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## APPLICATION OF PROTECTIVE MEASURES AGAINST DOMESTIC VIOLENCE

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### **Abstract**

This research approaches the application of protective measures in cases of domestic violence. Given the fact that the protection measures applied in the case of committing actions that constitute a manifestation of domestic violence is a rather vast institution, it is necessary to make a delimitation between those of civil, contraventional and criminal procedural order. Reference will be made to the procedure for applying protection measures, such as the protection order (civil-procedural/criminal-procedural) and the emergency barring order, the way of monitoring their compliance, as well as the legal consequences in case of violation of these measures by the aggressors.

**Keywords:** domestic violence, protective measures, victim, aggressor

### **INTRODUCTION**

Domestic violence is one of the most serious problems facing contemporary society, both internationally and nationally. The subject of domestic or family violence is becoming more present and discussed in society, asserting the idea that the person is much more vulnerable, specifically in the family environment. This is explained by the fact that the person never expects that he/she can be victimized within his own family, thus, he/she is not prepared to react to various cases of abuse by family members. The importance of the subject itself is also dictated by the role of the family in social life, or throughout the world the family is recognized as one of the main values of humanity.

For the Republic of Moldova, the topic of family violence becomes even more current following the ratification by our state of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, which entered into force for the Republic of Moldova on May 1, 2022.

In the national legal system, domestic violence as a phenomenon and its combat are regulated by a series of legal acts. However, given the fact that the present study is

focused in particular on the protection measures for victims of family violence existing in the Republic of Moldova, we will refer to the following legal framework:

- 1) Framework law: Law no. 45 of 01.03.2007 regarding the prevention and combating of family violence, which was amended following the adoption of Law no. 113 of 09.07.2020 for the amendment of some normative acts that will enter into force on 07.09.2023.
- 2) The Criminal Code of the Republic of Moldova, adopted on 18.04.2002.
- 3) The Contraventional Code of the Republic of Moldova, adopted on 24.10.2008.
- 4) The Code of Criminal Procedure of the Republic of Moldova, adopted on 14.03.2003.
- 5) The Civil Procedure Code of the Republic of Moldova, adopted on 30.05.2003.

In doctrine, domestic violence is defined differently, but common to all definitions is the idea that it represents any act of violence committed within the family by family members. Domestic violence is an action or inaction of the active subject (aggressor), directed against the passive subject (victim) or against common or personal property.[1]

A broader doctrinal definition of family violence establishes that family violence constitutes a threat, made in the present or in the past, to cause physical, moral or material harm or to provoke it, which is characterized by a constant tendency to escalate and by a major probability of repetition, within the relationship between the social partners, regardless of their legal status or domicile.[2]

Law no. 45/2007 provides the most comprehensive definitions of all forms of domestic violence. As a general definition, domestic violence involves acts of physical, sexual, psychological, spiritual or economic violence, except in self-defense or defense of another person, including the threat of such acts, committed by a family member against another member of the same family, through which material or moral damage was caused to the victim.[3]

We understand the following family member in the case of domestic violence actions:

- a) in the condition of cohabitation: persons in marriage, in divorce, under guardianship and guardianship, in respect of whom a measure of judicial protection has been instituted, their relatives, relatives, spouses of relatives, persons in relationships similar to those between spouses (cohabitation) or between parents and children;

b) in the condition of living separately: married, divorced persons, their relatives, relatives, adopted children, persons under guardianship, in respect of whom a judicial protection measure has been instituted, persons who are or have been in relationships similar to those between spouses (cohabitation).

Thus, the following forms of domestic violence are distinguished, the definition of which is also found in Law No. 45/2007:

- Physical violence;
- Sexual violence;
- Psychological violence;
- Spiritual violence;
- Economic violence;
- Violence against women.

## **METHODOLOGY**

In the process of the given study, there were used the following scientific research methods: systemic analysis, logical analysis, generalization, synthesis and classification.

