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PROTECTIVE MECHANISM IN CIVIL AND CRIMINAL MATTERS FOR VICTIMS OF DOMESTIC VIOLENCE

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Abstract
Domestic violence is a reality that is no longer ignored by the authorities who seek the most effective protective measures. The protection order is a protective mechanism designed to protect the victim by taking immediate measures to physically remove the aggressor and, under certain conditions, force him to follow detoxification programmes. The issuing of a protection order does not preclude the perpetrator from being held criminally liable when the conditions for this are met or from being given a custodial preventive measure. The protection order is a civil procedural measure, which removes a danger to the victim, and the preventive measure of preventive custody is provided for in criminal procedural law, which aims to remove a state of danger to public order.

Key words: *domestic violence, family member, protection measure, protection order, criminal liability.*

INTRODUCTION

The last century has been marked by a rapid evolution of society which has reconfigured all sectors of socio-economic life. In recent decades, society has become more aware than ever of the existence of a phenomenon that can no longer be ignored by the state authorities: domestic violence.

The escalation of the phenomenon of domestic violence has forced the Romanian legislator, as well as the authorities involved in the administration of

justice, to take steps to identify mechanisms to protect victims of domestic violence, not only in civil matters but also in criminal matters.

Judicial practice has shown that the application of a single instrument by the civil court to protect victims of domestic violence is not sufficient to put an end to the danger to which they are exposed.

The intensification of the Romanian authorities' efforts to counter domestic violence is also justified by the fact that 60% of the Romanian population "shows tolerance towards violent behaviour adopted in the family, which is considered as justified in certain situations" *(Andrei, L., Giurea, L. C., Palaghia, C.M., Domestic Violence, p. 11).*

In this scientific approach we will analyze the judicial practice of the Romanian courts from the perspective of the way in which the main mechanisms regulated by the Romanian legislation for the protection of victims of domestic violence are used, but also of the requirements imposed by the case law of the European Court of Human Rights.

I. STANDARDS IMPOSED BY THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights (hereinafter referred to as ECtHR) has repeatedly ruled, through several judgments in which it analysed the violation of Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, that the state authorities have a positive obligation to take all measures for the protection of victims of domestic violence, measures that are adequate to discourage and prevent this phenomenon, and when they are informed, by any means, of the existence of a case of domestic violence to conduct an effective official investigation (*D.M.D. v. Romania, M. and M. v. Croatia, Bălșan v. Romania, Buturugă v. Romania).*

In Balșan v. Romania, the ECtHR recalled that "Article 1 of the Convention, read in conjunction with Article 3, imposes a positive obligation on States to ensure that persons within their jurisdiction are protected against all forms of ill-treatment prohibited under Article 3, including where such treatment is inflicted by private persons. The Court also recognised the particular vulnerability of victims of domestic violence and the need for active state involvement in their protection." (*para.57, Judg. Bălșan case, application no. 49645/09, against Romania available https://hudoc.echr.coe.int/?i=001-173619*).

In the above-mentioned case, the ECtHR reiterated that States have an obligation to create "a system of sanctions for all forms of domestic violence and to provide sufficient safeguards for victims" *(para.57 above-mentioned Judgment).*

It should be pointed out that, in the view of the ECtHR, the fact that certain State authorities recognise that a person has been the victim of domestic violence and take measures, in accordance with the powers conferred on them by domestic law, for the protection of the victim does not exempt the other

authorities from fulfilling their positive obligation to carry out an effective investigation of the facts complained of or which they have learned or ought to have learned of in order to ensure real and concrete protection for the person who claims to be the victim of domestic violence (*Buturuga v. Romania case available at https://hudoc.echr.coe.int/?i=001-201342).*

In this case the ECtHR held that "Although the legal framework put in place by the respondent State offered the applicant some form of protection (supra, para. 65, s.n. the issuance of the protection order), it intervened after the acts of violence complained of and was unable to remedy the shortcomings of the investigation" (para. 72 of the above-mentioned judgment). Thus, even if the victim of domestic violence requested and obtained a protection order from the civil court, this did not relieve the prosecuting authority of its obligation to conduct an effective investigation of the facts and to provide guarantees and protection to the victim.

The ECtHR also ruled in another case that "Member States should endeavour to protect expressly and comprehensively the dignity of children, which in turn requires in practice an adequate legal framework to ensure the protection of children from domestic violence, which falls within the scope of Art. 3 and which includes: a) effective deterrence of such serious violations of personal integrity; b) reasonable measures to prevent ill-treatment of which the authorities knew or ought to have known; and c) effective formal investigations in cases where a person makes a substantiated complaint of ill-treatment" (*para.52 H.R. D.M.D. v. Romania case,* https://hudoc.echr.coe.int/?i=001-177226).

