

ACTIONS OF THE COUNCIL OF EUROPE TO COMBAT DOMESTIC VIOLENCE. CONFIGURING AND EFFICIENT LEGAL FRAMEWORK

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Abstract

It is mandatory that we discuss aspects relating to violence within the family, since this phenomenon has appeared because of social problems that lately afflict more and more families. When it manifests itself within the family and the relationships that exist here, violence is terribly destabilising, both on a material as well as a moral level. Therefore, it is essential that any measures taken must be to both combat family violence, and also to mend its consequences, when they were unavoidable.

Explicit provisions referring to family violence can be found in several areas of law, from criminal, civil and administrative to family and social law, as there is, in this case, an increasing tendency to elaborate upon the laws that already exist in this field, to interpret them and to firmly set their guidelines in order to render them clearer and more precise, and therefore applicable in cases of domestic violence.

Keywords

Violence, family violence, criminal, civil and administrative to family and social law, domestic violence

1. The legal typology relating to family violence in the New Criminal Code

It is crucial that we discuss aspects relating to violence within the family, since this phenomenon has appeared because of social problems that lately afflict more and more families. A study of this phenomenon involves a complete analysis of several factors¹, for this reason special attention must be paid to identifying the specific situations, the causes and generating factors, in order to ensure efficient means of prevention and protection.

Domestic violence represents a most serious social problem, classified as a form of deviant behaviour. This concept includes *any physical or verbal action intentionally perpetrated by a member of the family against another member of the same family, which causes physical, emotional or sexual abuse or any form of material damage*².

Violence within the family has been perceived as *a recurrent phenomenon*; therefore, it was considered that by taking preventative measures future incidents may be

¹ G. Văduva, *Analiza și prevenirea violențelor în familie*, Ministry of the Interior, Bucuresti, 2002, p. 13.

² Art. 2 paragraph 1 from *Law 217/2003 for the prevention and combating of domestic violence*, published in the Official Journal of Romania, Part I nr. 367 from 29th May 2003.

averted³. The social impact of this type of violence has extended not only to victims, but also to persons that have witnessed it or have knowledge of such situations⁴.

At present, provisions relating to the protection of women and children against any and all forms of abuse are contained both in the Constitution and national laws⁵, as well as many international documents.

The current Criminal Code does not expressly incriminate *domestic violence*, although it regulates the institution of family by classifying as crimes any form of ill treatment of minors, consisting in neglect, indifference, abandonment. Also, Romanian legislation mentions other types of family violence such as incest, making children beg, forcing them to do labour etc. It is sought thus to ensure real protection of family members, by creating measures and penalties for people that commit these actions, which cause physical and emotional suffering for family members. In the New Criminal Code, however, legislators have included domestic violence, in article 199, in the category of crimes committed against a family member, a reason why we salute this legislative solution. With regard to the stipulations in the Constitution, as well as in the Criminal Code relating to the family, we have already made some mention before, and yet we cannot fail to specify that, although the legislator, *de jure*, is outlining the legal framework to protect family members, *de facto* the victims of domestic violence have no notion of their most elementary rights⁶. In this sense it falls to us to try to redirect the legislation in this field.

In our opinion, we consider that there are a number of lacks in the prevention system here in Romania, marked even more by the lack of trust in the authorities and in the application of the law due to the numerous cases in which the police have remained impassive to victims' complaints of various forms of domestic abuse. At the same time, the dysfunctionality of the system in Romania in this field resides in the fact that the state and its authoritative bodies are reluctant to intervene, as it is still thought of as a private matter⁷.

2. The necessity to establish efficient legal measures in order to prevent and combat domestic violence

In order to converge all prevention policies in cases of domestic violence in all Member States, the Committee of Ministers of the Council of Europe have adopted numerous recommendations⁸. This initiative is based on the fact that domestic violence represents a serious attack on the victims of this crime, but also on society and thus it does damage to an essential value for the Council of Europe, the promotion of safety and

³ I. M. Ropotică, *Violența intrafamilială*, Editura Pro Universitaria, București, 2007, p. 135

⁴ C. Nicoară, *Protocolul privind cooperarea în domeniul prevenirii și combaterii violenței în familie*, în "Drepturile minorilor și ale victimelor violenței în familie" nr. 2/2007, p. 29

⁵ *Law 217/2003 for the prevention and combating domestic violence*, published in the Official Journal of Romania, Part I nr. 367 from 29th May 2003; *Law 272/2004* regulates the legal framework concerning the protection and promotion of children's rights; published in the Official Journal of Romania, Part I nr. 557 from 23rd July 2004

