister-in-law;
- conjugal partners;
- former spouses recognized by court decision as a family member and moved into the living space of its owner according to the housing legislation.

The **subjective aspect** of this administrative offense is characterized by guilt in the form of direct intention.

The article under comment specifically defines a form of guilt, therefore administrative responsibility may only begin with intention. Hence, the administrative responsibility by negligence is excluded.

Usually there are informative features of the subjective aspect within administrative offenses: purpose or motive. For example, Article 91 of the AOC RT stipulates responsibility, in particular, for the use of guardianship or trusteeship for mercenary purposes in prejudice of the ward or leaving it unattended and without the necessary financial support, in the absence of elements of crime.

The commented article does not contain the above informative features. However, Article 1 of the RT Law “On Prevention of Domestic Violence” defines economic violence as follows: “economic domestic violence is a deliberate wrongful act of one family member in relation to another for the **purpose** of depriving his housing, food, clothes, property or means, to which the victim has the right provided by the legislation of the Republic of Tajikistan, and this act can cause violation of physical or mental health or cause other adverse conditions”.

According to the interpretation of the RT Law “On Prevention of Domestic Violence”, other types of domestic violence do not pursue any aim or motive, which also leads to some problems in understanding of the matter.

However, the literature sources on the prevention of domestic violence still refer to domestic violence committed for a definite purpose or motive.

Thus, according to a number of authors, the motive of domestic violence is the desire of the offender to confirm power in family relations providing him with superiority over other family members as well as continuous control over them. According to them, the purpose of domestic violence is unconditional submission of victims of domestic violence to the will of the offender [11; 12].

III. CONCLUSIONS

On the basis of the above we suggest the following definition of a family in the Instruction: “a family is the community of people formed on the basis of marriage between a man and a woman and on the basis of other conjugal (or family) relations; or the community of people being in close family relations; or the community of people connected among themselves by personal and property rights and duties resulting from marriage between a woman and a man or by other actual conjugal (or family) relations as well as being in

close family relations; or the community of people having the status of a family member in the order established by the law”.

The proposed amendment to the concept of a family will provide for more efficient fight against domestic violence since it is able to cover a wider range of issues related to the prevention of domestic violence. A new wording of family also opens more opportunities for the development of the right in general since there is no concept of a family at the legislative level.

According to Chapter 12 of the Instruction – Observation of behavior of a person saddled with a police record to which measures of individual enforcement are applied, one of the forms of cooperation of the Department of Internal Affairs with other subjects preventing domestic violence is the use of methods to mediate the settlement of family conflicts (Subparagraph 1, Paragraph 33 of the Instruction).

Despite the fact that mediation is one of modern alternative ways to settle conflicts, however, according to us, the use of mediation methods to settle family conflicts in case they are recognized as a crime or an administrative offense are unacceptable. The reason for this is the fact that now there is no regulatory legal act governing the mediation mechanism in the Republic of Tajikistan.

Therefore, in our opinion, there is a need to fully refuse from the use of mediation methods regarding cases of domestic violence when they are recognized as a crime or an administrative offense. Hence, Subparagraph 1, Paragraph 33 of the Instruction shall be stated as follows: “use of mediation methods to settle family conflicts when they are recognized as a crime or an administrative offense”.

Acknowledgements

The authors express their gratitude to the Russian-Tajik Slavonic University for financing the research under the University Development Program for 2018.

References

- [1] Comment to the Administrative Offence Code of the Republic of Tajikistan. Under the editorship of the honoured worker of science and technology of Tajikistan, D.J.S., professor Rakhimzod M.Z., Cand.Sc. Law, associate professor Bakhriddinzod S.E. (in Tajik). Dushanbe, 2017.– pp. 1008.
- [2] A.Sh. Alizoda, S.Kh. Khuseynzoda, “Crimes against family and minors”. Study manual (in Tajik). Dushanbe: ER-graf, 2017. pp. 120.
- [3] Comment to the Law “On prevention of domestic violence” of the Republic of Tajikistan. Under the editorship of J.M. Davlatov. Dushanbe: Academy of mukolama, 2014. pp. 207.
- [4] B.V. Rossinsky, Yu.N. Starilov, “Administrative law: study manual”. 4th edition, revised and amended. Moscow: Norma: Infra-M, 2010. pp. 916.
- [5] Karim Soliyev, “Comment to crimes related to human trafficking”, Dushanbe: Academy of the Ministry of Internal Affairs of the Republic of Tajikistan, 2011. pp. 112.
- [6] See more details: Comment to the Criminal Code of the Republic of Tajikistan. Editor in chief Kh.Kh. Sharipov. (in Tajik). Dushanbe: Globus, 2006. pp. 880.
- [7] “Russian criminal law”. Special part: study manual for higher educational institutions, V.S. Kommisarov, ed.. SPb.: St. Petersburg, 2008. pp. 84; “Criminal law”. Special part: study manual, under the editorship of I.V. Shishkov. Moscow: Prospekt, 2014. pp. 84.
- [8] Khuseynzoda S.Kh., Nazhbudinov M.A., Khikmatzoda J. Crimes against health. Study manual (in Tajik). – Dushanbe: Somon-graf, 2017. – pp. 364.
- [9] Project on the prevention of domestic violence. [Electronic resource]. Retrieve from: <http://www.pdv.tj/ru/>
- [10] Comment to the Administrative Offence Code of the Russian Federation, Under the general edition of prof. E.N. Renov. Moscow: Norma, 2002. pp. 1040.
- [11] “Russian criminal law. Special part: study manual for higher educational institutions”, V.S. Kommisarov, ed.. SPb.: St. Petersburg, 2008. pp. 84.
- [12] “Criminal law. Special part: the textbook”, I.V. Shishkov, ed.. Moscow: Prospekt, 2014. pp. 84.