In ensuring the dignity of children, in the ECtHR's opinion, there can be no compromise in condemning violence against them, whether it is accepted as "tradition" or disguised as "disciplinary" action. It is clear that respect for the dignity of the child cannot be ensured if national courts accept any form of justification for acts of ill-treatment, including corporal punishment, prohibited under Article 3 (*para. 50 Hot, cited above*).

In the light of the ECtHR's ruling, it follows that the obligation to take all measures to protect victims of domestic violence is incumbent not only on the prosecuting authorities and the specialised criminal courts, but also on the civil courts. The state authorities must therefore be proactive.

II. STANDARDS AND OBJECTIVES IMPOSED BY INTERNATIONAL LEGAL INSTRUMENTS

Awareness of the phenomenon of domestic violence, to which the ECtHR has actively contributed and which through its case law has set standards in this area, has led to the emergence of the Council of Europe Convention on preventing and combating violence against women and domestic violence of 11.05.2011

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(*hereinafter referred to as the Istanbul Convention, ratified by Law No 30 of 17 March 2016*[1])

From the preamble of this Convention it was recognised that "women and girls are often exposed to serious forms of violence, such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called 'honour' and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men", including children who "are victims of domestic violence, including as witnesses to domestic violence".

The Istanbul Convention defined domestic violence as "all acts of physical, sexual, psychological or economic violence occurring within the family or domestic environment or between former or current spouses or partners, regardless of whether the perpetrator shares or has shared the same household with the victim" (*Article 3(b) of the legal instrument*).

This international instrument aims, among other things, to protect women against all forms of violence and to prevent, prosecute and eliminate violence against women and domestic violence (Article 1(1)(a) of the Convention).

In the light of the above, we can say that the main purpose of the Istanbul Convention is to protect victims of domestic violence. It is particularly important to note that one of the measures to protect victims of domestic violence is the adoption of measures aimed at rehabilitating and providing specialist assistance, not only to victims of violence, but also to the perpetrators.

Therefore, the Convention stipulates that States ratifying this international treaty will adapt their domestic legislation "to initiate or support programmes to teach perpetrators of domestic violence to adopt non-violent behaviour in interpersonal relationships, with a view to preventing further violence and changing violent behaviour patterns." (Article 16(1)) and "to initiate or support programmes designed to prevent perpetrators, in particular sex offenders, from reoffending" (Article 16(2)).

Furthermore, an obligation is established for States ratifying the international legal instrument to "take the necessary legislative or other measures to ensure that in criminal proceedings instituted for the commission of any of the acts of violence falling within the scope of this Convention, culture, custom, religion, tradition or so-called 'honour' shall not be regarded as justifying such acts". This refers in particular to allegations that the victim has violated cultural, religious, social or traditional norms or customs of appropriate behaviour." (Article 42(1)).

When offences are committed in the specific area covered by the Istanbul Convention, signatory States are required to adopt legislative measures to ensure effective, proportionate and dissuasive penalties (Article 45(1)) as well as to take

[1] Published in the Official Romanian Monitor, No 224 of 25 March 2016

other measures against offenders, including "monitoring or supervision of convicted persons; withdrawal of parental rights, if the best interests of the child, which may include the safety of the victim, cannot otherwise be ensured" (Art. 45(2)).

With regard to the prosecution and punishment of acts of domestic violence, the Istanbul Convention requires signatory States to adopt measures to ensure that this "shall not be wholly dependent on a report or complaint made by the victim if the offence was committed in whole or in part in their territory, and that proceedings may continue even if the victim withdraws his or her report or complaint" (Article 55(1)).

The Convention briefly analysed above is not the only international instrument which establishes the obligation of States to guarantee protection to victims of domestic violence.

The Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, an international instrument which was signed in New York on 6 September 2000 and which requires States Parties to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse". (Article 19).

At the same time, Directive (EU) No 29 of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA (published in the Official Journal of the European Union L 315/57 of 14.11.2012) provides in Art. 1 par. 1 the rights of any person who has been the victim of a crime, namely: "to be recognised as such from the moment of identification, to be treated with respect, professionalism, individualised protection and support, financial compensation and restoration of rights".

