

CRIMINAL MEANS TO COMBAT DOMESTIC VIOLENCE – GUARANTOR OF THE PERSON'S SAFETY. STATE OF THE ART AND PERSPECTIVES

M. SAVA

Mihaela Sava

Bucharest University of Economic Studies

Piata Romana nr. 6, sector 1, Bucharest

E-mail: avocat.msava@gmail.com

ORCID: <https://orcid.org/0000-0002-1657-8881>

ABSTRACT

The present work is part of the research steps dedicated to the writing of my PhD thesis on the topic of combating domestic violence by criminal means, dealing mainly with the effect of criminal instruments on the safety of victims. The latter is an important social problem, especially in the current context of spending longer periods of time at home, which, together with a relatively more difficult access to justice, has led all over the world to an escalation of domestic violence.

Specifically, I will briefly deal with the presentation of the current legislative framework, insisting on the elements of criminal legislation and I will highlight the weaknesses in relation to guaranteeing the safety of the person, respectively, I will advance proposals for harmonization and improvement of the legislative framework.

The conclusions of the study present the neuralgic elements of the criminal legislation, regarding the protection of the life and integrity of the victims of domestic violence, as well as the changes that I consider appropriate for improving the legal intervention in the field.

KEYWORDS: domestic violence, Romanian criminal legislation, person safety and family protection

INTRODUCTION

Guaranteeing the safety of the person is a desideratum of modern societies. However, especially in the current pandemic context, we are witnessing, all over the world, an exponential increase in the number of cases of domestic violence. In Romania, at the level of the first quarter of 2020, 6,731 victims of domestic violence were reported, of which 5,343 are minor victims and 1,388 are adult victims. Of these, 94.74% were women. For comparison, at the level of the entire year 2018, there were 2,321 adult victims of domestic violence, which means that over the course of a single year, the number of victims increased almost 2.5 times (ANES statistics, 2021).

Regarding the frequency of aggressions, it is found that most of them take place daily (38.94%), which means that we are not talking about accidental events, but practically about a lifestyle in which a large part of the Romanian population is found, independent of the social status.

In terms of legal steps taken in cases of domestic violence, in the same period (Q1 of 2020), 279 forensic certificates were issued, of which 27 were subsequently withdrawn, 1,136 criminal complaints were filed, of which 126 were withdrawn, respectively 371 applications were registered for the issuance of protection orders, of which 23 were withdrawn. In the applications for the issuance of the protection order, in 182 cases, the evacuation of the aggressor was also requested, 16 of these requests being subsequently withdrawn.

On a simple calculation, we note that out of 1,388 cases with adult victims, only 1,010 complaints were filed and maintained, which means that in over a quarter of the cases no mechanism of legal protection was set in motion. From the complaints filed, we find that only about a third is resolved with the issuance of a protection order and only in less than half of the cases for which protection orders have been issued, it goes as far as the evacuation of the

aggressor from the family home, this being, in my opinion, an adequate measure of protection of the victims.

Summing up, in relation to the number of cases of domestic violence, only in one situation out of nine, we can say that an attempt is being made to guarantee the safety of the victim by legal means. Here, then, is the legal and social relevance of a discussion about the effectiveness of criminal means in protecting victims of domestic violence.

REFLECTION OF THE THEME IN THE SPECIALIZED LITERATURE

Romania had experienced domestic violence on a large scale, as a social phenomenon, long before there was a legal framework for identifying and combating it (Wimmer & Harrington, 2008, p. 624, quoted in Tunduc, 2020). The spread of the phenomenon is due to a cumulation of factors such as:

- traditional, including religious - education - which cultivates a supremacy of the man in the family (the head of the family and for a long time its only financial supporter); (Irimescu, 2006; Koya and Cook, 2010; Philip, 2019; Vrabiescu, 2019)
- the more precarious financial and occupational situation of the woman in relation to the life tainer; (Broza-Grabowska, 2011; Slabbert, 2017)
- social pressure (the feeling of fault or personal failure in case of a possible divorce, the guilt that is attributed almost exclusively to her in the family and in society); (Sweeney, 2016; Haselschwerdt & Hardesty, 2017- addresses the issue of social pressure in wealthy and socially well-positioned families, where violence is denied for the preservation of appearances)
- lack of legal means to resort to in case of violence exercised against her (Dumitrescu, 2014)

The widespread social acceptance of these domestic abuses and the tendency not to complain about them were not such as to put pressure on the legislator to create and strengthen the legislative framework, which would allow their identification and solution. External events, such as the accession to the EU in 2007 as well as the natural need for alignment and harmonization of laws and procedures, have most likely led to the awareness of the need to create a legislative framework in the field of domestic violence.

