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A JURISPRUDENTIAL ANALYSIS REGARDING THE SANCTIONING OF THE VIOLATION OF THE PROTECTION ORDER CRIME FROM THE PERSPECTIVE OF LEGISLATIVE EVOLUTION

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Abstract

At the phenomenon of domestic and couple violence has generated in recent decades, both at global, European and national level, a multitude of debates in the public space, aimed at both highlighting the phenomenon and the most appropriate measures to adopt in order to limit it. Among these measures, one of the most effective, at least in the short and medium term, is the establishment of a protection order. Although the special civil Law no. 217/2003 on preventing and combating domestic violence did not provide for this measure at the time of its adoption, it was necessary to introduce it after the famous "Perla Hairdresser" case in Bucharest, in which a woman was killed at work, despite having previously made several complaints against her husband, who was a firearm owner and user by profession. This article aims to study from a legislative and jurisprudential point of view the evolution of the regulation of the protection order and the provisional protection order, in particular with regard to the sanctioning of its violation.

Keywords: *protection order (OP); provisional protection order (PPO); domestic violence; the offence of violating the protection order and that of the provisional protection order.*

INTRODUCTION

Prior to 1990, various forms of family and domestic violence were treated as normal ways of relating. The opening up of our country and its accession to new European and international bodies, such as the Council of Europe and, much

later, the European Union, has led to a common approach to the problem of these forms of violence, which exist in all societies and are present on all social levels.

In Romania, the state's first reaction was of criminal nature.

Thus, the criminal legislation on family and domestic violence has evolved from the regulations adopted in 2000 *(Law no. 197/2000),* which involved the creation of aggravated forms of the offences of assault and other violence *(Art. 180 of the previous Criminal Code)* and simple bodily harm *(Art. 181 of the previous Criminal Code)* to the current ones present in the Criminal Code, which includes a separate criminal type of family violence *(Art. 199 of the Criminal Code).* Despite the fact that the crime of domestic violence is provided for in a separate article, most doctrine *(Pușcașu, 2014, p. 437; Boroi, 2014, p. 95; Pușcașu, Ghigheci, 2021, pp. 122-123)* and jurisprudence still consider this offence only an aggravated form of the offences to which it refers, namely: the offence of assault and other violence (Art. 193 CC), bodily harm (Art. 194 CC), simple and qualified murder (Art. 188-189 CC) and the offence of blows and injuries causing death (Art. 195 CC).

At the same time, the crime of killing or injuring a newborn child immediately after birth is also considered a form of domestic violence (Art. 200 of the Criminal Code), a crime that should have been placed in another chapter, given its criminogenic substrate and very different personal and social motivations from the rest of domestic violence.

But alongside the development of criminal law regulation, which can still be much improved, there is an even more dynamic development of civil law in this area. The adoption in August 2003 of Law no. 217/2003 on preventing and combating family violence, which later became domestic violence in 2018, was an important step in creating effective means of dealing with and limiting the phenomenon of relational violence, especially in the private sphere. According to IGPR statistics for 2018, 81% of domestic violence crimes are committed in the home of the parties (*Network for Preventing and Combating Violence against Women*, 2018), which makes it necessary, and at the same time useful, to establish a victim protection order.

The introduction of the protection order for victims of domestic violence into the legislation in 2012 was created against the background of an increasing number of cases brought to the attention of criminal investigation bodies and in the media concerning such acts. Although the phenomenon seems to have had a slight decline in 2014 (probably due to changes in criminal legislation, following the entry into force of the two Codes: Criminal and Criminal Procedure), it has recorded steady increases from 2015 to the present (*The National Agency for Equal Opportunities for Women and Men, Monitoring report on the status of implementation of the Operational Plan for the implementation of the National Strategy on promoting equal opportunities between women and men and*

preventing and combating domestic violence for the period 2018-2021, 2018, p. 6).

In order to create effective remedies against domestic violence and violence against women, Law no. 217/2003 has been amended 16 times so far, being subject to both constitutionality review (CCR Decision no. 264/2017) and interpretation by the ICCJ in its Decision no. 50/HP/2020.