III. MECHANISMS FOR THE PROTECTION OF VICTIMS OF DOMESTIC VIOLENCE IN CIVIL MATTERS

In civil matters, the main mechanisms for the protection of victims of domestic violence were established by Law No 217/2003 on preventing and combating domestic violence[2] .

The Romanian legislator defined domestic violence as "any intentional act or inaction of physical, sexual, psychological, economic, social, spiritual or cyber violence, which occurs in the family or domestic environment or between spouses

[2] Republished in the Official Journal of Romania, Part I, No 948 of 15 October 2020, hereinafter Law No 217/2003

or ex-spouses, as well as between current or former partners, regardless of whether the aggressor lives or has lived with the victim" *(art.3 Law 217/2003)*.

The forms of manifestation of domestic violence are listed in art. 4 of this normative act, and it considers violence: verbal, psychological, physical, sexual, economic, social, spiritual and cyber violence.

In judicial practice, it has been appreciated that the respondent's act of continuing to try to enter the dwelling, even though the court had previously provisionally ordered the applicant and her children to enter it, having concluded an eviction report to this effect by a bailiff, thus creating a state of fear and anxiety for the appellant and the minors, justifying the admission of the civil action for the issuance of a protection order (*Civil Decision no. 546/2023 of the Court of Sibiu, available at* www.rejust.ro).

At the same time, it was established that the respondent's conduct took the form of verbal, psychological and cyber violence within the meaning of Article 4(4). 1 lit. a, b and h of the Law, when he addressed insults, insults and threats to the complainant, had acts of demonstrative violence on objects (overturning the garbage bin with the car), manifestations of jealousy, continuous attempts to control the complainant's life, following her and watching her home even during the night, making multiple phone calls and sending countless messages to the complainant which by their content create fear and stress. Harassing the complainant online, abusively using information and communication technology in order to shame, humiliate and frighten her (sending messages on Whatsapp containing threats, insults, including sending to witness X indecent pictures capturing intimate details of the complainant) are acts of violence (*Dec. civ. no. 107/2023 of 14.09.2023 of the Arad Court, available on* www.rejust.ro).

In order to comply with the standards imposed by the ECtHR in para. 50 of the Judgment in D.M.D. v. Romania, of 03.10.2017, the Romanian legislator has established a negative obligation for the authorities, namely not to accept in the case of domestic violence in any form and under any circumstances, that custom, culture, religion, tradition and honour be considered as justification for acts of violence (art. 4 para. 2 of Law no. 217/2003).

In civil matters, Law no. 217/2003 establishes that a family member means: "a) ascendants and descendants, brothers and sisters, spouses and their children, as well as persons who have become relatives by adoption, according to the law; b) spouse and/or ex-spouse; siblings, parents and children from other relationships of the spouse or ex-spouse; (c) persons who have established relationships similar to those between spouses or between parents and children, current or former partners, whether or not they lived with the offender, ascendants and descendants of the partner, and their brothers and sisters; d) the guardian or other person exercising de facto or de jure rights in relation to 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 exercise of their professional duties" (art. 5 (1)).

The Temporary Protection Order is the first instrument of protection for victims of domestic violence that is regulated in Law 217/2003.

Provided for in Chapter IV of Law 217/2003, the aforementioned instrument of protection is issued by the police officer who, in the exercise of his duties, finds that there is an imminent risk that the victim's life, physical integrity or state of liberty may be in danger as a result of acts of domestic violence (one such act being sufficient) and aims to reduce this risk (Article 28(1)).

When issuing this protection instrument, for a limited period of 5 days, the case officer, after assessing the factual situation he/she is faced with, orders one or more protection measures that he/she considers appropriate to reduce the risk found. The measures that the police officer may provisionally order are expressly provided for by Law 217/2003, and concern: the temporary eviction of the aggressor from the common dwelling, regardless of whether he is the owner of the property right; the reintegration of the victim and, where appropriate, of the children in the common dwelling; the obligation of the aggressor to keep a certain minimum distance from the victim, from the members of her family, as defined in Art. 5 or from the protected person's residence, place of work or educational establishment; order the perpetrator to wear an electronic surveillance device at all times and order the perpetrator to hand over to the police the weapons held (Art. 31 para. 1; for details, Franguloiu, S., "Necessity of full implementation of the electronic monitoring measure in case of application of alternative measures to detention", accepted for publication in the Journal of Criminalistics, Criminology and Penology, Romanian Society of Criminology and Criminalistics). It should be noted that this protection instrument is enforceable in the sense that the measures imposed are binding after its issuance without the passage of any period of time and without the need to summon the alleged aggressor, being necessary, however, to communicate it to the persons who were involved in the incident that led to its issuance, according to Article 32 para. 1 and art. 33 of Law no. 217/2003.