LEGISLATIVE CONTEXT

According to the Romanian legislation, the adjudication of domestic violence cases involves both civil and criminal legal texts, which requires the effort of harmonizing the two corpora of law, to allow a unitary and covering approach, regarding the protection of victims.

From the point of view of the stages through which a case of domestic violence passes, I propose the following systematization of the categories of norms incident in the field: norms regarding the prevention of the phenomenon of domestic violence, the norms applicable in the criminal investigation phase and in the trial phase, respectively the norms intended to prevent relapses. Also, to these are added the measures of protection of victims and of control of collateral effects, such as those on children, who, even if they are not directly involved, assist in committing acts of violence, which can be classified as psychological violence. In the following, I briefly describe each one.

1.1. Rules on prevention

The institutional responsibilities regarding the prevention of domestic violence are divided between several bodies, each of which is subject to specific norms, as follows:

CRIMINAL MEANS TO COMBAT DOMESTIC VIOLENCE – GUARANTOR OF THE PERSON'S SAFETY. STATE OF THE ART AND PERSPECTIVES

- MMJS Order no. 2525/2018, puts in charge of the local authorities the intervention, upon the victim's notification, through multi-fulfillment teams, to advise her from the point of view of exercising her legal rights, to provide her with medical, psychological, spiritual assistance. Also, these teams can guide the victim to state social shelters or inform them about alternative services offered by NGOs or other private entities. At national level there are 42 such teams, at the level of each county and of Bucharest, which can be contacted through a national call center – 0800500333, launched in 2015.
- The Ministry of National Education organizes educational events for parents and children, on topics related to domestic violence, to prevent it. Since 2005, by GD nr. 686 / 12.07.2005 which approves the National Strategy in the field of preventing and combating the phenomenon of domestic violence, is given to the Ministry of Education the responsibility to introduce in the school curriculum, activities dedicated to the prevention of domestic violence, respectively to organize manifestations to educate young people in the spirit of respecting family values. At present, there is not yet a very clear framework for evaluating the implementation of these measures and their impact, as they are still left to the discretion of teachers.
- The Public Service of Social Assistance (SPAS) has attributions at local level, in the sense of early detection of situations of family risk and intervention to prevent violence against children, respectively the separation of children from parents, if the stage of prevention was ineffective and the violence is reached in the continued form. If SPAS do not have the capacity to provide social services in an emergency regime, it is necessary to collaborate with the DGASPC's that take over the management of the case.

To these local and central state structures are added the accredited social service providers from the private environment, namely NGOs, foundations, churches, private medical networks, through which the material and logistical base of the state institutions can be extended.

1.2. Norms regarding the criminal prosecution and the trial phase

The finding and solving of domestic violence cases is also a matter for the police and the courts, which in some cases may be complete by the criminal and in other situations, specialized panels of minors and family.

The investigation of cases of domestic violence is set in motion, in most situations, upon the notification of the victim, who requests the support of the police. In a small number of cases, the police are notified by third parties (relatives, neighbors, people nearby, etc.) or even act.

After registering a complaint regarding an act of domestic violence, the police authorities ascertain the existence of the deed and based on the investigations, assess the degree of risk for the life and integrity of the victim. If an imminent risk to the life, physical integrity or freedom of a person is found, to eliminate or reduce this risk, the police officer issues a temporary protection order for a period of 5 days, calculated per hour, respectively 120 hours from the moment of issuance.

The police officers find the existence of an imminent risk, analyzing the factual situation, by:

- a) the evidence obtained because of the verification of the complaints regarding the domestic violence when the acts of domestic violence are not the object of the investigation under the aspect of committing other crimes.

b) the evidence gathered according to the provisions of Law no. [135/2010](#) on the Code of Criminal [Procedure](#), with subsequent amendments, when acts of domestic violence are the object of investigation under the aspect of committing acts that fall under the provisions of art. 199 of Law no. [286/2009](#) on the Criminal [Code](#), with subsequent amendments.

Also, the policemen assess the factual situation based on the risk assessment form, according to the methodology of its use, according to the provisions of art. 22¹⁰ of the Law 217/2003.

The provisional protection order issued by the policeman shall order, for a period of 5 days, one or more measures to protect the victim:

- temporary eviction of the aggressor from the common dwelling, even if he is the holder of the property right.

- reintegration of the victim and, where appropriate, of the children into the common dwelling.

- obliging the aggressor to keep a minimum distance determined from the victim, from his family members, or from the residence, place of work or educational establishment of the protected person.

