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The Order of Protection in the Romanian Legal System

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Abstract: The phenomenon of domestic violence, quite common in the countries of Eastern Europe, including Romania, can be perceived as a consequence of shortcomings in the education of person, or a faulty education. The aims of current study is to present and analyze the legal instruments designed in the area of civil law due to combat and prevent domestic violence, with a special regard to the protective order governed by the law No. 217/ 2003, as amended and republished. Legal provisions are analyzed with regarded to the person who may apply for order of protection, the conditions for the admissibility of the petition for the issuance of the protective order, the measures which may be imposed by an protection order, the duration of these measures, the conditions for revocation of the protective order etc. The study reveals the practical application of analyzed legal provisions, by referring to the decisions given by Romania courts in cases involving the “protective order”. Finally are exposed the advantages and shortcomings of normative framework already existing, as well as the effectiveness of the legal provisions in practice.

Keywords: violence; danger; family; protective order

1. Introduction

In Romanian legal system, the regulatory framework on preventing and combating domestic violence is represented by Law no. 217/ 2003³.

Even if legislator pursued to establish measures for prompt and efficient protection of victims of domestic violence, the practice has revealed that provisions of Law no. 217/2003, in large part, doubles the provisions of the Criminal Code from 1968.

Specifically, Art. 1 para. 2 of Law no. 217/2003, before the amendment and republication, stipulate that *“the State is acting to prevent and combat domestic violence, according to the provisions of Article 175, 176, 179, 183, 189 – 191, 193, 194, 198, 202, 205, 206, 211, 305 -307, 309, 314 – 316, 318 and other alike of the Criminal Code, Law no. 705/ 2001 on the national system of social assistance and other legal provisions on the same matter, as well as the provisions of the present law”*. Also, Art. 26 para. 1 of the same Law, established that *“in the course of criminal proceedings or during the trial in front of the Court, at the request of the victim or by inquest of office, wherever there*

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³ Law no. 217/ 2003 was published in the “Official Gazette of Romania”, No. 367 of the 29th May 2003 and republished in the “Official Gazette of Romania”, part I, No. 365 of the 30th May 2012.

is evidence or reasonable indications that a family member has committed a violent act injurious to the physical or mental suffering to another member, may order on the provisional basis, one of the measures provided for in Art. 113 and 114 of the Criminal Code, as well as the prohibition to return to family home". We do specify that measure of prohibition to return to family home was, as well, regulated by Art. 181 of the Criminal Code from 1968¹.

Therefore, the provisions of Law no. 217/2003, before the amendment, offered to victims of domestic violence tools which were already covered by Criminal Code of 1968.

Indeed, according to Art. 26 para. 1 of Law no. 217/2003, unlike Art. 118 of the previous Criminal Code, the measures of prohibition to return to the family home didn't depend on existence of "*conviction to prison punishment at least a year for flicks or any other acts of violence causing physical or mental suffering perpetrated upon the members of the family*". In other words, the victim wasn't forced to wait for the finalization of trial and for a judgment of conviction, being able to request imposition of this measure previously. Even if apparently was created an additional tool to protect the victim its readiness remained questionable, because, according to Art. 26 of Law no. 217/2003, the prohibition of return to the family home, could be ordered by the Court only provisionally and only during the criminal proceedings or the trial, obvious whenever there were serious indications that a family member has committed a violent act injurious to the physical or mental suffering to another member.

Therefore, from the date of enforcement referral to the criminal investigation bodies till finalization of criminal proceedings, or depend on the case, from the date of filing an application to the Court till setting up a hearing there was a period when the victim was outside of any regulated protective measures. Or, the period which we referred to, usually, is not a short one. Furthermore, the victim didn't have the legal opportunity to file a petition to the Court with the request to prohibit the offender to return to the family home. The victim had to file a criminal complaint, to await the beginning of criminal proceedings and only from this point could file a petition requesting the taking of the measures of prohibition to return to the family home.