Legislative mobility at national level has followed in these cases the dynamics of European regulations, especially those at the level of the Council of Europe, especially after the adoption by Romania of the Convention on preventing and combating violence against women and domestic violence, also known as the Istanbul Convention *(Marinică, 2021)*, as well as the international ones at the level of the UN Parliamentary Assembly.

At the same time, it highlighted a phenomenon that is present but still hidden in people's consciences and homes, not only in our country but everywhere.

I. PRESENTATION OF THE LEGISLATIVE CHANGES WHICH LED TO THE INTRODUCTION OF THE PROTECTION ORDER AND THE PROVISIONAL PROTECTION ORDER

In accordance with the provisions of Art. 52 and 53 of the Istanbul Convention, the signatory States have an obligation to introduce in their legislation, if they do not already have them, protection orders and urgent restraining orders, as mechanisms for the defense of victims, either in an acute state of need or in the position of habitual victims of domestic violence by their partner in particular.

Romania's ratification of the above-mentioned Convention in 2016 led to the adoption of some of the most significant and multiple amendments to Law no. 217/2003 since its adoption, along with those produced in 2012.

However, since in this article we have set out to analyze the legislative history in this field, it is important to recall the original legal provisions and the evolution of regulation over time, in order to be able to appreciate the current situation, both legislatively and jurisprudentially.

In its original version, Law no. 217/2003 on preventing and combating domestic violence did not provide for any offences in case of violation of its provisions, but only for a series of misdemeanors. The only legal provision referring to criminal proceedings (Art. 26 of Law no. 217/2003 in its original form) provided that, *ex officio* or on request, if the prosecution authorities or the court were to find that there was definite evidence or strong indications that violence causing physical or mental suffering had been committed, they could provisionally order one of the following safety measures: ordering medical treatment (Art. 113 previous CC), medical internment (Art. 114 previous CC;

*(Vlădilă, Mastacan, 2012, pp. 249-258)*or, ineffectively, the prohibition to return to the family home *(Art. 116 previous CC; Vlădilă, 2007, pp. 131-140).*The adoption of any of these measures implied, first of all, the existence of a criminal trial and, in addition, a long period of time; as for the prohibition to return to the family home, which seemed more like a complementary punishment, it could only be ordered if the defendant was convicted, which presupposed that a considerable period of time had passed since the assault.The effectiveness of such a measure, as I pointed out on another occasion, was almost nil, especially in cases of domestic violence, where the need for the state bodies to react must be ultra-rapid. These legal provisions remained in force until the legislative changes in May 2012.The lack of pragmatism of these legislative measures has been highlighted by the contradictions that have arisen between the slowness or sometimes the lack of responsiveness of criminal investigation bodies to the growing needs of victims for protection. The effect ? *The case of "Perla Hairdresser" Bucharest*.

I will not repeat the details of this case, but it is necessary to note that in May 2012 this case led to one of the most important legislative changes adopted since 2003 in the content of Law no. 217/2003. Following these changes, the law was republished for the first time.Following the adoption of Law no. 25/2012 (Official Gazette of Romania, no. 365/13 May 2012) Chapter IV on the Protection Order (proper) was introduced.The chapter has comprehensively regulated the situation of this legislative and practical means of protection for victims of domestic violence; according to Art. 23 (of the regulations adopted after 2012), the protection order is the procedural means by which a person whose life, physical or mental integrity or freedom is endangered by an act of violence by a family member is protected; the law has created several measures that can be ordered by the court, which have proved, in the 11 years of application, very useful and even necessary.

Also, at this time of legislative change, a special or qualified form of the offence of failure to comply with a court order (Art. 287 of the Criminal Code) was introduced in the art. 32 of Law 217/2003, who was intitle similar to the one prevent by the Criminal Law, as: the offence of non-compliance with the court order. The penalty was only with imprisonment from one month to one year.

The legal provisions as originally adopted created the impression of a regulatory mismatch. On the one hand, the law gave offenders the impression of leniency, as it provided for the possibility of reconciliation of the parties/remission (after the entry into force of the current Criminal Code), and on the other hand, it imposed a sentence of execution only or possibly the execution of the sentence at work (a possibility that existed only until 2014, but rarely used in practice, especially in such cases).

