Protection order - effective means to combat family violence

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Abstract: Domestic violence is a reality present on a large scale in all contemporary societies. The order of protection is a relatively recent legal institution established by the legislator in order to stop the violent actions in the family, regardless of their nature: physical, verbal, sexual, mental, economic, social or spiritual. It is materialized in a civil court ruling, issued urgently, through which mediated, provisional and necessary measures are taken in order to protect the victim of an act of domestic violence. The basic characteristics of this legal instrument are speed and prevention of committing acts of domestic violence, governed by the principle of the right to life. The procedure that applies in the case of issuing an order of protection is urgent, and the consequences for not respecting them bring criminal liability. It is essential for the implementation of the provision that persons in situations of risk to be informed and motivated to turn to the law. At the same time, the procedure for application for protection order needs significant improvement in order to meet the crisis situation in which the victims of domestic violence. Simplification of procedures for legal counseling and free legal representation of the victim, as well as the introduction of measures free of charge for the issue of the forensic documents required for issuing the courts’ ruling, would significantly enhance the efficiency of the protection order.

Keywords: order of protection; domestic violence; criminal liability; celerity.

Introduction

Despite the fact that domestic violence constitutes for only a few decades a topic of debate, it has not been able, so far, to put an end to this extremely destructive form of violence. Family violence is a complex problem, involving both the protection of the personal integrity of the victims, as well as protecting their common social interests, as freedom and democracy.

Conscious of the whole spiritual and moral heritage, the European Union founds its coordination activities only on the indivisible and universal values of human dignity, freedom, equality and solidarity, as well as on the principles of democracy and the rule of law, placing the person at the centre of all of his actions [1]. Domestic violence is a violation of important dimensions of human rights. In order to align with the policies promoted by the Union with regard to this aspect, Romania adopted Law no 217/2003 on preventing and combating domestic violence [2] establishing the legal framework for the protection order.

Domestic violence must be addressed as a matter of public interest. The campaigns regarding this kind of violence and the reactions to this phenomenon must be directed both to men and to women as well.

The order of protection is a legal instrument with urgent and provisional character through which the necessary measures may be taken in order to protect the physical and mental integrity of the victim of an act of domestic violence.

It is materialized in a court order issued in the framework of a special procedure, a emergency one, with the attendance of the parties, through which one or more obligations or prohibitions can be disposed against the aggressor, qualified by the legislator under the definition of “family member”, without however limiting the incidence sphere of this institution to the family framework as it is set out in the civil law but in an extended framework that includes the persons among which exist or existed relationships of this kind.
1. Area of application

According to the article 23 of Law no. 217/2003 on preventing and combating domestic violence, issuing an order of protection may be requested by the person whose life, physical or mental integrity or liberty is endangered by an act of violence from a family member.

May be the subject of such applications the intended actions or inactions, with the exception of self-defense or defense actions, physically or verbally manifested, committed by a family member against another member of the same family that causes or could cause injury or physical, mental, emotional, psychological or sexual suffering, including the threat of such acts, constraint or deprivation of liberty as well as preventing women from exercising their fundamental rights and freedoms.

The request for issuing an order of protection can be formulated only by the person who has the quality of family member in relation to the aggressor. According to article 5 of the law on preventing and combating domestic violence, this quality is had by the ascendants and descendants, brothers and sisters, their children, as well as the persons adopted, according to the law, such relatives, spouses and former spouses, as well as persons who have established relationships similar to those of spouses or between parents and children, if they cohabit, guardian or other person who exercise in fact or in law the rights of the child as well as the legal representative or other person who take care of the person with intellectual disability, mental illness or physical disability, except for those who fulfill such tasks in the exercise of professional duties.

Different from the provisions of the Civil code, which does not give legal effect to the relationships that do not have a form as provided by law, marriage or kinship, the special rules governing the order of protection gives an extensive meaning to the notion family member, recognizing that quality to the affective relationships which create similar family relationships. Cohabitation, although not internationally recognized, has the appearance of a marriage through its community living and housekeeping [3]. It is a union which allows inclusively homosexual relations, marriage being a lawful union which may be established, under the law, only between heterosexual persons.