The doctrine has noticed that it was urgently necessary to create a complex tool that can be used to remove the danger created by exposure to aggressive treatments. In fact, it was about a way of removing the threat that the victim was exposed to, and which can generate situations of committing serious crimes even against victim's life. In other words, by reference to practical needs, it was necessary to supplement the legal framework by creating, alongside the existing protective instruments, of a preventive tool with immediate effect to the danger that victims of such violence are exposed.

Therefore, deficiencies raised by doctrine and practice, which obstruct a preventive and effective protection of victims, have determinate the substantial amendment of Law no. 217/2003 by Law no. 25/2012.²

The amendments brought by the Law no. 25/2012, relates to indication of the principles governing the protection and promotion of the interest of domestic violence victims; expansion of coverage of "domestic violence" concept, so that it will correspond with the defining standards imposed by

¹ Law No. 29/ 1963 on the Code of Criminal Procedure was repealed by Art. 108 of Law no. 255/ 2013 for the implementation of Law no. 135/ 2010 on the Code of Criminal Procedure and on modification and completion of some legislative acts containing provisions of Criminal Procedure (published in the "Official Gazette of Romania" part I, No. 515 of the 14th August 2013).

² Law no. 25/2012 was published in the "Official Gazette of Romania" part I No. 156 of 13th March 2012.

international legal instruments¹; expanding the number of interrelation situations that are covered by the concept of “family member”, in relation to the regulatory field etc.² (Gorunescu, 2012).

The highlights of the amendments brought by Law no.25/ 2012 consist in creating an instrument of protection of family violence victims called “protective order”.

Thus, although in Romanian legal system there was a normative act in the field of preventing and combating domestic violence since 2003, placing the protective order in the context of this act lasted 9 years. Moreover, it was determined by a dramatic event.

So, doctrine shows that the modifications promulgated on March 2012 of the Law no. 217/2003 were the result of a case tends to become well known, namely the shooting at “Perla” Hairdresser in Bucharest. (Vladila, 2013) In this case, a woman noticed the police in many times regarding the possibility that her husband is trying to murder her, because they were separated and he continuously threatened her with physical violence, and the police did nothing. The silence of the police allowed her husband, who has a firearm license, to come at the victim’s working place – a hairdresser – and, in broad daylight to fire without discrimination in all the persons who were there, employees and customers. The victim and other persons deceased, while others were seriously injured. (Vladila, 2013)

The protective order is materialized by a judgment issued on an urgent basis that establishes immediate and necessary actions in order to protect the physical and/or mental integrity of the domestic violence victim. (Ghita, 2014)

It should to be mentioned that the protective order, with effect from 12 May 2012, represents a novelty for the Romanian legal system, but in legislation of other States, this tool has already proven its usefulness.³

Besides, as we shown already, the absence of this legal instrument from Romanian legislative landscape has been keenly felt by the victims of domestic violence. This is also confirmed by the results of a National Study on the implementation of the protective order⁴, according to which, during the period 12 May 2012 – 28 January 2013, were filed petition for protective orders in front of 123 Romanian courts from 176 existing and the total in the country, were recorded 1009 of such requests.

2. Holders of Petition for Protective Order

We reiterate that the order of protection is a measure which is available to the victim of domestic violence. Therefore, the holder of the application for the issuance of such order is the victim herself. The application may be submitted by the victim personally or through a legal representative.

Alternatively, the application may be field on behalf of the victim, also by the Prosecutor, the representative of the competent authority, at the level of administrative territorial unit, with powers in

¹ In this sense are eloquent the provisions of the Council of Europe Convention on the prevention and combating of violence against women and domestic violence.

² <http://www.juridice.ro/209698/ordinul-de-protectie-in-legislatia-romaneasca.html>.

³ Mention that in the European Union was adopted the Directive 2011/99/ EU of the European Parliament and of the Council of 13th December 2011 on the European Protection Order. According to Art.21 of Directive the Member State are required to transpose its provisions into national law no later than 11th January 2015.