That is why, in the same year of its adoption, the text as originally proposed was amended by Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code (Art. 134), removing the provisions of Para. 2,

which provided for the impossibility of applying conditional suspension of the execution of the sentence, keeping intact the other provisions.In any case, after the entry into force of the current Penal Code, the text of Para. 2 would have been obsolete, as the institution of conditional suspension of the execution of the sentence no longer existed. The effectiveness of the provision on reconciliation as a ground for removing criminal liability remains to be examined. Was it a benefit for the victim or for the offender?

From a jurisprudential point of view, we have encountered enough situations, from some apparently lighter ones, presenting minimal social danger, to some even very serious ones, in which the parties to the dispute have nevertheless reconciled.In this context, I will recall the case of an aggressor who, after a protection order was issued against him, violated it 6 times for 33 days, threatened the victim, destroyed certain property and committed the crime of housebreaking 6 more times, yet the beneficiary of the protection order reconciled with the offender (Bacău Court of Appeal, Decision no. 1107/2016).In another case, the perpetrator was present for 4 days at the victim's home, his sister, violating the protection order that required him not to approach the victim's home at more than 50 m, and also committed the offence of culpable destruction by arson, forgetting a lit candle in the house, being sentenced for this last act, only to a fine of 4500 lei (Bacău Court, Sentence no. 1815/2018). Another serious situation in which the parties reconciled, their family relationship being that of son-aggressor and elderly parents, was that in which the son, a shepherd by profession, violated the protection order three times "causing them serious and unbearable mental disorders" (Sibiu Court, Judgment no. 10/2015).

Situations in which the violation of the protection order was manifested with minimal physical effects or the offence was only one of danger, we encountered when the aggressor against whom a protection order had been imposed for a maximum period of 6 months (at that time), returned 3 months after its imposition, to wash his working overalls in the common home and although he was warned by his children that he was violating the court order, he still ignored it and stayed there until the police arrived and found that the offence had been committed *(Galati Court, Sentence no. 410/2018)*;or the situation where, dissatisfied that a protection order had been issued against him, the husband insulted the victim, who called the police for his protection (Sibiu Court, Judgement no. 345/2016) or the case of a husband against whom a protection order had been issued who met his wife on the street and approached her a few meters away to talk to her *(Oradea Court, Judgement no. 92/2017).*

As we can see, the cases range from the most serious to some seemingly harmless situations.

However, until an optimal solution is found, the Romanian legislator has made other changes regarding the issuance of the protection order.

II. ANALYSIS OF THE LEGISLATIVE AMENDMENTS CONCERNING THE PROVISIONS OF ART. 32/47 OF THE LAW NO. 217/2003

Thus, the next change concerning the implementation of the protection order was ordered by Law no. 272/2015 (Official Gazette of Romania, no. 842/12 November 2015), in order to complete the provisions of Art. 31. In this context, which aimed to ensure the speedy protection of the victim, the law provided for the need to communicate the protection order to the police authorities in the area of residence of both the victim and the aggressor, if they are different, within a maximum of 5 hours after the court has issued it.

The amendments made by Law no. 351/2015 (Official Gazette of Romania, no. 979/30 December 2015) were also made for the same purpose, requiring the courts to hear the case within 72 hours from the time of the referral, the participation of the prosecutor being mandatory (Art. 27).

Law no. 35/2017 (Official Gazette of Romania no. 214/29 March 2017) added to Art. 23, in the sense that it allowed the court to require the aggressor to report regularly to the police in order to verify compliance with the protection order, but also to require him to inform the same bodies of his housing situation, if the court had ordered his eviction from the common dwelling. The new provision was intended to create a greater police presence in the offender's life, direct and immediate contact with the offender, to discourage him from violating the order and causing further harm to the victim. With regard to violations of protection orders, the statistical situation shows a constant percentage of about one third of court decisions not respected, which justifies the introduction of such a provision. For example, in 2016 a percentage of 28.86% had been violated, in 2017, protection orders violated amounted to a percentage of 33.7%, for 2018 the percentage was 37.72%, and in 2019 it decreased to 09.69% (Romanian Government Press Release, 2016-2017; ANES, 2018, p. 10; OSSPC, 2021, p. 19). However, even if the percentage seems similar, it should be noted that the number of protection orders issued by the courts has been and is increasing from year to year; therefore, the number of offences of violation has been and is increasing. It is, in my opinion, what has justified, since 2018, the adoption of a firmer criminal policy than previously towards such acts.