The extended meaning of the quality of family member covered by law No. 217/2003 on preventing and combating domestic violence includes also former spouses; the proof of this quality can be made with a certificate of divorce or the definitive court decision through which the marriage of the parties was disconnected. Issuing an order of protection can be requested even if former spouses have separate residences, if the existence of violence acts of the kind set out above can be demonstrated.

The request for protection order can be introduced by the victim personally, and through the legal representative, in the case of minors and courts’ forbidden. According to paragraph (3) of article 25 of Law no. 217/2003 active procedural quality can have the prosecutor, authority’s representative or competent structure with competencies in matters of protection of family violence victims in the administrative-territorial unit, as well as the representative of any of the providers of social services in the field of prevention and fight against domestic violence, with the consent of the victim.

2. Conditions of the request for the emission of the protection order

a) The existence of a state of danger. The danger that could affect the life, physical or mental integrity or freedom of the person is the foundation for the emission of the order of protection. The person whose life, physical or mental integrity or liberty is endangered by an act of violence from a family member may apply to the Court, with the purpose of removing a danger state, to issue an order of protection, to dispose, provisionally, one or more steps, obligations or prohibitions in the aggressor's task. The existence of a State of danger to which the victim is exposed at the same time justifies the brief procedure, characterized by swiftness, which applies to the prosecution of such applications.

b) The state of danger to be caused by the existence of an act of violence. According to the European Council - Committee of Ministers, 1985, domestic violence is “any act or omission committed inside the family by one of its members and which affect the life, bodily or psychological integrity or freedom of another member of that family, and seriously damages the development of his/her personality” [4]. Are justified to request the issuance of protective measures the individuals who have suffered acts of domestic violence in one or more of the following forms:

- verbal abuse - materialized in addressing through a brutal offensive language, as well as the use of insults, threats, degrading phrases and words;
psychological violence - when the abuser wants to impose willpower or control by causing moods of tension and mental suffering in any way and by any means, including demonstrative violence against objects and animals, verbal threats, blatant display of weapons, control of personal lives, neglect, acts of jealousy, or constraints of any kind;

physical violence - through bodily or health harm by hitting, shoving, slamming, hair pulling, pinching, cutting, burning, strangling, biting, in any form and of any intensity, including masked as the result of accidents, poisoning, intoxication, and other actions with similar effect;

sexual violence - materialized through sexual assault, coercion and degrading acts, harassment, intimidation, manipulation, brutalization for maintenance of forced sexual intercourse;

economical violence - manifested by prohibiting development of professional activities, deprivation of economic means, including lack of the primary existence, such as food, medicines, objects of first necessity, theft of the goods of a person, prohibition of the right to possess, use and dispose of joint property, the exercise of an unfair control over goods and common resources, refusing to support the family, imposing heavy and harmful work detrimental to health including a minor family member, as well as other actions with similar effects;

social violence - by isolating a person from family, community and friends, prohibition of attending an institution of education, the imposition of isolation through detention, including in the family home or intentional deprivation of access to information;

spiritual violence - minimizing the importance of meeting the moral-spiritual needs through prohibition, limitation, mocking, penalty of the aspirations of family members, of the access to cultural, ethnic, linguistic or religious values, imposing the adherence to faiths and unacceptable spiritual and religious practices are, as well as other activities with similar repercussions;

c) The state of danger to be caused by a family member. For the fulfillment of such conditions it is necessary that between the victim and the aggressor to be family relationships. The family, as it is commonly understood, does not cover the entire population of a society. Since the 1970s, alternative models of life began to expand. As a structure, there are a wide variety of forms more or less familiar: there are single (permanently or temporarily celibate), unions of cohabitation (consensual)-without or with children, marriages formed of persons between whom sexual relations are not established, homosexual and of course, the known family forms: nuclear family and the family with 3-4 generations. In Romania there also are non-familial structures, but most have a family at the base and it can be: non-parental (without children), parental or grandparental (children raised by grandparents) [5].