⁴ The national Study regarding the implementation of the protection order – Law 25 of 2012 (Law 217/ 2003 republished for preventing and combating domestic violence) for the period of 12th May 2012 – 28th January 2013, funded by the Open Society Foundation, the data collected by the Association for Freedom and Gender Equality, the Curricular development and Gender Studies FILIA, Romanian Group for Human Rights, available on <http://www.fundatiasensiblu.ro/wp-content/uploads/2013/08/Studiu-monitorizare-ordine-de-protectie-2013.pdf>.

the field of protection the victims of domestic violence; the representative of social service's providers in the field of preventing and combating domestic violence, accredited under the law, with the consent of the victim (Art. 25 para.1. of Law no. 217/ 2003)¹.

Application for order of protection shall be made according to the request form provided for in the annex to the Law no. 217/ 2003 and is exempt from judicial stamp duty. Also, upon request, the petitioner for protective order may be provided with assistance or representation by lawyer.

We believe that these legislative measures are well disposed towards victims of domestic violence, thus avoiding situations in which an application would not be introduced because the victim does not have specialized training in order to file such a request or because the victim doesn't have financial resources to pay the stamp duty. Furthermore, the victim has the possibility to request to be assisted or represented by a lawyer, regardless of the income carried out by the victim². For the same reason there is regulated the opportunity for other person or authorities to formulate the request in the name of the victim. Through this measure, the legislator aimed to avoid a situation in which an application would not be introduced because the victim's physical or psychological condition doesn't allow her/him to initiate such a process. (Gorunescu, 2012)

We mention that if petitioner for protective order may be provided with assistance or representation by lawyer only upon request, legal assistance of the person against whom the order is sought is mandatory. We appreciate that this legislative choice aims to prevent abuses of law consisting of exposure to a measure, in order to limit the exercise of rights, under a protective order a family member who is not in fact an aggressor. It is possible that in such situations is wished even a psychological aggression against a family member, through false accusations of violence. (Gorunescu, 2012)

In cases where the application for protection order has been filed in the name of the victim by one of the person mentioned in Art. 25 para. 3 of Law no. 217/2003, the victim may renounce the trial in condition of Art. 406 of Law no. 134/2010 on the Code of Civil Procedure³. More specifically, the renunciation can be made at any stage, verbally in court or by written request.

Also, the victim can renounce to the trial when she personally filed the petition for protective order. Even if Law no. 217/2003 doesn't stipulate expressly this situation, the practice of the Romanian courts shows that in case of renunciation the judge will take note of the expression of will and will pronounce a final judgment of disinvestment⁴.

¹ References to the texts of Law no. 217/2003 will be made considering the amended and republished form.

² In the Romanian legal system there is a normative act, under which the litigants may ask for public judicial aid in the form of free legal assistance, or representation by a lawyer appointed or elected, due protection a right or legitimate interest, or to prevent a dispute, called assistance by a lawyer. In this sense are provisions of Art.6 letter a) of Government Emergency Ordinance no. 51/ 2008 on the legal aid in the civil matter (published in "Official Gazette of Romania" part I, no. 327 of 25 April 2008.) This form of public judicial aid, as well as others regulated in Art. 6, can be provided, only to the people whose average monthly income per family member in the last two months prior to the formulation of the application, is below the level of 500 lei. Therefore, in the absence of explicit provision, we appreciate that a victim of domestic violence who request protection order can request to be assisted or represented by a lawyer, regardless her/his income. In other word the victim of domestic violence can ask for public aid even if her/his income is higher than those covered by Government Emergency Ordinance no.51/ 2008. This situation regulated by Law no. 217/ 2003 represent an exception from the common regulation in public aid matter, i.e. Government Emergency Ordinance no. 51/ 2008.

³ Law no. 134/ 2010 on the Code of Civil Procedure, republished in "Official Gazette of Romania" part I. No. 545 of 3rd August 2012.

⁴ City Court, Targu Mures, Civil Section, Final Judgment (disinvestment) No. 6311/ 04.12.2013, pronounced in Case no. 13596/320/2013.

According to the Study on the implementation of protective order in Romania, in 2012 – 2013 period, the petitions for protective order have been withdrawn at a rate of 10,80% (of which 10,39% withdrawn by women victim and 0,51% withdrawn by men victims).