In the context of strengthening measures to ensure the protection of victims, the next legislative act that significantly amended the provisions of the law on preventing and combating domestic violence was Law no. 174/2018 (Official Gazette of Romania, no. 618/18 July 2018). The normative act in question was promoted in the Romanian public space after the ratification of the Istanbul Convention by Law no. 30/2016, being necessary to bring the national provisions in line with this convention, which the Constitutional Court considers a genuine treaty promoting human rights (CCR Decision no. 264/2017).

From the perspective of our present research, the new law brought several significant additions: it changed the name of the law from family violence to

domestic violence; it redefined certain forms of violence from those specified under Art. 4, it extended the application of the protection order to the situation of partners who are no longer living together, it gave the possibility to Probation Services to work with persons convicted of crimes, which are classified as forms of domestic violence according to Law no. 217/2003 and not the Criminal Code (thus widening the scope of work), enabled the courts to order the aggressor to wear an electronic protection system, introduced the possibility for the police to grant a provisional protection order for 5 days, required the person protected by the protection order to comply with it, last but not least, it removed the possibility of reconciliation as a means of extinguishing criminal proceedings in the case of the offence of violation of the protection order itself, by criminalizing a new offence, namely that of violation of the provisional protection order, which has a similar constitutive content to the previous one, differing only in the prerequisite situation (in the first case a protection order is issued and in the second case a provisional protection order). Renumbering of the texts as a result of republication, the text of Art. 32 has become Art. 47 with two paragraphs.

At the same time, Law no. 174/2018 removed the name of the offence from its content, which leads us to believe that the legislator intended, among other aspects, to change its special legal object, from a special offence of non-compliance with a court order (Boroi, 2014, pp. 412-413), into an offence, also against the administration of justice, but which has its own special legal object, clearly defined, in which the idea of a protection order and the family relationship between the parties is essential and not necessarily the fact that this order is issued by a court decision, which in the case of the offence under Art. 32 Para. 1 (at that time) may be a special secondary legal object.Also, it should be noted that the name of the offense provided for by Art. 32 Para. 1 may have also been determined by the new criminalization of the violation of the provisional protection order, which is ordered by the police bodies, so that a unitary regulation was required, which also involved a new conception of the special legal object of the two crimes, according to the shown above.

The last two changes, but the removal of the possibility of conciliation, are the result of strengthening the legal and effective protection of the victim that I mentioned previously. As I tried to show through the presented cases, I found the existence of enough situations in which the parties to the criminal litigation reconciled, which gave a low efficiency to the incriminating provisions. The feeling of impunity because of reconciliation has in many cases weakened the firmness of the arm of the criminal law and the institution of the protection order. In this sense, in a study carried out on domestic violence, one of the interviewed victims specified that, in Spain, even if the victim agrees to "forgive the aggressor", still by violating the protection order the person is convicted and then either he or other people who would be in the same situation "... maybe they think

twice, before doing something because they know that they are not forgiven" *(CCSAS, p. 121).*

However, for the acts of non-compliance with the protection order, I noticed that there are more cases in which the courts either ordered the conviction of the defendant but applying the provisions of Art. 91 of the Criminal Code regarding the suspension of the execution of the sentence under supervision, or they have chosen the solution of postponing the application of the sentence (Art. 83 et seq. of the Criminal Code). For example, in a case in which the aggressor against whom a protection order was ordered, the very next day after this, he went twice to the victim's residence, thus violating the ordered order; in this case, the court established the penalty of 6 months in prison, along with the complementary penalty of the prohibition of certain rights for its minimum duration of 1 year, but postponed its application, establishing a term of supervision of 2 years. Although, in general, we appreciated those courts that also imposed the complementary punishment, even if the law does not impose it, nevertheless, in this case, as a result of the solution chosen to sanction the defendant, the court could not order the application of a complementary punishment; in addition, the choice of the rights that were prohibited was not very inspired either, since they had nothing to do with the type of crime and the protection of the victim (the prohibition of the rights provided for by Art. 66, Para. 1, Let. a)-b) CC was ordered in the case; District Court 6 Bucharest, Sentence no. 118/2021).