- obliging the aggressor to hand over the weapons held to the police. (<https://www.politiaromana.ro/ro/prevenire/violenta-domestica/ordinul-de-protectie-provizoriu>, accessed 28.10.2021)

These obligations enter into force immediately, without any further prior notice.

After the provisional protection order has been issued, it shall be submitted by the territorially responsible police unit, within 24 hours, to the Prosecutor's Office attached to the Court in which the jurisdiction was issued. At the level of the Prosecutor's Office, a case prosecutor decides on the need to maintain the measures established by the police. Within 48 hours from the issuance of the protection order, the prosecutor decides either that the measures must be maintained, through an administrative resolution applied on the provisional protection order, or that they are not justified and must be revoked, in which case they motivate and communicate this fact to the police unit. This, in turn, informs the parties involved.

The provisional protection order maintained by the prosecutor is submitted by him, with all the supporting documents, to the territorially competent court, with a request for issuing the protection order, for a maximum period of 6 months. In this situation, the 5-day validity of the OPP is extended accordingly, until the completion of the judicial procedures regarding the issuance of the PO, with the information of the aggressor.

The Provisional Protection Order (OPP) may be challenged in the competent court within 48 hours of communication.

If it is found that the conditions for issuing the provisional protection order are not met in the present case, the policemen are obliged to guide the persons who claim to be victims of domestic violence to formulate, if they wish, a request in court for the issuance of a protection order.

In the practice of the courts, the legislative base consists of both the Criminal Code and a corpus of special laws, represented mainly by law 217/2003, which has undergone numerous successive additions and modifications, some of them wearing, in their turn, the form of law.

In the Criminal Code, the headquarters of the matter is represented by art. 199, which defines domestic violence, and art. 177, which delimits the notion of family member. The wording of art. 199 of the Pen Code does not reveal the crime of domestic violence as a crime in its own right but considers it as an aggravating circumstance in the case of the deeds stipulated in art. 188 and art. 189 pen Code as well as art. 193-196 pen Code. Therefore, the crime of domestic violence is not sanctioned separately but only comes to increase the special maximum of the punishment applied for committing one of the previously listed offenses.

This understanding of the crime of domestic violence is congruent with the practice of the criminal investigation phase, when in parallel with the issuance of an OPP, the case

*CRIMINAL MEANS TO COMBAT DOMESTIC VIOLENCE – GUARANTOR OF THE
PERSON'S SAFETY. STATE OF THE ART AND PERSPECTIVES*

prosecutor finds, on the background of the situation of domestic violence, the perpetration of some offenses provided by the above-mentioned articles and orders the formation of a criminal file in terms of committing those offenses, continuing the criminal prosecution that can end with the sanctioning of the aggressor.

1.3. Rules on the prevention of relapses

Under Law nr. 252/2013 on the organization and functioning of the probation system and gd no. 1079/2013, which approves the Regulation for the application of the law, at the level of the Ministry of Justice carries out its activity in the direct coordination of the minister, the National Probation Directorate. This direction aims at the social rehabilitation of offenders, maintaining safety in the community by decreasing the risk of relapse. Also, the probation system reduces the social costs of executing sanctions, offenders being reintegrated into the community and into labor relations.

At the level of each county there is a local probation service, composed of probation counselors, who:

- carries out the evaluation of the defendants ex officio or at the request of the judicial bodies.
- supports the court in individualizing the punishments and educational measures.
- supervises the observance of the measures and the execution of the obligations established by the court in the charge of the persons it supervises (<http://www.just.ro/directia-nationala-de-probatiune>, accessed on 02.11.2021).

The violation of the protection order by the aggressor is a crime, which is punished, according to law 183/2020, by imprisonment from 6 months to 5 years, whether it is a temporary protection order, or the protection order issued by the court.

A series of studies at national level, published by NGOs fighting for women's rights, between 2012 and 2018, show that, on the one hand, the average duration of obtaining a protection order has decreased from 33 days in 2013 to about 7 days in 2017, which considerably decreases the risk of violence in the form continued in the period between the moment of the referral and the issuance of the protection order. With the introduction of the provisional protection order (OPP) in 2018, this risk is at least theoretically canceled. Things are not as good regarding the violation of the protection order, at the level of 2018 being registered 1424 such offenses, which means that approximately 1/3 of the issued POs were violated (<http://www.fundatiasensiblu.ro/wp-content/uploads/2015/02/Studiu-la-nivel-national-ordine-de-protectie-decembrie-2013.pdf>, accessed on 02.10.2021; <https://transcena.ro/wp-content/uploads/Retea-VIF-studiu-2017.pdf>, accessed on 02.10.2021).