According to the same Study, between petitions for protective order filed by women and man, prevalence of woman is very high, relative 94%.

3. The Conditions for the Admissibility of the Petition for Protective Order

The provisions of Art. 23 of Law no. 217/ 2003 require the following conditions for the admissibility of the petition for protective order:

a) Existence of an application for the protection order;

We reiterate that the application may be field personally by the victim of family violence, by his/her representative or one of the persons referred to in Art. 25 para. 3 of Law no. 217/ 2003.

b) Existence of a danger to life, liberty, physical or mental integrity of domestic violence victim.

c) State of danger should derive from an act of violence.

According to Art. 3 of Law no. 217/ 2003 “domestic violence” means any deliberate physical or verbal action or inaction, except for actions of self-defense or defense, committed by a family member against another member of the same family that causes injury or physical, psychological, sexual, emotional suffering, including threats of such acts, coercion or arbitrary deprivation of freedom. The family violence means as well the hindering of the woman to exercise her fundamental rights and liberties.

Besides the fact that Law no. 217/ 2003 define the expression “domestic violence” pass the review the forms of domestic violence, explaining their significance.

Thus, according to Art. 4 of Law no. 217/ 2003, domestic violence can occur under the following forms: verbal violence; psychological violence; physical violence; sexual violence; economic violence; social violence or spiritual violence.

d) the act of violence has to be committed by a family member.

The term “family member” is defined in Art. 5 of Law no. 217/2003 and it has a special and extensively meaning unlike the meaning this term has in civil and even criminal law.

Thus, within the meaning of Law no. 217/ 2003, in the category of “family member”, includes:

- ascendants and descendants, brothers and sisters, their children, as well as those made through adoption, according to the law, such as relatives;
- the husband/wife and/or ex-husband/ex-wife;
- persons who have established similar relations to those between spouses or between parents and children, if they are living together;
- guardian or other person exerting, *de facto* or *de jure*, the rights in the name of the child;
- legal representative or other person who take care of the person with mental illness, intellectual disability or physical handicap, except those who perform these as their professional duties.

e) protective order may be required for the elimination of the state of danger.

According to Art. 24 of Law no. 217/ 2003, measures ordered through protective order shall be determined by the judge, without be able to exceed the period of 6 months from the date of issuing the order.

Therefore, the maximum period for which may be issued an order of protection is 6 months.

If the judgment on protective order does not set the duration of ordered measures, they will take effect for a period of 6 months from the date of issuing the order.

Romanian jurisprudence reveals a heightened attention and concern toward victims of domestic violence, which is why most of the times the order of protection is issued for a maximum period of 6 months¹.

Obviously, considering the legislative provisions previously cited, along with other doctrinaires, we appreciate that the protection order has a provisional character. With all this, the victim has the possibility to request the issuance of a new protective order, if there are indications that in the absence of protective measures, the life, the physical or mental integrity or freedom would be put in danger (Art. 33 of Law no. 217/ 2003).

The moment when the victim may request a new order of protection is questionable considering the expression used by legislator in the content of Art. 33, i.e. “on expiry of protection measures”. The expression may be read in the sense that a new protective order can’t be requested before the previous order didn’t expire or a new protective order can’t be requested until the day on which the previous order expires. Such an interpretation would leave the victim without protection from the moment of filling the petition for new protective order, including whether it would be filled in the day when previous order expires, till the moment of trial and issuing the new order. Indeed, according to Art. 27 para. 1 of Law no. 217/ 2003, the judgment on protection order is issuing on urgent basis but even so from the moment of registration and up to the moment of solving the application there is a period of time, even if theoretically should be a short one, it can be fatal for protected values through this institution, i.e., the life, physical and/or mental integrity or person’s freedom.

We hope that these considerations are underlying the existing judicial practice in the sense of acceptance and solving the petition for new protection order before the expiry of the previous one².