The legislator has established a presumption that the order issued by the police officer is deemed to have been served even if the offender refuses to receive it or to sign for it, and if he leaves the place where the order was issued, although he has been expressly told to wait for the outcome of the checks (*Article 33(3) of Law No 217/2003*).

The order issued by the police officer is subject to confirmation by the public prosecutor of the competent court within 48 hours of its issuance (Article 34(2) to (4) of Law 217/2003), and after confirmation, the Public Prosecutor's Office will submit to the court a request for the issuance of a protection order, to which it will attach the documentation underlying the issuance of this instrument and the confirmation (*Article 34(6) of Law 217/2003).*

The person against whom the provisional protection order has been issued has the possibility, within 48 hours of its communication, to lodge an appeal against it, which will be decided by the court in whose territorial district it was issued (Art. 35 para. 1).

A second instrument provided for by Law 217/2003 is the protection order, which the victim of domestic violence can apply for to the court, namely the court of his/her domicile/residence.

Victim of domestic violence (Art. 40 para. 2, 3) who considers that his/her life, physical or mental integrity or freedom is endangered as a result of the conduct of a family member, has the possibility to request the court to order, on a provisional basis, one or more measures, obligations or prohibitions consisting of "a) temporary eviction of the aggressor from the family home, regardless of whether he/she is the owner of the property; b) the reintegration of the victim and, where appropriate, the children, into the family home; c) the limitation of the abuser's right of use to only part of the common home where this can be shared in such a way that the abuser does not come into contact with the victim; d) the accommodation/placement of the victim, with his/her consent, and, where appropriate, of the children, in an assistance centre among those referred to in Art. 19; e) order the offender to keep a specified minimum distance from the victim, from the members of the victim's family, as defined in accordance with Article 5, or from the residence, place of work or educational establishment of the protected person; f) prohibiting the offender from travelling to certain localities or specified areas which the protected person frequents or visits regularly; (g) an obligation on the offender to wear an electronic surveillance device at all times; (h) a prohibition on any contact, including by telephone, correspondence or any other means, with the victim; (i) an obligation on the offender to hand over to the police any weapons he or she has; (j) the custody of minor children or the establishment of their residence; (k) a prohibition on the offender's receiving state child allowance and an order that the parent to whom the child has been entrusted for upbringing and education or with whom the child's residence has been established receive it. "(Article 38(1)).

In addition to these measures, the court may order the perpetrator to bear the costs of renting and maintaining temporary accommodation for the victim of domestic violence, her minor children and other family members (Article 38(3)) or to undergo psychological counselling, psychotherapy and may recommend voluntary commitment (Article 38(4)).

In judicial practice, it has been held by the courts that, under Article 38 para. 4 of Law no. 217/2003, that the aggressor must attend psychological counselling courses at the Assistance Centre for Aggressors in X., taking into account the self-control difficulties manifested by the respondent, the fact that more than 6 months have passed since the dissolution of the marriage without him being aware of the fact that the petitioner is free to interact with other male

persons, taking into account also the fact that the respondent is a drug and alcohol consumer, showing depressive behaviour (*Dec. civ. no. 107/2023 of 14.09.2023 of the Court of Arad, available on www.rejust.ro*)

In justified cases, the court has the possibility to request, under the terms of the Law on Mental Health and Protection of Persons with Mental Disorders no. 487/2002 (republished in the Official Journal of Romania, Part I, no. 652 of 13 September 2012), the non-voluntary admission of the aggressor; if the aggressor is a consumer of psychoactive substances, the court may order, with his consent, the integration in a programme of assistance to drug users *(art. 38 para. 4 Law no. 217/2003).*

If the civil court grants the application for a protection order, it may also establish control measures on the part of the authorities to monitor compliance with the obligations and prohibitions laid down, which may consist of an obligation for the aggressor to report to the police station designated to supervise compliance with the protection order at intervals set by the court; to provide information on the new home, if eviction from the family home has been ordered, and regular and/or spontaneous checks on the whereabouts of the person against whom the order has been issued *(Art. 38 para. 5 Law no. 217/2003).*

The court, having regard to all the circumstances of the case, has exclusive jurisdiction to decide on the duration of the protection and supervision measures referred to in the protection order, the legislature limiting itself, by Article 39 of Law No 217/2003, to laying down the maximum duration for which those measures may be ordered, namely 12 months from the issue of the order, and to establishing a presumption as to the duration of the measures if no mention is made in the judgment as to their duration, namely the maximum duration referred to above.