⁶ V. Stoiciu, A. Stoiciu, N. Mănescu, *Violența domestică – manual de prevenire și combatere*, Asociația Idee, București, 2003, p. 60

⁷ C. Nicoară, *Protocolul privind cooperarea în domeniul prevenirii și combaterii violenței în familie*, în "Drepturile minorilor și ale victimelor violenței în familie" nr. 2/2007, p. 29

⁸ Recommendation R (79) 17 concerning the protection of children against ill treatment, Recommendation R (85) 4 concerning domestic violence, Recommendation R (87) 21 concerning assistance given to victims and preventing victimization, Recommendation R (90) 2 concerning certain social measures against interfamilial violence, Recommendation R (93) 2 concerning medical-social aspects of the abuse of children, Recommendation R (2000) 11 concerning measures against human trafficking for sexual exploitation, Recommendation R (2001) 16 concerning the protection of children against sexual exploitation, Recommendation R (2002) 5 concerning the protection of women against domestic violence.

security within the community. When the wellbeing and physical wholeness of a person are regularly jeopardised in their own home or family, where in fact they should feel most safe, this constitutes a serious problem for society.

Time and time again the Member States have considered that, taking into account the social and political context, it is urgent to define a policy against violence. This growing awareness has provided the necessary impulse in the fight to prevent and combat domestic violence.

By this token, policies against violence perpetrated by individuals were created and the following *historic paradigms*⁹ were identified:

- an efficient punitive system must be instituted for individuals that have resorted to illegitimate violence; issuing this policy with regard to illegitimate violence is centred, in this case, on maintaining order;
- particular attention must be paid to the importance of children for society, as future citizens and members of functional families. This is why the first laws were passed in favour of the child's safety and wellbeing; from a social point of view this is a legitimate intervention of the state;
- it is necessary to ensure that the rights of potential victims are protected and that they live a life free of violence.

In the family environment one can find *the specific elements of the three paradigms* identified, of greater and or lesser importance, depending on the legal and cultural traditions of the respective countries. Consequently, it is possible to interpret in a different way the meaning of "*incrimination*" of domestic violence, although, as a common thread of most Member States, domestic violence remains a violation of human rights.

From this point of view, it was noticed that northern countries have given priority to all legislation referring to social protection; the criminal justice system is concerned with the treatment of the perpetrators of these crimes and its main objective is to ensure an overall prevention of these crimes, as a result of social values being included in the legislation¹⁰. Therefore, one endorses the premise that convictions, punishment and sanctions have the same effect as prevention.

More than this, some Member States affirm that violence within the family is regulated by the current criminal justice system and it is therefore unnecessary to systematise the crimes committed against people, depending on their sex or the relationship between them, or to create special laws regarding domestic violence, because any attack on a person is punished by law. For example, the Criminal Code of *Denmark* states in article 244 that any person who commits an act of violence against another or any other form of attack is fined or jailed. In the case of *Finland*, the unlawful acts committed against the life and health of a person are punishable by virtue of article 21 of the Criminal Code, which contains provisions with regard to violence and aggravated violence. In the case of *Germany, Andorra, Armenia, Austria, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Denmark, Estonia, Georgia and Lithuania*, domestic violence is punished the same as any other act of violence. *Spain and Sweden* incriminate acts of domestic violence as specific crimes, while in *Great Britain, Germany, Austria, Belgium and Turkey* the relationship

⁹ Comité ad-hoc pour prévenir et combattre la violence à l'égard des femmes et la violence domestique, Strasbourg, 5th May 2009 CAHVIO (2009)13, p. 6 ; In order to study and consult the document, it is made available on:

http://www.coe.int/t/dghl/standardsetting/violence/CAHVIO%20_2009_%2013%20FR.pdf.

¹⁰ J. Niemi-Kiesläinen, *Criminal law or social policy as protection against violence*, in *Responsible Selves. Women in the Nordic Legal Culture*, Nousiainen, Kevät et autres, Aldershot, Ashgate, 2001, pp. 289-309

between victim and aggressor is seen as an aggravating circumstance. In France the connection between victim and aggressor may constitute and aggravating circumstance and may be an element of the crime.

From these examples, we observe that in all the legislations, no matter how different they may be, acts of family violence constitute crimes and fall under the jurisdiction of criminal law. In order to make the legal system in Romania more efficient, we could try to implement some of these provisions in our national legislature, such as the declaring domestic violence a special crime.