In the legal sense, family means the group of persons between whom rights and obligations exist, which is born of the marriage, kinship (including adoption), as well as from other reports similar to the family relationships. Thus, the family is a legal reality by regulating them by law [6].

In the expanded framework provided in law no. 217/2003 on preventing and combating domestic violence, the consensual unions or the relationships which, although they did not have biological origin, are established between an adult person and a child after a parental pattern, are treated as family relationships. In view of this normative act, the member quality is also recognized to the former husband, as well as people caring for a mentally ill person or with intellectual disability or physical handicap, if they do not perform these activities in the exercise of the professional duties.

By recognizing the quality of family member of such persons, the legislature did not wish to amend the legal meaning of the concept of family, or to give legal effect to the relations that do not have a form stipulated by law - marriage, kinship, adoption. What he had in mind was the factual conduct of certain types of relationships that can create an emotional background similar to family relationship, and during which may appear random acts of violence in one of the forms set out above, that, although produce serious consequences most often due to a insurmountable mental threshold or lack of information, are not made available to the authorities.

3. The characteristics of the protection order

a) The order of protection is issued for the purpose of removing the state of danger. Depending on the type and severity of exercised family violence protective order may comprise one or more of the following measures/obligations:

evacuation for a maximum period of six months of the aggressor from the family home, regardless if he is the owner of the property;
- the reintegration of the victim and/or children in the family home;
- limitation of the right of use of the aggressor only on a part of the common house when it can be shared so that the abuser does not come into contact with the victim;
- obligation of the aggressor to maintain a specified minimum distance from the victim, from children or other relatives or the residence, place of work or the protected person's education;
- interdiction of the assailant to move in certain places or defined areas which the victim attends or visits regularly;
- prohibition of any contact, including by telephone, by correspondence or in any way, with the victim;
- obligation of the aggressor to hand over to the police the firearms owned;
- custody of the minor children or establishing their residence;
- the aggressor shall pay the rent and maintenance for the temporary home where the victim, minor children or other family members are staying or going to live due to impossibility to remain in the family home;
- compelling to psychological counseling, psychotherapy, a treatment or some forms of care, especially for the purpose of detoxification;

There is jurisprudence increasingly richer in this sense. By way of example, it may be given the decision no. 1089/23.10.2014 of Court Bacau [7], according to which it is noted that the defendant gave evidence, repeatedly, of verbal, physical and mental violence, both to the applicant and their underage children, as these notions are defined by art. 4 of law no. 217/2003, for which reason the request was admitted and was issued an order of protection by which the Court has ordered, for a duration of six months, the evacuation of the defendant from the family house, keeping a minimum distance of 50 meters from the applicant and its children, the prohibition of any contact, including by telephone, correspondence or in any other way with the applicant and children and order the offender to attend psychological counseling and psychotherapeutic treatment in order to improve his aggressive behavior.

In the same context is also the Decision no. 1256/09.12.2014 pronounced by the Court Bacau [8], through which the Court has issued a protection order for the applicant aged 82 years, concerning his son, in the sense that the defendant was prohibited any contact, including by telephone, correspondence or in any other way with the complainant for a period of three months following the decision pronouncing due to acts of verbal violence exercised by the son on the father.

b) Provisional character. The measures ordered by means of the protection order have a temporary nature of a maximum of six months, with the possibility of extension for the same period. If the decision does not contain any mention of the length of the steps laid out, they will have effect for a period of six months from the date the order was issued. Due to the nature of the relations considered by the legislator, the measures taken have provisional character, giving the aggressor the real possibility to change his behaviour and reintegrate within the family. In case he does not respect the obligations imposed on him by this decision, he risks a penalty of imprisonment between one month and one year, without the possibility of suspension of execution.