In order to ensure effective protection of victims, the legislator has established mechanisms to ensure that, in justified, urgent cases, the protection of the law is obtained, i.e. the protection order against the aggressor.

Thus, in order to remove the difficulties involved in drawing up an application for a protection order enabling the victim of domestic violence to obtain state protection as quickly as possible, a pre-established form is made available to the victim of domestic violence (Article 41(1), annexed to the Framework Law, and the police officer investigating the complaints, even if he considers that the requirements for issuing the temporary protection order are not met, is "obliged to inform the persons claiming to be victims of domestic violence about the possibility of making an application for the issuance of a protection order according to the provisions of Art. 38 and to provide them with the application form provided for in Art. 41." (Art. 28(5)).

The legislator has also removed any financial barriers by exempting civil actions for the issuance of a protection order from stamp duty *(Article 41(2) of Law 217/2003).*

With regard to legal aid, we note that, although Law 217/2003 provides that the legal assistance of the person requesting the protection order and of the aggressor is compulsory (Article 42(2) and (3)), the law does not specify the cost of the fees of the court-appointed defence counsel.

Under these circumstances, judicial practice is not uniform on this matter.

There are civil courts which consider that, since legal aid is compulsory, the fees of the public defender are to be paid out of the State budget and leave these costs to the State (in this regard, civil judgement. no.546/15.09.2023 of the Tribunal Sibiu, civil judgement no.193/07.06.2023 of the Tribunal Suceava, civil judgement no.107/14.09.2023 of the Tribunal Arad, civil judgement nr.1383/15.09.2023 of the Tribunal Iași) but there are also courts which oblige the plaintiff or the defendant to pay the fees of the lawyers appointed by the court (dec. civ.nr.1169/13.09.2023 of the Tribunal Dolj) *(all available www.rejust.ro).*

Regarding the court hearing, in order to protect the privacy and image of the parties, the legislator has established that the trial of civil actions concerning protection orders shall take place in chambers and, in view of the role conferred on the Public Prosecutor's Office by Article 131 of the Romanian Constitution as representative of the general interests of society and defender of the rule of law, with the mandatory participation of the prosecutor *(Article 42(1) of Law 217/2003).*

These types of cases are tried in urgent procedure, being exempted from the procedure of regularization of the request for judgment provided for in Articles 200 and 201 of the Civil Procedure Code, the time limit for summons is reduced, the urgent rules of summons apply, and in particularly urgent cases the court may pronounce a decision without summoning the parties, the case being decided exclusively on the basis of the request and the documents submitted with it without the need to hear the conclusions of the parties *(Article 42(4) and (5) of Law No 217/2003).*

Specialized literature has pointed out that the law establishes that the summons period is the one applicable in urgent cases "the judge's assessment will not concern the reduction itself, but the duration of the reduction" (Tăbârcă, M., Drept procesual civil, procedura contencioasă în fața prima instanța. Judicial non-contentious procedure, 2nd edition, vol.II, Solomon Publishing House, Bucharest, 2017, p.175) and the summons must expressly state that the time limit has been reduced.

Regarding the probatory evidence, the legislator has stipulated in Article 42(6) of the Law that "evidence which requires a long time to be taken is not admissible".

Therefore, the court may receive the documents submitted by the parties within the time-limit, hear the witnesses who were present at the time-limit or take evidence by questioning the parties present in the courtroom.

The court may postpone its decision for a maximum of 24 hours, and the reasons for the decision must be drafted within 48 hours of the decision (Article 42(8)), the legislator requiring that the entire procedure in which the civil court decides the application must not exceed 72 hours from the time of its submission, except where a provisional protection order has been issued in the case (Article 42(9)).

The alleged victim of domestic violence has the right to dispose of the application for a protection order, even in cases where it has been made on her behalf by another person, as is clear from the interpretation of Article 43 of Law 217/2003.

The judgment issuing the protection order is found to "have, from its pronouncement, the authority of res judicata" and "represents an enforceable title" (Boroi G., Stancu M., Drept procesual civil, editura Hamangiu, București, 2015, p.561).

It should be noted that, while the victim of domestic violence could have withdrawn the application for a protection order prior to the court judgment, after the order has been issued and has become final, compliance with the order is mandatory even for the person in whose favour it was issued, as is clear from the provision of Article 44(1) of the Convention. 3.