4. The Content of Protective Order

The provisions of Art. 23 of Law no. 217/ 2003 allow to judge, in order to eliminate the danger, to issue a protective order, which will impose, provisionally, one or more of the following measures – obligations or prohibitions:

- temporary evacuation of aggressor from the family home, regardless if she/he is the owner;
- reintegration of the victim and, depend on the case, of children in the family home;

¹ City Court, Targu Mures, Civil Section, Judgment no. 5760/16.07.2014 pronounced in Case no. 8720/320/2014; *idem* Judgment no. 409/23.01.2014; *idem*, Judgment no. 3194/23.04.2014 pronounced in Case 4343/320/2014.

² For example, can be mentioned the Judgment no. 5760/16.07.2014, pronounced by City Court, Targu Mures. In this case, the victim of domestic violence filed at 2nd of July 2014 a petition for protective order although the previous protective order issued by Judgment no. 409/23.01.2014 should expire only on 23rd of July 2014. However, the Court upheld the application and issued a new protective order through Judgment no. 5760 pronounced at 16th of July 2014 (before the expiry of previous order).

- limitation of the aggressor's rights to use only on a part of the common home where it can be shared in such a way that the abuser does not come into contact with the victim;
- ordering the aggressor to maintain a minimal distance from the victim, children or other relatives or from the residence, working place or school of the protected person;
- interdiction for the aggressor to move in certain places of deferred areas that the protected person attend occasionally or visit regularly;
- prohibit any form of contacting the victim, including by telephone, by correspondence or any other way;
- ordering the aggressor to hand over the police any held weapons.
- entrusting minors or establishing their residence elsewhere than the residence where they suffered or witnessed domestic violence;
- ordering the aggressor to pay the rent or household expenses for the temporary residence where the victim, minor children or other family members reside or are about to reside due to the impossibility of remaining in the family home;
- ordering the aggressor to undergo psychological counseling, psychotherapy or recommending taking control measures, the treatment of some forms of care, particularly for the purpose of detoxification.

Also, according to Art. 35 of Law no. 217/2003, if Court, during the issuing the protective order, ascertains the existence of one of the situations that require the establishment of a special protection measures for child, will refer to the local public authority with duties relating to child protection. These measures are regulated by Art. 59 of Law no. 272/2004 on the protection and promotion of the right of the child, republished¹. Specifically, the special child protection measures are: a) placement; b) emergency placement; c) specialized supervision.

5. The Procedure for the Issue and Bringing into force the Order of Protection

According to the Art. 27 para. 1 of Law no. 217/2003, petition for protective order is analyzed in a closed-door hearing (Council Room), the Prosecutor's participation being mandatory.

Instead, according to the national Study on the implementation the protective order, to which we already have referred, only 23% of the processes concerning issuance of a protective order are analyzed in the closed-door hearing (Council Room). This phenomenon revealed by the jurisprudence materializes, on the one hand, a disregard of legal provisions, and on the other hand, an exposure of the direct and collateral victims to a public contempt.

The procedure to issue the protection orders should be performed with celerity and, in particular, should not be admissible evidences that requires a long time for being bringing and presenting in the court.

As result from the practice of the Romanian courts, the following evidences are approved: the documentary evidences, the interrogation of the defendant and the witnesses, who are usually brought by the victim of domestic violence and listened by the judge at the first fixed hearing. Thus, Romanian courts, considering the urgent character, attempt to judge the petition with celerity. Indeed, in cases where it is not performed the quotation procedure of the defendant, the Court, with a view to respect the rights of defense will postpone the trial and fix a new court date. In this last case, the hearing

¹ Law no. 272/ 2004 was published in "Official Gazette of Romania" part I. No.557 from 23th June 2004 and republished in "Official Gazette of Romania" part I. No. 159 from 5 March 2014.

should be rescheduled for a short time, and when the petitioner knows and informs the Court about the defendant's telephone number, he will be informed about the new court date through the phone, as well, the court reporter drawing up a "telephonic notification"¹.

In the case of special urgency (by title of example, mention situations where risks to the integrity or life of the victim of aggression is imminent) the Court may issue an order of protection on the same day, ruling out on the basis of the application and documents submitted, without the conclusions of the parties.

In the Court session, the Prosecutor has the obligation to inform the person requesting the protective order about the legal provision concerning protection of victims of crime.