## **RESULTS**

### ***Subsection Statistical data on the phenomenon of family violence in the Republic of Moldova***

Given the fact that acts of family violence are manifested in a narrow circle - the family environment, it is much more complicated to identify the cases of their commission. Thus, acts of violence in the family are characterized by a high degree of latency, because their identification, largely, depends on the reporting by the victims, even if the reporting is encouraged by any person for whom the fact of resorting to violence in the environment has become known family.

In accordance with the Activity Report of the Prosecutor's Office [4], in 2021, prosecutors led the criminal investigation in 947 criminal cases initiated on the basis of art. 201<sup>1</sup> of the Criminal Code (domestic violence), an increase compared to 2020, in which 866 criminal cases were initiated, but a decrease compared to the years 2019 (969 cases) and 2018 (998 cases).

At the same time, we can use the data according to the Information Note on the state of criminality that threatens the life and health of the person and those committed in the sphere of family relations during 12 months of 2021[5], developed by the National

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Public Security Inspectorate of the General Police Inspectorate. Therefore, in 2021 were detected 2609 cases of family violence (2453 in 2020), of which:

- 947 (866 in 2020) cases met the constitutive elements of the criminal offense (art. 201<sup>1</sup> Criminal Code);
- 1662 (1587 in 2020) cases met the constitutive elements of the misdemeanor composition (art. 78<sup>1</sup> Contraventional Code).

At the same time, according to this Information Note, it is found that during 2021, the police submitted 322 actions (compared to 340 in 2020) to the courts, regarding the application of protection measures to victims of family violence.

Regarding the issuance of protection orders for victims of family violence (in the procedural-criminal order), in 2021, judges issued 766 protection orders (compared to 635 in 2020).

Regarding the situation during the year 2022, given the fact that at the time of the elaboration of the respective study there is no data reported by the courts, the police or the Prosecutor's Office regarding their activity in the year 2022, we refer to statistical data reflected in the Report on Police activity for 9 months of 2022.[6]

According to these data, during 9 months of 2022, the Police received 11700 addresses regarding conflicts in family relationships. Of them, 665 cases that were qualified as crimes regarding domestic violence, and 1232 cases met the constitutive elements of the misdemeanor/contravention component.

As a preventive measure, in order to ensure the protection of victims of domestic violence, 590 protection orders were issued by courts, and supervised by the Police.

Given the fact that the victim becomes even more vulnerable in relation to the aggressor after the legal authorities find out about his/her actions, it is necessary to intervene as quickly as possible in order to protect the victim. Precisely for this purpose, there were created mechanisms to protect the victim by applying some measures to the aggressor by issuing emergency restriction/barring orders (applied by the police) and protection orders (applied by the court in the civil/criminal order).

### ***Subsection Application of protective measures to victims of domestic violence in the civil procedural order***

Since the purpose of the law is to ensure legal relations and provide them with additional protection, the Parliament has the obligation to adopt legal norms that will harmonize social relations that are under a certain risk or degree of danger.

The application of domestic violence protective measures in the civil process is an additional mechanism for maintaining the stability and safety of family relationships. As much as this regulation is welcome, the position and role of the parties in this process is very special.

Therefore, chapter XXII<sup>2</sup> of the Code of Civil Procedure of the Republic of Moldova [11], adopted for the purpose of implementing the Law on the prevention and combating of family violence no. 45-XVI of March 1, 2017, regulates the mechanism for resolving requests for the application of protective measures in favor of victims.

According to the law on the prevention and combating of domestic violence [3], the request regarding the commission of acts of domestic violence and for the issuance of the protection order can be submitted by the victim personally or through a representative. However, the law covers cases in which the victim cannot be present, for various reasons (such as health, age or other valid reasons), at her/his request, the application for the issue of the protection order can be submitted, in the interests of the victim, by the police representative or the social assistance. Moreover, the local guardian authority can submit the request for the issue of the protection order in the interests of the child or the person in respect of whom a judicial protection measure is instituted, even in the absence of a request from the victim or his legal representative.