IV. MECHANISMS TO PROTECT VICTIMS OF DOMESTIC VIOLENCE IN CRIMINAL MATTERS

As we have shown above, contemporary social reality has demonstrated that it is not enough to establish mechanisms for the protection of victims of domestic violence in civil matters alone and that a stronger criminal justice response is also needed to protect victims of these forms of violence, to promptly punish perpetrators of this type of acts and to reduce the phenomenon.

In criminal matters, measures have been introduced in Romania to protect victims of domestic violence, both in substantive criminal law and in criminal procedural law.

While in civil matters, the Romanian legislator has mainly focused on taking measures to establish a mechanism for the protection of victims, in criminal matters it can be seen that there is a greater concern to ensure that persons who commit offences involving (active and passive) family members are held criminally liable.

If in civil matters the term family member covers a broad category of persons, in substantive criminal law the legislator has restricted this concept to ascendants and descendants, brothers and sisters, their children, as well as persons who have become by adoption, according to the law, such relatives (in case of adoption, also the adopted person or his descendants in relation to the natural relatives), the spouse, persons who have established relationships similar to those

between spouses or between parents and children, if they live together *(art. 177 para. 1 and para. 2 of the Criminal Code).*

It has been remarked in the doctrine that "according to the current regulations, the notion of "family member" extends to cohabitants and relatives, as well as to any other persons, under two conditions: they must have established relations similar to those between spouses or between parents and children and they must live together" *(Chiș I., Dobrinoiu, M., Dobrinoiu, V., Gorunescu, M., Neagu, N., Pascu, I., Pascu, M.A., Păun, C., Sinescu, M.C., p.80).*

In order to consider the commission of an offence that can be classified as domestic violence, within the scope of protection of the criminal law, it is necessary "the capacity of spouse of the active and passive subject that must exist at the time of the commission of the act. The offence subsists even if the spouses live separately" *(Ibid. p. 79).*

This is one of the main differences between civil and criminal matters concerning the concept of victim of domestic violence.

While in the view of Law No 217/2003 the ex-spouse is also considered to be a family member, without fulfilling any additional conditions, benefiting from the special protection of civil law, in the view of the criminal code, it is necessary that this special quality exists at the time of the offence or that the ex-spouse lives and cohabits with the defendant.

At the same time, in criminal matters, the judicial authorities have to take into account whether the perpetrators of crimes related to domestic violence are adults or minors. In this regard, it has been recognised that young people, not having fully developed personalities, "need special attention and assistance in order to develop mentally and intellectually and to integrate better into society, and must be protected by the law under conditions that guarantee their peace, freedom, dignity and safety" (Alexandru, M., Franguloiu, S., p.9).

In criminal matters, the legislator has chosen to punish persons who commit offences involving acts of violence against family members, either by separate incrimination or as an aggravating circumstance, in all these cases the punishment provided by law for these acts being more severe, considering the special status of the active subjects.

The Criminal Code in force brought as a legislative novelty the regulation of a new crime, namely Domestic Violence, with its own nomen juris.

According to Art. 199 para. 1 of the Penal Code, with the marginal name of "Domestic Violence", "the acts provided for in Art. 188, Art. 189 and Art. 193-195 committed against a family member are criminalized, the special maximum penalty provided for by law is increased by one fourth.

In the light of previous criminal legislation, the commission of the offence of assault or other violence, the offence of bodily harm or the offence of murder against a family member appeared as an aggravating circumstance but, as noted in

the doctrine, "did not exist in the case of serious bodily harm and assault or injury causing death" (*Chiș, I., s.a. Ibidem, p. 78).*

It has been mentioned in the specialized doctrine that "the separate regulation of the crime of domestic violence is nothing more than the aggravated version of some crimes against life or corporal integrity, which was imposed in order to eliminate the gaps and inconsistencies caused by the successive amendments of the previous Criminal Code" (Ibidem).

It should be noted that in the case of the offence of domestic violence provided for in Article 199 para. 1 in relation to the provisions of Art. 193 and Art. 196 of the Criminal Code, i.e. the offences of assault or other violence and culpable bodily harm, criminal proceedings may also be initiated ex officio, but the legislator has further established in Art. 199 para. 2 final sentence of the Criminal Code that "reconciliation of the parties removes criminal liability".