The giving of judgment may be delayed but no more than 24 hours, and the motivation of the order is made not later than 48 hours from the moment of giving.

The judgment on protective order can be appealed within 3 days from its issuance if the parties were summoned or from the communication if the parties were not summoned.

Once issued, the order is enforceable and should be immediately communicated to Romanian Police structures in whose territorial limits the victim and aggressor's home is. The police have the duty to supervise the manner in which the judgment is respected and to seize the criminal authorities in case of avoiding the execution.

In cases where the person against whom the order was issued, is invading the provided protection measures, the victim or the police may refer to the criminal authorities for the prosecution of non-abidance by court decision crime, being sanctioned by imprisonment from one month to one year, for this penalty the conditional suspension not being possible (according to Art. 23-35 of the Law no. 217/2003 amended).

6. Revocation of Protective Order or Replacement of the Protective Measure

According to the Art. 34 para. 1 of Law no. 217/ 2003 "the person against whom was issued a protective measure through an order of protection for a maximum period may request the revocation of order or replacement of the measure".

Per a contrario, revocation of the protective order or replacement of the measure cannot be requested if were not issued for a maximum period, respectively 6 months.

In the content of the Art. 34 para. 2 of Law no. 27/2003 are listed the required condition, for revocation of the protective order. Specifically: a) the aggressor has complied the prohibition or obligations; b) the aggressor has followed psychological counseling, psychotherapy, addiction treatment or any other form of counseling or therapy that has been fixed in or to comply with safety measures, if such measures has been taken according to the law; c) if there is reasonable evidence that the offender no longer represent a real threat for the victim of violence or for her/his family. To these conditions explicitly regulated, there is one more regulated implicitly by the same Art. 34 para. 1 of Law no. 217/ 2003, i.e. protective order was issued or a maximum period, respectively 6 months.

The application of revocation is settle only after the parties and police who applied the order which revocation is requested were quoted.

¹ City Court, Targu Mures, Civil Section, Court resolution from 10th July 2014. Specifically, through this resolution Court postpone the trial, in order to carry out the procedure for summoning the defendant, including the telephonic notification.

7. Conclusions

The domestic violence is a phenomenon quite frequently, which manifests itself in various forms even in the most advanced contemporary societies.

Reduction of the phenomenon is extremely difficult, because of presence of two elements that characterize the family life and the rapports which it presume: the secrecy that surround and protect the privacy of the family's and couple's and the traditional acceptance on the one side of unequal roles of family members, and on the other side of the exercise of authority in the family through violence of any sort¹.

In this context, we respect the legislator's efforts and demarches towards prevention and combating domestic violence, resulting in amendments to Law no. 217/2003 by Law no. 52/2012. Although it can be perfected, just like any normative act, Law no. 52/2012 represents an important step forward in the fight against this undesirable phenomenon.

Given the importance of regulated social relations, the complexity and magnitude of domestic violence consequences, we appreciate that it requires a heightened attention and concern for victims. In this regard by *lege ferenda* we suggest the amendment of Art. 27 of Law no. 217/2003 in the sense that legal assistance to become mandatory for the person requesting the issuance of protective order, as well, and not just for the person against whom the order is sought. Indeed, it is now actually consecrated the right of the victim to request legal assistance, but it is possible that the victim may not have knowledge of this right or may omit to exercise it, possible under the commotions caused by acts of violence. Alternatively, the mentioned legal provisions could be modified in the sense of establish the obligation to inform the victim, at the first hearing, about the right to receive legal aid. The latest solution could be criticized because if the victim would exercise his/her right it would be necessary to assign an advocate, arrangement that involves a hearing postpone. For these reasons we appreciate that the first solution proposed is more effective. Specifically, at the time of filling the application, will be assigned an advocate who would be able to get in touch with the victim or inverted, in order to advise the victim, at least relative to evidences that should be administrated. In such conditions, at the first hearing the victim would present all evidences in support of his/her request and the chances to solve the petition for protective order at a single term would increase considerably.

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¹ The National Study regarding the implementation of the protection Order – Law no. 25 from 2012.