4. Procedure for issuing the order of protection

The request for issuing an order of protection must have the form presented in a form defined in the annex to law no. 217/2003 on preventing and combating domestic violence. Besides completing this form, I appreciate that it is desirable the drafting of an exposure on the actual situation, as well as some notes of evidence that complete the responses given in the application form and that, often, prove to be insufficient. The application is exempt from stamp duty.

In terms of material and territorial competence with respect to the judgment of the case it goes to the court in whose territorial radius the victim has his domicile or residence.

The cause will be judge in the council room, with the participation of the prosecutor. The parties shall be cited according to the rules for citing urgent processes, the judge has the obligation to apply the derogating rules governing this procedure designed to ensure increased speed in resolving the causes of this type.

The deadline for handing over summons will be shortened at less than five days prior to the date of judgment. Together with the summon the defendant is handed a copy of the petition form, putting them in mind that, in a short term, or until the first term of the trial, he should formulate a response.
In case of emergency, the law allows the court to issue an order of protection even in the same day, to pronounce on the basis of the request and of the documents submitted, without the parties' conclusions.

The establishment by the legislator of an urgent procedure in these cases followed the removal of a possible state of danger that threatens the life, physical integrity or liberty of a person or the psychic. Although in the component of the panel of judges it will be mandatory found a representative of the Public Ministry, the procedure applied is that of civil order, governed by the principle of availability, so that the victim can quit the judgment of the application, including when it was not inserted by him.

Considering that the measures which may be ordered by the protection order are limitations of fundamental rights (freedom of expression, freedom to travel and to choose a home, property right), the legal assistance of the defendant is obligatory.

Judgment of the application is urgent and priority. Evidence whose administration require a significant period of time or would lead to delayed taking a quick head-to-head solutions will not be admitted.

The judge can postpone the ruling for a maximum of 24 hours, and the motivation of the order may not exceed 48 hours after the pronouncement. The decision is enforceable, and at the request of the victim or ex officio, when the circumstances of the case require, the Court may decide that its execution will be done without notice or without a time limit.

The decision can be appealed only through appeal within three days of the pronouncement, if it was given with the attendance of the parties or of the communication, if the order was issued without the presence of the parties. Enforcement may be suspended until the appeal hearing, but only with payment of a bail whose amount is determined by the Court of appeal. The trial in front of the control court will take place in the Council Chamber, with the obligatory participation of the prosecutor.

According to the dispositions provided for by art. 31 paragraph (1) and (2) of law no. 217/2003 on preventing and combating domestic violence, the order of protection shall be communicated as soon as possible to the Romanian police structures. The length of time elapsed between the date of sentencing and the date of communication of the order for execution, is in close connection with the document that shall be communicated to the latter, by the Court. The practice is not unified on the issue, identifying the following situations:

- the act communicated to the executing body is a copy of the decision, an address in which it is inserted the sentence or a protection order done separately, in which case the protection order is put into execution from the day of the judgement;

- the order of protection is communicated to the execution body after editing the decision, within up to 48 hours, in which case the communicated act is the judicial decision in its entirety;

Similarly, when the communication of the order of protection will be made by the Control Court it orders the issuance of the order either immediately or after editing the civil judgment.

For putting in execution the order of protection, the police authorities are allowed access to the family home and any of its annexes, with the consent of the person protected or, in its absence, with the consent of another family member.

The defendant may request the revocation or replacement of the measures ordered. The request will be solved with the summons of the parties and the police. The revocation can be made by court if the following conditions are met cumulatively: a. the abuser has complied with the obligations or prohibitions imposed; b. he attended psychological counseling, psychotherapy, rehab treatment or any other form of counseling or therapy which was established for him or was recommended; c. he complied with the security measures, if such measures were taken, according to the law and there are strong hints that the offender does no longer presents a real danger to the victim of domestic violence or for family members.

In the event that the measures ordered by court order are not respected by the one against which it was issued, the police has the obligation to notify the criminal prosecution bodies for crime failure to comply with the court’s decision. In this situation, the defendant can be sent to prison between one month and one year, without the possibility of suspension of execution.