As has been argued in specialist doctrine, reconciliation of the parties "constitutes a bilateral act, necessarily implying the consent of the injured party and the accused" *(Damaschin, M., Neagu, I. p. 294)* and has the meaning of "clemency of the victim which has greater influence on the offender (obviously in limited cases) than the severity of a sanction" *(Oancea, I., p.478 apud Giurgiu, N., p.427).*

Therefore, in the case of domestic violence offences, the victim of the offence has a right of disposal over the prosecution.

In the current legislator's view, the crime of rape is regulated as a form of domestic violence under Article 218 of the Criminal Code, and the literature states that "rape of a spouse, of brothers' or sisters' children or of persons who have become such relatives by adoption is the standard form of the crime, while rape of relatives in the direct line, brothers or sisters is the aggravated form of the crime" (*Chiș, I., p. 166*).

In our opinion, the current regulation and the recognition that rape can also be committed against the husband is a positive development of the legislator and judicial practice, representing a recognition of the status of the husband as a victim of the crime of rape.

Earlier doctrine did not recognise the status of a wife who was forced to have sexual relations against her will as a victim of the crime of rape. It was thus held that "a man who commits such an act against his wife does not commit the crime of rape. The existence of marriage presupposes the woman's consent to sexual relations with her husband, and if this consent is no longer maintained, she may end the conjugal life by dissolving the marriage through divorce" (*Bulai, C., Dongoroz, V., Fodor, I., Iliescu, N., Kahane, S., Oancea, I., Roșca, V., Stănoiu, R., p. 331*).

Even if rape committed against the spouse is not currently incriminated as an aggravating circumstance of the offence provided for by Article 218 of the Criminal Code, it is in the light and wisdom of the judge, depending on all the

circumstances of the case, to determine the penalty that reflects the seriousness of the act of rape committed against the spouse.

At the same time, a protection mechanism for victims of domestic violence offences is also represented by the possibility for the court to apply to the defendant, in the event of a conviction, where the penalty is imprisonment, the accessory and complementary penalties regulated by Article 66(2) of the Criminal Code. 1 lit. e, lit. n and/or lit. o of the Criminal Code, namely the prohibition of parental rights, the right to communicate with the victim or his/her family members, with the persons with whom he/she committed the crime or with other persons, determined by the court, or to approach them, and the right to approach the victim's home, workplace, school or other places where the victim carries out social activities, under the conditions determined by the court.

The above-mentioned additional penalties constitute a special form of protection for victims of domestic violence and ensure that the perpetrator does not contact the victim after the sentence has been served.

Recent studies state that "the purpose of the additional penalty under letter o) is to prevent the convicted person from being in the places indicated and in this way to prevent revenge against the victim" (*Boroi, A., p. 494).*

If the perpetrator of the assault who has also been sentenced to the accessory and supplementary penalties provided for in Article 66(1)(a) and (b) is convicted of an offence under Article 66(1)(a), the offender shall be liable to the penalty provided for in Article 66(1)(b). 1 lit. e, lit. n and/or lit. o of the Criminal Code evades its execution or does not execute it according to the law, commits the offence of non-execution of criminal sanctions provided for and sanctioned by Art. 288 para.1 of the Criminal Code.

The criminalisation of the offence provided for in Article 288 para. 1 of the Criminal Code is a normal state of affairs, given that the additional and accessory penalties are established by a court decision, which, as established in the literature, "does not only contain the assessment and resolution of the case, but also constitutes an act of disposition. What the court has ordered by a final judgment becomes binding and enforceable both on the parties concerned by the judgment and on the bodies called upon to enforce it." *(Volonciu, N., p. 164).*

Moreover, under Law 217/2003, also as a form of protection of the victim of domestic violence, the violation by the person against whom a protection order has been issued of any of the measures mentioned in the order and the violation by the person against whom the provisional protection order has been issued of any of the measures established by the provisional protection order constitute offences, according to Art. 47 para. 1 and para. 2.

It is relevant that the offences mentioned in the previous paragraph persist irrespective of the conduct of the person in whose favour the protection order was issued, because, as already stated above, under Article 44 para. 3 of the

aforementioned act, compliance with the protection order is also mandatory for the victim.

Also as a special form of protection, the legislative has established that, as of 01.01.2024, in the case of rape and sexual assault offences provided for by Art. 218, 218[1], 219 and 219[1], the statute of limitations shall not remove criminal liability (Art. I, paragraph 1 of Law no. 217/2023[3]).