From the IGPR data, in the first half of 2019, 16585 criminal acts of domestic violence were notified, 3016 protection orders were issued and 3034 OPP. There were 766 offenses of non-compliance with the PO and 236 offenses of non-compliance with the OPP, which indicates, proportionally, a slight decrease compared to the previous year.

There are no impact studies yet on the effects of Law no. 183/2020 that tightens the sanctions for violating the protection orders. However, I can say that the simple legislative amendment, in the absence of adequate surveillance and intervention measures, will not have a significant impact.

In this respect, it is necessary to implement the electronic surveillance bracelets provided by Law no. 97/2020 currently in the stage of parliamentary debate. These bracelets are already a good practice in other European countries, such as Austria, Sweden and Norway. By way of example, in a 2016 article Henneguella et al. studies the effect of electronic bracelets on recidivism in France, showing that their implementation decreases the likelihood

of relapse by 9 to 11%, which has important economic effects. There are also studies for the UK (Hucklesby & Holdsworth, 2016).

LEGISLATIVE EVOLUTION

Regarding the provisions of the civil legislation, I summarize below the main amendments to Law 217/2003, on three main levels:

A. Completing and nuanced the notion of domestic violence:

- **Law nr. 25/2012**, which substantially completes art. 2 of the initial law, in the sense that it expands the spectrum of domestic violence (initially understood only as physical, verbal, and sexual violence), by including psychological, economic, social, and spiritual violence.
- **Law nr. 106/2020**, which defines more broadly the notion of domestic violence and introduces a new notion, that of cyber violence as well as a series of duties of some state institutions regarding the combating of the phenomenon of domestic violence.

These two amendments led to an extension of the notion of domestic violence that currently includes all the situations encountered in current practice, being also aligned with the definition of this notion at European level.

B. The broader and more precise definition of the notion of family member:

- **Law nr. 25/2012**, which completes art. 3 of the initial law, which defined the notion of family member in a very narrow sense, significantly broadening the definition, as follows:
 - a) ascendants and descendants, brothers and sisters, their children, as well as persons who have become such relatives by adoption by adoption, according to the law.
 - b) the spouse and/or former spouse.
 - c) persons who have established relations like those between spouses or between parents and children if they are living together.
 - d) the guardian or other person exercising in fact or in law the rights towards the person of the child.
 - e) the legal representative or other person caring for the person with mental illness, intellectual disability, or physical disability, except for those who perform these duties in the performance of professional duties.

However, the law maintains the condition of cohabitation of family members, which will be eliminated by CCR Decision no. 264/2017, which dismissed the exception of unconstitutionality and finds that the phrase "*if they live together*" from the content of art. 5 lit.c) of Law no. [217/2003](#) for preventing and combating domestic violence is unconstitutional.

C. Streamlining the measures for the protection of victims and tightening the sanctions for violating the protection order

- **Law nr. 187/2012** for the implementation of Law no. 286/2009 on the Criminal Code, amends art. 32 of Law no. [217/2003](#) as follows:

Infringement of any of the measures referred to in Article 23 (2) (a) shall be replaced by the following: (1) and ordered by the protection order shall constitute the offence of non-compliance with the court decision and shall be punished by imprisonment from one month to one year. Reconciliation removes criminal liability."

Subsequently, by **Law no. 183/2020**, these sanctions were much tightened, as follows:

1. Infringement by the person against whom an order for the protection of any of the measures referred to in Article 23 (1) has been issued. (1), (3) and (4) lit. a) and b) and

CRIMINAL MEANS TO COMBAT DOMESTIC VIOLENCE – GUARANTOR OF THE PERSON'S SAFETY. STATE OF THE ART AND PERSPECTIVES

ordered by the protection order constitutes a criminal offence and is punishable by imprisonment from 6 months to 5 years.

2. *Infringement by the person against whom an order for the provisional protection of any of the measures referred to in Article 22⁴ (2) has been issued. (1) and ordered by the provisional protection order constitutes an offence and is punishable by imprisonment from 6 months to 5 years.*"

- **Law 174/2018**, which introduces the provisional protection order, which can be issued directly by the police, when the criteria of severity and speed provided by law are met.

We note from the enumeration of these changes that progress has been made both in the sense of more precise circumscribing of the phenomenon and in that of streamlining the protection of victims, respectively of sanctioning the aggressors.

In its current form, the special law is, therefore, mainly oriented towards providing prompt protection to the victims, so it has a broader meaning and insists more on identifying the sources of violence, both in terms of its types and in terms of categories of perpetrators, while the criminal code envisages the qualification of the deed as a crime and less some detailed classifications.