As a result of the proposal submitted to the Superior Council of magistrates by the Ministry of Justice, it was issued the Order of the Chief Inspector of Judicial Inspection no. 29/15.04.2014, which has set itself as objective for the first semester of the year 2014 to carry out a themed control on "verification by the courts, of the application modes of the provisions of article 23 and the following of law no. 217/2003 on preventing and combating domestic violence, relating to the issuance of the protection order". Comparative analysis of the data and statistical statements, reported in the period 12.05.2012-31.03.2014 in which were registered the causes found on the role of the courts showed that through the new regulations, although the
judge has the decisional autonomy regarding the organization of the session of the Court, has not recorded an improvement in the sense of reducing the duration of solving the causes which have as object the issuing an order of protection [9].

The fund courts found that the existence of uneven practices concerning the management of causes in an emergency report in their prosecution established by law, with regard to: the method of establishing the first judgment and the application of settlement proceedings, the length of time limits given, as well as the time interval at which the protection order is communicated, conditioned by the document communicated to the execution bodies.

At the control courts (tribunals), the uneven practice was generated by the different interpretation of the provisions governing the appeal that can be exercised against the sentence pronounced by the first Court, under the aspect of settling the case in the Council room or in public session and ensuring the legal assistance of the defendant, as well as regarding the communication of the protection order by the fund Court or by the Court for judicial review, if the latter is the one that disposes the issuance of the protective order.

During this control, it has also been found, a lack of swiftness of proceedings of this kind, based on which the different management measures taken by the courts, with reference to the provisions of art. 200 Code of civil procedure, regarding the regulation of the application, as well as caring out the written procedure without the time limits to be reduced by a judge, according to the provisions of article 201, paragraph (5) Civil Procedure Code and the establishment of the first court term at large periods from their registration on the role of the Court, taking into account sometimes the court holiday period.

These issues led to the settlement of cases in different time intervals, some even approximately one year from the date of registration in the system.

**Conclusions**

Although domestic violence is a phenomenon that has always accompanied the construction and family dynamics, its coming to the attention of the legislature is of recent date. Only in the last 20 years the social sciences and legal international regulations make reference to domestic violence.

In the Romanian legislation, the regulatory framework in the field of preventing and combating domestic violence is law no. 217/2003, edited in a consistent manner, in order to correct certain problems encountered in practice.

Protection order is a legal institution which aims to protect victims of domestic violence, an advanced tool that can be used in emergency situations to immediately eliminate exposure to aggressive treatments. In fact, it follows the removal of an imminent danger to which the victim can be exposed and which can generate the perpetration against some members of the family of serious crime in respect of their fundamental rights.

The procedure of issuing the protective order is urgent, being governed by derogating rules, designed to provide increased speed in resolving the causes of this genre.

However, the practice of some courts showed that the term emergency has a relative character, being reported by the judge to the workloads of the Court, and of the judges' panel invested with the proceedings, in particular. Poor management of cases’ management having as object the issuing an protection order, not in few lines, resulted in lack of substance of the provisions considered by the legislator, thus transforming this causes in genuine actions of common law [10].

In order to improve the deficiencies pointed out in practice, I appreciate as being useful to legislate a normative framework that expressly state short term recommendation adapted to the urgency character of the application, to complete the regularization procedure of applications which have this object with exceptional character as well as the obligation of the court to communicate a copy of the court’s decision through which the request was admitted to the execution bodies, on the day it was pronounced.

**References:**


[2] Law no. 217/2003 on preventing and combating domestic violence was republished in the Official Gazette of Romania, Part I, no. 205 of 24 March 2014 and modified through the Government emergency Ordinance no. 6/2015 on the modification and completion of the law no. 217/2003 on preventing and
combating domestic violence, published in the Official Gazette of Romania, part I, no. 78 of 29 January 2015;


[4] The European’s Council Recommendation No. R (85) with respect to domestic violence was adopted on 26 March 1985;


[7] Decision no. 1089/23.10.2014 of Court Bacau, according to portaljust.ro/180/pages/dosare


[10] Ibid [9], p. 29;