With regard to the protection mechanisms for victims of domestic violence offences provided for by criminal procedural law, it is worth mentioning the right of the injured party to request to be informed, in the event that the defendant is deprived of his liberty, "of his release in any way or his escape" provided for by Article 111(2) of the Criminal Code. 5 C.pr.pen., as well as the fact that the law of criminal procedure presumes that victims of domestic violence are vulnerable victims and several special protection measures must be taken against them *(art. 113 para. 2 C.pr.pen.).*

By *lege lata*, being presumed vulnerable victims, according to Art. 111 para. 6 and par. 7 C.pr.pen., the judicial body may order, when there is this possibility, and when it considers, with reasons, that it does not prejudice the proper conduct of the trial or the rights and interests of the parties: the hearing of the injured person in premises designed or adapted for this purpose or through or in the presence of a psychologist/other specialist in counselling victims and as far as possible their hearing, as well as their possible rehearing is carried out by the same person (Franguloiu, S., p.).

By law from 01.01.2024, as additional protection measures for victims of domestic violence crimes, they will be provided with compulsory legal assistance (Art. II, para. 2 of Law no. 217/2023), they will be able to be heard by videoconference or other technical means of communication at the place where they benefit from the protection measure of temporary accommodation, and their statement will be recorded, without exception, if the victim is a minor (Art. II, para. 3); the hearing will be declared non-public ex officio or at the request of the injured party/prosecutor (Art. II, para. 6); cases involving minor victims will be heard urgently and in priority (Art. II, para. 7), when the injured person is a minor under 16 years of age and the judge considers that the taking of certain evidence may have a negative influence on him/her, the minor will be removed from the hearing and the injured person will be heard only in duly justified cases (Art. II, para. 8).

V. CO-EXISTENCE OF CIVIL AND CRIMINAL PROTECTION MECHANISMS FOR VICTIMS OF DOMESTIC VIOLENCE

The protection mechanisms for victims of domestic violence established by the legislator in the two areas, civil and criminal, are not mutually exclusive;

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on the contrary, they are designed to complement each other in order to ensure that the victim does not benefit from illusory, ineffective rights.

The legislative authority itself has established that "the issuing of the provisional protection order does not prevent the taking of a preventive measure under Law No 135/2010" *(Article 28(6)).*

Judicial practice has established that the same person, alleged perpetrator of an act of domestic violence, may be issued a protection order, as well as to order the measure of preventive arrest *(Decision no.22/AUP/2019 of the Suceava Court, unpublished, which ordered the preventive arrest of the defendant, noting that previously against him was issued, by s. c. no.1764/16.04.2019 of the Suceava Court, a protection order).*

In accordance with the above, we note that by civil judgement no. 6658 of 2023 of the Court of Sect. 1 Bucharest – first instance (unpublished) a protection order was issued against the respondent, although by the conclusion of 26.07.2023, pronounced by the same court (unpublished), the alleged aggressor was preventively arrested.

However, there have been civil courts which have held that a victim protection measure is not required under the provisions of civil law where the alleged offender is under pre-trial detention.

In this regard, by civil judgement no. 2401/2023 of the Suceava Court – first instance (unpublished), it was held that as long as the defendant, the defendant in question, was ordered to be placed under preventive arrest, and when this measure is replaced or expires, the judicial authorities may order the same measure as the one requested in the present case (keeping a distance from the victim), the civil action lacks one of the elements required by Article 32 of the Civil Procedure Code, i.e. the interest to act, which is why the application was rejected accordingly.

In the contrary sense, by civil judgment no.193/2023, the Suceava Court (second instance) stated that the purpose of the two measures differs, the issuing of the protection order being a civil procedural measure, which removes a state of danger for the victim, while the preventive arrest is a criminal procedural measure, aimed at removing a potentially dangerous state affecting public order. The protection order may be issued for a period of 6 months and the preventive measure for a maximum of 30 days with the possibility of extension, and nothing prevents the court from ordering in parallel a civil procedural measure, the main objective of which is to protect the victim, given that in this case the aggressiveness of the defendant and his dangerousness to members of his family have been fully proven (available at www.rejust.ro).

CONCLUSION

As it is obvious, the protection of victims of violence is a desideratum that must constantly concern the judicial authorities of the state, especially since reality has shown that domestic violence is a major problem of Romanian society.

In our opinion, the legislator has now succeeded, through legislative amendments, including Law No 217/2023, in bringing both civil and criminal legislation into line with the standards imposed by the above-mentioned ECtHR decisions, as well as with European legislation.

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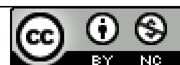

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