Summarizing all the legal provisions, we would like to mention that the circle of persons authorized to submit the request regarding the issuance of the protection order is actually quite wide, the subjects being:

- the victim of domestic violence;
- the contractual or legal representative of the victim;
- the guardianship and guardianship body - in the case of the minor or the person in respect of whom a protective measure has been instituted, may, without the express request of the victim or his legal representative;
- the person in charge of protecting the person under protection - in the case of the person in respect of whom a protective measure was instituted, may, without the express request of the victim or his legal representative;
- any other person who justifies an interest regarding the defense and personal or patrimonial protection of the person under protection - in the case of the person in respect of whom a protective measure has been instituted may, without the express request of the victim or his legal representative;
- the social assistance body;

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- the police body, in accordance with art. 21, lit. n), Law on police activity and police officer status no. 320 of December 27, 2012.

In this regard, we mention that starting from January 9, 2023[12], some modifications to the related legislation will come into force, among which they exclude one of the subjects of the submission of the request - the prosecutor. The reasoning behind this change is the exclusion of the intervention of participants in criminal proceedings in the mechanisms provided for by civil legislation.

As the commission family violence acts are extremely sensitive and need both special regulation and a more special case settlement, the requests described above shall be examined urgently, within 24 hours.

Thus, similar to the procedures applied at this stage and within the criminal process, if the request is accepted, the court issues a protection order, by which it applies to the aggressor one or more of the following measures, some of which are to be monitored electronically in the prescribed manner by law:

- a) the obligation to temporarily leave the common home or stay away from the victim's home, without deciding on the way of administration and the right to dispose of the assets;
- b) the obligation to stay away from the victim's location, at a distance that would ensure the victim's safety, excluding any visual contact with her/him or her/his children;
- c) the prohibition of any contact, including by telephone, by correspondence or in any other way, with the victim or her/his children, with other persons dependent on her/him;
- d) the prohibition to approach certain places: the victim's place of work, the children's place of study, other specific places that the protected person frequents;
- e) the obligation to contribute to the maintenance of the children he/she has in common with the victim;
- f) the obligation to participate in a special treatment or counseling program, if such action is determined by the court as necessary to reduce or eliminate violence;
- g) limitation of rights regarding common assets with the victim;
- h) establishing a temporary visiting regime for his/her minor children;
- i) the prohibition to keep and carry a weapon.

Moreover, for double safety, both physical and psychological, the victim or his/her family members can wear an electronic surveillance system that allows the aggressor's compliance with the obligation to be verified, expressing in written form

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their agreement in this regard - an additional mechanism necessary for both victims and law enforcement agencies to ensure the safety of all subjects involved.

According to the law, the term of application of the measures stated above is up to 3 months. However, the term can be extended by the court. Thus, the court may apply a new term upon repeated request as a result of i) committing acts of domestic violence during the first period of application of the protection measures; ii) as a result of non-compliance with the conditions provided for in the protection order; iii) if, at the expiration of the period of application of protective measures, the victim remains at risk of being subjected to violence; iv) other illegal actions by the aggressor. *Per a contrario*, at the well-founded request of the victim, the court can revoke the protective measures applied, ensuring that the will of the victim is freely expressed and that she was not subjected to pressure from the aggressor.

An extremely interesting aspect to analyze in the civil procedure is the applicability of protection measures to under-aged children, and when the judge has the right to accept or refuse the issuance of the protection order on them.

Precisely for that reason, it is appropriate to analyze art. 278<sup>5</sup> of the Code of Civil Procedure, which regulates the content of the request (which is not an ordinary summons request). In the application regarding the application of protection measures, the circumstances of the act of violence, the intensity, the duration, and the consequences suffered and other circumstances that indicate the need for the application of protection measures are indicated.