3. Instituting concrete measures of prevention and combating domestic violence at the level of the member states of the Council of Europe

Most of the specific legislation regarding domestic violence is centred, especially, on measures of protecting victims. In this way, victims of violence must benefit from different forms of protection, at different times, seeing as they meet with violence wither at home or in public.

Immediate consequences of domestic violence

Priority should be given to the physical security and safety of victims and, eventually, to their families also. In this situation, the victim may require spatial and temporal separation from their aggressor. This may be done by removing the aggressor from the victim's home with the assurance that they will not return any time soon or by taking the victims to a safe place, such as shelters or other such places of refuge.

Within the Ad-hoc Committee on Preventing and Combating Violence against Women and Domestic Violence summoned in Strasburg, on 4th May 2009, a special assistance regiment was created, which could be applied to help victims of violence. It consisted of the following actions:

- giving immediate medical care, meaning adequate medical examinations and treatment, done by qualified personnel, trained for this purpose;
- interviewing in accordance with imposed standards, confidentiality and knowledge of this type of violence so as to ensure at the very least the principle of "do no harm";
- counseling from trained personnel on legal options that include taking statements, preserving evidence and ensuring protection orders;
- offering a one-stop service that provides security, medical and legal advice.

On a long term, the measures of assisting victims depend on the needs they have depending on the particular situation of the victim, as well as the context, in which they were exposed to violence. These needs include¹¹: constant access to a secure shelter, guaranteed for the victim, either at their home or elsewhere; ongoing and confidential treatment for physical and emotional wounds, seeking long term rehabilitation, through counseling, psychotherapy, support services etc.; assistance in requesting and obtaining any form of social security.

A large number of European legal systems, although not all, generally rely on the courts of law to prevent and eventual criminal acts. Indeed, in the form of guaranteeing justified, efficient and quick access to justice for victims of violence, international law requires that all Member States of the Council of Europe adopt appropriate and efficient legislative and administrative procedures. We consider, however, that special laws are

¹¹ Comité ad-hoc pour prévenir et combattre la violence a l'égard des femmes et la violence domestique, Strasbourg, le 4 mai 2009, CAHVIO (2009)11, pp. 1-2, document available on : http://www.coe.int/t/dghl/standardsetting/violence/CAHVIO_2009_11%20typologie%20de%20la%20protection%20pour%20les%20femmes%20victimes.pdf

passed for cases of domestic violence the more the potential victims of domestic violence are more often those who willingly share their home, their property and their family with their potential aggressor, which excludes any trespass of the law into the private domain.

Elaborating a special strategy¹² is also imposed as a measure of protection, by combining the ways of applying the implemented legislation at the level of police services with the applied civil legislation through optional actions that are available to the courts.

Concretely, this strategy is put into practice through the possibility of appealing to the following courses of action¹³:

- on one side, the police have the authority and the duty to immediately evict from the victim's home, any person who threatens the victim with repeated acts of violence; this measure may be applied for 7-14 days. It is an intervention by the police in light of its duty to protect citizens in danger, without the need for a complaint or a plea from the victim;
- on the other side, victims are encouraged to ask the courts to act by transferring sole right of residence to the victim, to impose protection of the children or to find in the area a residence and a place of work for the victim or a school which the children could attend.

The eviction of the aggressor, imposed by the police, is based on the fact that other future violence is possible, without excluding, however, the duty of the police to start a *detailed investigation* of the elements that make up the content of the crime.

In most of the Member States of the Council of Europe, the legislation contains ordinances of protection and regulate the instituting of certain restrictions upon the violent perpetrators in order to guarantee that they cannot enter the premises of the victim's home, which must be protected, nor can they harass or try to meet or contact the victim. These restrictions, whose duration can vary, may be issued ex officio by the competent authority. The special provisions meant to incriminate violence in the family environment are less frequent, acts of abuse between family members are broadly defined as they may include the abuse of children and of the elderly. Therefore, violence aimed against the life partner is considered an aggravated circumstance in French-speaking countries and in those that are linked to the French justice system, while the model based on coordinated police action with the possible civilian action is adopted in German-speaking countries and their neighbours.

In conclusion, the Member States have become aware of the supreme value of family in any society and they try to bring domestic violence up to the rank of a problem of public interest, that is why they put so much effort to co-opt other states of the world, in order to ensure the right of victims to security, protection, services and justice, in a well established legal framework.

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¹² Comité ad-hoc pour prévenir et combattre la violence à l'égard des femmes et la violence domestique, Strasbourg, 5 May 2009 CAHVIO (2009)13, pp. 12-13

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