In another, more serious case, in which the aggressor committed a combination of four offences, namely: assault and other violence in simple form (Art. 193 Para. 1 of the Criminal Code), continuous threat (Art. 206, with the application of Art. 35 Para. 1 of the Criminal Code) that he would kill the victim and set fire to her/his home, an act which also occurred a few days after the threat, leading to the classification of aggravated destruction by arson (Art. 253 Para. 1 and 4 of the Criminal Code) and violation of the protection order (Art. 47 of Law no. 217/2003, with the application of Art. 5 of the Criminal Code), the court established a prison sentence of 7 months for the offence provided for by the special law, and the application of the provisions on concurrent offences resulted in a final sentence of 2 years and 11 months, of which 7 months had already been spent in pre-trial detention. Taking into account that "the defendant, aged 63, retired, with a good conduct in society prior to the commission of the offences, where he was known as a quiet person, good housekeeper, skilled woodworker, who is in his first conflict with the criminal law, suffering from several illnesses and had a largely sincere attitude, admitting and regretting during the criminal proceedings what had happened", his own daughter giving a good characterization, the court chose the prison sentence but, ordering its execution to be suspended under supervision. However, the court of judicial review, the Iasi Court of Appeal, by Decision no. 158/2022, criticized the application of the suspended sentence, since, in its assessment, "it was necessary to establish much

more severe penalties, dosed towards the environment of the special limits of punishment", because "the judicial bodies have the obligation to react firmly, through effective, proportionate and dissuasive measures, which take into account the particularities of acts of domestic violence – a serious and often hidden social problem that could cause systematic psychological and physical trauma, with severe consequences", so that this would have led to the imposition of a sentence with execution.

With this example, however, we move on to the last legislative amendment of the offences analyzed in this study, namely Law no. 183/2020 (Official Gazette of Romania no. 758/19 August 2020), which amended the penalty for the two offences from 1 month to 1 year, to 6 months to 5 years, and, in addition, increased the application of the material element, in the sense that it was established that it is an offence to violate several measures ordered by the protection order, extending from Art. 23 Para. 1, 3 and 4 Let. a)-b) of the Law no. 217/2003.

Therefore, given the date of commission of the offence and the date of the trial both in the previous case presented (Decision no. 158/2022 of the Iasi Court of Appeal) and in the case I am going to present at the end of this study, the two higher courts applied the provisions of Art. 5 of the Criminal Code, i.e. they chose Law no. 217/2003 prior to its amendment in August 2020 as the more favorable criminal law on the basis of the criterion of lighter criminal sanctions.

As already mentioned, in the next case I wish to present, the defendant, against whom a protection order had been issued the day before, arrived at night (2.45 a.m.) at the victim's home and set fire to two cars, one of which belonged to the victim and the other to the victim's mother. In this case, the court held that there was a concurrence of offences between the offence of violation of the protection order (Art. 47 Para. 1 of Law no. 217/2003), for which the defendant was sentenced to 1 year and 6 months of imprisonment, and the offence of aggravated destruction (Art. 253 Para. 1-4 of the Criminal Code), for which he was sentenced to 2 years of imprisonment, resulting in a final sentence of 2 years and 6 months of imprisonment, which he was sentenced to serve. The Bucharest Court of Appeal, as a court of judicial review, rejecting the defendant's appeal against the sentence set by the first instance, found that the operation of individualization is an important but also sensitive operation in the machinery of the criminal trial, which is why one of its roles is to "restore social peace and reintegrate the legal order". Specifically, in relation to the acts committed by the defendant, the Bucharest Court of Appeal "notes the defendant's total disregard for the need to respect the rules of social coexistence. In the conscience of any man of good faith, the existence of a protection order in his name should awaken a sense of awareness of the situation in which he finds himself", and "by violating the protection order and setting fire to a car that was in front of the dwelling

where the persons protected by the protection order lived, the defendant demonstrated defiant and violent behavior. He simply cannot censor his behavior (even though there is a protection order which he has to take into account), which leads to the conclusion that at any time the situation could degenerate and the defendant could commit acts with much more serious consequences".