Interpreting the legal norm, we conclude that its recipients, including children, must demonstrate the need for the issuance of the protection order. Most of the time, the victim-parent requests that the protection measure also apply to the child or minor children, without proving or demonstrating additionally why protection may be needed for them as well. Some judges, however, partially admit the submitted request, only in favor of the victim, because this necessity is not proven for children. That is precisely why the regulation from 278<sup>5</sup>, which is a general one and at first glance, comes to protect the victim together with the children. In this regard, we understand that it is an obvious fact that emerges from the essence and complexity of the phenomenon of domestic violence, but the norm is still vague, and its applicability is different from case to case, depending on the arguments of the victim and sometimes on the empathy of the judge.

Analyzing the judicial practice of recent years with reference to the issuance of the protection order in the civil process, some judges justify their partial admission of the requests in favor of the children by the fact that the violence against the child has not

been proven to the court. Moreover, the aggressor-parent claims that he/she only has hostile relations with his partner, not with the child, and the judge, following the principles of immediacy and contrariety, admits only proven claims, showing maximum impartiality and objectivity, but forgetting other important aspects of this phenomenon.

The decision regarding the admission or rejection of the request for the application of protection measures can be challenged with an appeal, but contesting the conclusion regarding the application of the protection ordinance does not suspend the execution of the applied measures.

In the context of the amendments that are about to enter into force [12], we want to emphasize other additions to the law, including modifications that bring the national law into line with the standards established by the Istanbul Convention. Thus, the amendment to the Code of Civil Procedure that was introduced in art. 278<sup>2</sup> paragraph (2) implies the institution of the possibility for the court to conduct the hearing of the victim by means of videoconference, which is extremely salutary considering the multitude of circumstances that would not allow the victim to appear before the court, even furthermore, moving her to a court, could be an increased risk to the victim's safety. At the same time, the legislation supplies with regulations that will allow the hearing of the alleged aggressor to take place in the absence of the victim if the latter requests this fact. Thus, it ensures, to the extent possible, the lack of contact between victims and aggressors in the buildings of the courts and government law enforcement agencies.

Additionally, a short but extremely welcome change that will make the court responsible for supporting victims of domestic violence is the introduction of a rule that requires the court to explain to the victim how to access the services intended for victims of domestic violence and to provide information on the contact details of the respective services.

### ***Subsection Application of measures to protect victims of domestic violence in the procedural-criminal and contravention order***

In the situation analyzed previously, regarding the application of measures to protect victims of domestic violence in the civil procedure, the order is issued by the judge following the examination of the materials presented within a maximum of 24 hours. Thus, it is not necessary to establish the aggressor's guilt in the criminal or contraventional sense. On the other hand, in the case of criminal/contraventional proceedings, we are already talking about crimes or contraventions, with all their constituent elements.



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Given the fact that there is a need to protect the victim of domestic violence as quickly and efficiently as possible, separating her from the aggressor, Law 45/2007 regulates the possibility of applying the emergency barring order. Already from its name, we conclude that it is a measure that is applied first, being one of maximum urgency.

The emergency barring order, in the sense of the legislative framework, means the administrative act issued by the police, by which protective measures are applied to ensure the immediate removal of the aggressor from the home of the family subject to violence and the establishment of prohibitions provided by law, in order to prevent repeating/committing acts of violence, thus guaranteeing the safety of the victim and other family members in their home and outside it.[3]

Thus, following the enforcement of the restraining order by the police, the following protective measures shall be applied to the aggressor:

- a) the obligation to temporarily leave the common home or stay away from the victim's home;
- b) the prohibition to approach the victim, respecting the distance that would ensure his security and excluding any visual contact with the victim and/or children;
- c) prohibiting any contact, including by telephone or by any other means of communication, with the victim and/or the children;
- d) the prohibition to keep and carry the weapon.

Thus, the police *is obliged* to immediately order the issuance of the emergency barring order, if the place of the crime has been established where there is a reasonable suspicion that acts of violence in the family are being committed, in order to remove the crisis.