In criminal matters, the offenses of domestic violence are found in Title I, chapter. III – Crimes committed against a family member, which includes only two articles, art. 199 – *Domestic violence* and art. 200 – *Murder or injury of the newborn committed by the mother*.

Apart from the articles to which art. 199 of the Pen Code refers and about which I mentioned before, there are also to be considered a series of articles of the Criminal Code that are circumscribed, in my opinion, in the sphere of the crime of domestic violence, as follows:

- **Art. 197 – *The ill-treatment of the minor***, a crime that in the Criminal Code of 1969 was part of the chapter of offenses against the family and by extending its scope in the new Criminal Code, was included in the chapter dedicated to the offenses against the person, which a person can commit, regardless of the nature of the relationship with the assaulted minor. I believe that for this offense, the circumstance of its commission by a family member of the minor should be provided separately, in which case the provisions of art. 199 of the Pen Code should be applied.
- **Art. 211 – *Trafficking in minors***, a crime for which the aggravated form is not provided in the case of its perpetration by a family member of the minor, although I consider that these situations are encountered in practice and their sanctioning accordingly should be found in the text of the article.
- **Art. 220 – *Sexual intercourse with a minor*** and **art. 221 – *Sexual corruption of minors***, which although they explicitly provide for the aggravated circumstance of their commission by a relative in direct line, brother or sister of the minor and the increase of the punishment limits, are not mentioned in the enumeration in art. 199 as crimes of domestic violence.

In conclusion, I think it is useful to extend the enumeration from art. 199 Criminal Code, with the inclusion in the sphere of domestic violence offenses and those provided for in the above-mentioned articles.

FINAL CONSIDERATIONS

From the examination, briefly, of the socio-cultural context, as well as of the legislative corpus relevant for domestic violence, both in civil matters (Law 217/2003, with subsequent additions and modifications), as well as in criminal matters, the following conclusions are drawn:

- Undoubtedly, significant progress has been made in the legislative plan, in the sense of unifying the legislation and harmonizing it with the European trends. Specifically, in relation to the aspect that interested me, in the present work, that of protecting the victims, I highlighted the introduction of new elements (such as the provisional

protection order) intended for immediate protection, when the situation requires it, respectively the increase of punishments, to discourage, as much as possible, such attitudes on the part of the aggressors.

- However, there are, in my opinion, necessary improvements. As we note, the protection of victims is ensured especially by the civil legislation, respectively the special law. A better protection, in criminal matters, can be ensured by broadening the spectrum of the crime of domestic violence, as we have shown, respectively by nuancing the conditions in which the penalties for other offenses are increased, for which the aggressor's family membership is an aggravating circumstance.

I also come back to the need for terminological unification – domestic *violence* in the special law, in the sense of alignment with the term used in European legislations, but domestic *violence* in the Criminal Code, which leads to non-unitary approaches in the practice of the courts and to the restriction of the spectrum of sanctionable deeds, under the aspect of committing the crime of domestic violence.

BIBLIOGRAPHY

1. Filip, O.L., Popp, E.L., Andrioni, F. (2019) Domestic violence: a determining factor in the socio-emotional development of children, *University Journal of Sociology*. Year XV, no. 2/2019, pp. 161-167
2. Irimescu, G. (2006) Social protection of the abused child, Editura Universității "Alexandru Ioan Cuza", Iași, Romania
3. Kaya, Y., Cook, K.J. (2010) A cross-national analysis of physical intimate partner violence against women. *International Journal of Comparative Sociology* 51(6), pp. 423-444
4. Mossige, S., Dyb, G. (2009) Voldsutsatte barn og anoint i Oslo. Forekomst og innsatsområder for forebygging, Oslo, Norsk institutt for forskning om oppvekst, velferd og aldring og Nasjonalt kunnskapssenter om vold og traumatisk stress
5. Tunduc, A. (2020) When intimate partner violence becomes femicide: A socio-legal analysis of the Romanian legal framework in light of the Istanbul Convention, Master Thesis, Umeå University, Faculty of Social Sciences, Department of Law, urn: nbn:se:umu: diva-173855
6. Vrabiescu, I. (2019) Creating solidarity: Intimate partner violence (IPV) and politics of emotions in a multi-ethnic neighbourhood in Romania, *European Journal of Women's Studies*, Volume 26 issue 2, pp. 150-164
7. Wimmer, J. S., Harrington, P. A. (2008). Domestic violence services in Romania: A longitudinal case study, *International Social Work*, 51(5), pp. 623–63