Even if it does not directly concern offences under Art. 47 of the special law, it has also been amended during 2021 and this year (2023), both of which will be specified below. By Law no. 146/2021 on electronic monitoring in judicial and criminal enforcement proceedings (Official Gazette of Romania no. 515/18 May 2021), the use of the Electronic Monitoring Information System (SIME) was established also in case of application of the provisional protection order and the protection order itself (Art. 1 Para. 2, Let. c) of Law no. 146/2021), and by Law no. 240/2023 (Official Gazette of Romania no. 669/20 July 2023) the period for granting the protection order was extended from 6 months to 1 year (12 months), which, however, can no longer be extended, as in the previous regulation.

CONCLUSIONS

I mentioned at the beginning of the article that this analysis over time of the provisions that amended Law no. 217/2003 will help us to perceive their true value; of course, we were also able to do this on the basis of a study of the case law that accompanied those legislative amendments, as well as official statistics, as we have also sought to do. Based on all the material studied, it emerged that the law under discussion has undergone a number of changes, in a rapid manner, sometimes even several times in one year (e.g., in 2012, 2015, 2018 or 2020), but that these were determined by the rapid adaptation of the laws to the factual situation. Perhaps some of the contributing factors were Romania's convictions at the ECHR on domestic and gender-based violence, which will be the subject of a study in another article; perhaps spurred on by the Western trend, by Western trends in legislative changes, but also by our integration into the Council of Europe, the European Union and the UN, these changes were self-imposed.

Were they necessary? Were they welcomed?

Our answer is without hesitation: yes, in both cases. The analysis of the case law we conducted for this article showed the difference in the perception of the courts between the situations prior to the 2018 amendments and afterwards, with the tightening of the criminal law response, but also between courts of different ranks, with higher courts considering that sentences with execution were imposed in the cases presented.

What else should be done? Is it enough just to increase penalties?

In the vast majority of cases where our legislature has chosen as its only penal policy the creation of too high penalties for crimes committed, on a large scale, I considered and still consider that it was not a viable solution unless it came with other changes in the social and economic environment.

In this case, the policy of harsher punishments has been carried out against the backdrop of important legislative additions and the creation of social structures (SPASs, DASs, DGASPCs, as well as mobile teams working within them), legal structures (creation of the protection order and the provisional protection order) and administrative structures (creation of ministerial structures – ANES) which have supported this trend of impunity, in the sense that they have come to the aid of victims, who no longer find themselves at the discretion of the perpetrators, finding support in the criminal investigation bodies and the courts, as well as in the social services, but also in order to counter the aggressive actions which are increasingly coming to light in this period. The number of protection orders increasing year on year is proof of this.

However, tougher sanctions alone are not enough, as we well know; they need to be complemented by a policy of firm and immediate enforcement, without regrets and evasions, without hesitation. As Beccaria said, "the cruelty of punishments...would only be useless and contrary to justice and the social contract itself" (Beccaria, 2001, p. 40).

There are still steps to be taken; linking the actions and activities of the administrative, judicial and medical institutions involved is one of them. Education, the creation of new, harmonious, happy patterns of relationships in the collective subconscious, are other steps. But each of them requires time and patience on the part of all those involved.

Everything that has been achieved so far gives us hope; that is why I prefer to end the article on an optimistic note, showing that the solutions are within Romanian society and therefore within our reach.

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1. Iași Court of Appeal, Decision no. 158/2022
2. Bacău Court of Appeal, Decision no. 1107/2016
3. Constitutional Court of Romania, Decision no. 264/2017
4. Iași Court of Appeal, Decision no.158/2022
5. High Court of Cassation and Justice, Decision no. 50/HP/2020
6. Bacău Court of First Instance, Decision no. 1815/2018
7. Galați Court of First Instance, Decision no. 410/2018
8. Oradea Court of First Instance, Decision no. 92/2017
9. District Court 6, Bucharest, Decision no. 118/2021
10. Sibiu Court of First Instance, Decision no. 10/2015
11. Sibiu Court of First Instance, Decision no. 345/2016.