In this sense, we draw attention to the wording regarding reasonable suspicion, which means that at the time of issuing the restraining order, it is not necessary to have proof of the existence of the misdemeanor/offence of domestic violence component, but only to establish a reasonable suspicion. This means, that there should be facts or information about them, which would convince an independent observer that acts of domestic violence are committed in that place, with regard to the concrete victim, by the concrete aggressor, in respect of which the restraining order is applied emergency restriction.

At the same time, concurrently with the period in which the measures imposed on the aggressor by the barring order take effect (the period of application can be up to 10

days), the police must take the necessary actions to establish the commission of the misdemeanor or the crime of domestic violence within a criminal/contravention process.

The basic means by which the protection of the victim can be ensured throughout the examination of the case related to the resort to violence in the family environment is the protection order, which is applied by the court and through which several measures are established, compared to the order of restriction.

Thus, the victim has the right, during the period of action of the emergency barring order, to request, under the law, the release of the protection order. The action of the emergency restriction order, in this case, is extended until the implementation of the protective measures established by the court.

However, it is essential that this right is available not only to the victim, which is also reflected in the text of the Istanbul Convention, or it is necessary that the protection of the victim is ensured regardless of the fact that the actions are reported by him. This fact is explained by the fact that victims of domestic violence often feel fear of the aggressor, which prevents them from reporting cases of domestic violence committed against them to the law enforcement authorities, and also from asking the state authorities for protection against the actions of the aggressor. Thus, reporting by any person who has become aware of the given fact is encouraged.

At the same time, the Code of Criminal Procedure stipulates in art. 215<sup>1</sup> the obligation of the criminal investigation body and the prosecutor to intervene, in order to obtain protection measures for the victim, if during the criminal process, it is found that the victim of domestic violence is in danger of being subjected to violence or other illegal actions, including the destruction of his property.

These provisions are important because it is natural that when the crime of domestic violence is committed, the victim of the crime is in imminent danger, he can be further humiliated, physically, mentally, sexually assaulted, etc. Accordingly, the criminal investigation body or the prosecutor is obliged to intervene urgently not only in the documentation of the case, but also to take some measures to protect this victim. Otherwise, the consequences of the criminal act may lead to more drastic consequences.[7]

Thus, following the submission of the request regarding the issuance of the protection order for the victim of domestic violence, the court, by concluding, issues, within 24 hours of receiving the request, a protection order, by which it can offer protection to

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the victim and her children, applying one or more protective measures to the suspect, the accused, the defendant.

The protection measures that can be applied to the aggressor following the issuance of the protection order are:

- a) the obligation to temporarily leave the common home or to stay away from the victim's home, regardless of the property right over the goods;
- b) the obligation to stay away from the victim's location, at a distance that would ensure the victim's safety, excluding any visual contact with her/him or her/his children, with other dependents;
- c) the prohibition of any contact, including by telephone, by correspondence or in any other way, with the victim or her/his children, with other persons dependent on her/him;
- d) the prohibition to approach certain places: the victim's place of work, the children's place of study, other specific places that the protected person frequents;
- e) limiting the unilateral disposal of common goods;
- f) the obligation to undergo a medical examination regarding mental state and drug/alcohol addiction and, if there is a medical opinion confirming drug/alcohol addiction, to undergo forced medical treatment for alcoholism/drug addiction;
- g) the obligation to complete a special treatment or counseling program if such an action is determined by the court to be necessary for the reduction of violence or its disappearance;
- h) the prohibition to keep and carry a weapon.[8]

The situation regarding the right of the criminal investigation body and the prosecutor to apply the emergency restriction order is unclear. Or, by the Law no. 45/2007, the emergency restriction order is issued by the police as the ascertaining body. In the procedural-criminal legislation, such a possibility is not assigned to either the criminal investigation body or the prosecutor. We believe that this should be remedied by making some changes in the Code of Criminal Procedure, or in this way, the immediate protection of the victim would be ensured within a criminal process, started on the fact of domestic violence. Practically, it appears that until the moment when the court issues the protection order (which includes the period of assigning the aggressor to the procedural status, the preparation of the application and the

examination of the application by the court), the criminal prosecution body/prosecutor is unable to react promptly to ensure the safety of the victim.

The protection measures are applied for a period of up to 3 months with the possibility of extending this period by the court at the repeated request of the victim, motivated by the repeated committing of acts of violence in the family or because of non-compliance with the conditions stipulated in the protection order by the aggressor.

In this sense, it is appropriate to mention that the application of protective measures only by issuing ordinances is not enough. It is necessary that the aggressor effectively respect these measures, and for this there are mechanisms for monitoring their respect.

This was mentioned by the ECHR, in the decision *Munteanu vs. Republic of Moldova* [9]. Thus, the Court found a violation of Article 3 of the Convention, because, despite the numerous complaints and protection orders issued, the authorities did not take sufficient measures to effectively protect the applicants from the constant violence from the aggressor. The arguments were that neither the fine imposed for breaching one of the protection orders, nor the police officer's discussions with the abuser clearly had any tangible effect on his behavior. Thus, it must be ensured not only the issuing of protective orders, but also ensuring compliance with the measures imposed by the aggressor.

In this regard, the national legislation regulates that the supervision of the fulfillment of the measures established in the protection orders belongs to the competence of the police body and the probation body.

First of all, the police are obliged to inform the aggressor about the measures to protect the victim that have been applied to him/her and to explain their essence, following the standard regarding informing the person in the criminal process regarding matters that concern him/her. This means that the aim must be to inform the aggressor in such a way that he fully understands the essence of the established measures, namely: the language spoken by the aggressor, the use of clear terms, etc.

In order to ensure effective monitoring of the aggressor's compliance with the victim's protection measures, the police are obliged to make unannounced visits to the victim's home, as well as to immediately intervene in any communication about non-compliance or attempted violation of the protection measures by the aggressor.

At the same time, the measures, such as: the obligation to temporarily leave the common home or to stay away from the victim's home, regardless of the property

right; the obligation to stay away from the victim's location, at a distance that would ensure the victim's security, excluding any visual contact with her/him or her/his children, with other dependents; prohibiting any contact, including by telephone, by correspondence or in any other way, with the victim or her/his children, with other dependents; the prohibition to approach certain places: the victim's place of work, the children's place of study, other specific places that the protected person frequents, are mandatory applied with electronic monitoring. At the same time, the victim, or if applicable, her/his family members, with their consent, can wear an electronic surveillance system that allows the aggressor's compliance with the obligation to be verified.

These measures allow the victim and his family members to be monitored through a GSM device, only with their written consent. Placing the electronic bracelet on the abuser can avoid violation of the protection order and protect the victim from further assault or prevent the commission of a crime, as the victim will be notified of the abuser's proximity. The police and probation will be informed in real time about the violation produced by the aggressor and they will be able to react operatively and immediately to remove the danger.[10]

Likewise, it is important to note that the refusal or evasion of the aggressor from the execution of the requirements of the emergency restriction order/protection order attracts contraventional liability based on art. 318<sup>1</sup> of the Contravention Code and criminal liability based on art. 320<sup>1</sup> of the Criminal Code, respectively.

#### **4 Conclusions**

In conclusion, we can mention that the situation regarding the fight against family violence in the Republic of Moldova is constantly changing and improving, with changes in the legislation that ensure a broad spectrum of protection for victims of family violence. This is also observed at the current stage, taking into account the changes in a series of legislative framework that will enter into force from January 9, 2023 and are aimed at connecting national legislation to international standards.

Moreover, due to the European course to which the Republic of Moldova has committed itself legally and morally, the authorities are in a continuous process of accession to international instruments, especially to European standards and legislation, the field of domestic violence being an extremely important one for connecting to human rights requirements and standards.

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