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RESTRAINING ORDER IN THE ROMANIAN LEGISLATION AND PRACTICE¹

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Abstract

The protection of the family (especially women and children) consists of important provision in both the international and internal laws of the states. Unfortunately, in Romania, the incidence of domestic violence is high, an aspect that we will highlight in our paper. In this article we aim to analyse the latest legislative changes in the field of protection order, with reference to the provisional protection order.

Regarding the temporary restraining order, it is regulated by Order no. 146/2578/2018 (Minister of Internal Affairs and Minister of Labor and Social Justice, 2018) on how to manage cases of domestic violence by police officers. Through this normative act, the necessary framework was created so that the police can intervene quickly when phenomena of domestic violence are registered and to ensure the immediate protection of the victims of aggressors. The police officers assess the risk situation in each case, and it may be ordered to issue a temporary restraining order until the competent court rules on the situation created for a longer period of up to 6 months, with the possibility of extending it. We will also present some relevant cases.

Over the last 10 years, the protection of the family (especially women and children) has made some important progress both in terms of legislation and practice. Unfortunately, the level of domestic violence is still significant and, in addition to the legislative measures we will refer to in the article, more measures are needed to educate the population and raise awareness of the severity of this phenomenon that affects the integrity and physical and mental development of victims.

Keywords:

restraining order, family, domestic violence, protective measures

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1. Preliminary Aspects Regarding the Restraining Order

Given that the domestic violence phenomenon has a special width and that it can produce major consequences as concerns the normal course of family relationships and the proper development of minors in the family, there have been serious concerns to stop acts of violence and protection of victims. Thus, in most states, there have been set up regulations whose purpose is to diminish the offences of domestic violence, in order to prevent the commission of serious offences against a family member.

In a study regarding this domain, it is shown that the European countries are making efforts in order to prevent and stop acts of domestic violence. While in some states, violence against family members is incriminated as specific crimes, in others it is stipulated as an aggravating circumstance. In most of these countries, the legal provisions establish the possibility of the courts of law to impose protective measures in cases of domestic violence, such as interdictions for the aggressor to return to the family home, to get close to the victim or to the places the victim usually goes to. In Germany and Austria, the level of protection is very high, as the police can adopt immediately the restrictive measures set down by law, in order to protect efficiently the victim (Chiticariu, 2016, pp. 240-241).

At international level, the Council of Europe adopted on 11 May 2011 the Convention on preventing and combating violence against women and domestic violence (Romanian Parliament, 2016), showing a particular interest in setting effective measures that would bring to an end the yearlong practices in which women were abused and disadvantaged. The Convention intended to adopt firm measures to be implemented in the signatory states, *"aspiring to create a Europe free from violence against women and domestic violence"* (Council of Europe, 2021).

Although the Convention mainly pertains to the ways to prevent and combat violence against women, its content shows that its provisions can be applied by Member States to any victim of domestic violence.

In Romania, the normative framework in this matter is ensured, mainly, by Law no. 217/2003 (Romanian Parliament, 2020) for the prevention and combating of domestic violence. The normative act has undergone many amendments since its adoption.⁴

Also, violence against family members is punished according to the provisions of the Romanian Penal Code as an aggravating version of the crimes against persons. In such cases, if the victim is a family member, the

⁴ The current form is represented by the 3rd republishing from Romanian Parliament No. 948 of October 15, 2020.

maximum limit of the punishment is increased by a quarter. The notion of "family member" in the terms of the Romanian Penal Code is stipulated by the article 177 and has a wider content than it was given by the previous Penal Code (Cioclei, 2020, pp. 96-97).

The possibility of setting up the protection order in case there is a risk concerning the violence from a family member was established in the Romanian legislation after some time after the adoption of the Law on preventing and combat the domestic violence. By this it was aimed at removing a state of danger, which, without the protection measures imposed, could have had much more serious consequences, threatening the life, bodily integrity, or freedom of a person. In the case of the restraining order, our legislation has undergone several amendments, the purpose of which was to improve the protection level that can be offered to victims of domestic violence. From the time of its entry into force until now, we can talk about an evolution of the legal framework in this matter, from practice resulting in problems related to the request of this order and new ways in which they can be solved so as to lower the risks implied by domestic violence.

In a recent study, it has been shown that successive legislative amendments were after eliminating the deficiencies found in practice and providing rapid means of protection for victims by quickly imposing the restrictions required for removing the state of danger (Domocoș, 2021).

Under the terms of the Istanbul Convention, according to Article 3 (b), domestic violence is defined as "all *acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim*".

According to Article 3 of Law no. 217/2003 republished, the notion of "domestic violence" is defined as representing "*any inaction or intentional action of physical, sexual, psychological, economic, social, spiritual or cybernetic violence that occurs in the family or domestic environment or between spouses or former spouses, as well as between current or former partners, irrespective of whether the aggressor lives or has lived with the victim*" (Romanian Parliament, 2020). In the next article, there are detailed and defined the forms of domestic violence, the legislator showing a special concern to indicate the ways in which domestic violence can play out, which can be verbal, psychological, physical, sexual, economic, social, spiritual and cybernetic.

In accordance with the legislative provisions of Romania, the notion of family member has a fairly wide meaning, including the following categories expressly provided by Article 5 paragraph 1 of Law no. 217/2003

(Romanian Parliament, 2020) for preventing and combating domestic violence:

”a) ascendants and descendants, brothers and sisters, their spouses and children, as well as persons who became relatives by adoption, according to the law;

b) spouse and/or former spouse; siblings, parents and children of other relationships of the spouse or former spouse;

c) persons who have established relations similar to those between spouses or between parents and children, current or former partners, regardless of whether or not they lived with the aggressor, the ascendants and descendants of the partner, as well as their brothers and sisters;

d) the guardian or another person who exercises in fact or in law the rights towards the person of the child;

e) the legal representative or other person who takes care of the person with mental illness, intellectual disability or physical disability, except for those who fulfill these attributions in the exercise of professional tasks.”

By the provisions of Article 5 para. 2, the victim is defined as the person against whom any of the forms of violence stipulated by law is exercised. Also, in accordance with the provisions of the Preamble of the Istanbul Convention, the victim is also considered the minor who witnesses these forms of violence, motivated by the fact that the existence of frequent conflict within the family has a negative impact on his mental and emotional development.

2. The Legal Procedure for the Temporary Restraining Order

The temporary restraining order was provided within the legal provisions of Romania with the purpose to provide fast protection measures in cases where it is found that there is a situation having an imminent risk as concerns” life, physical integrity or freedom of a person” which is determined by an act of domestic violence. In such situations, restrictive measures should be put in place so as to reduce the risk found.

This quick way to remove a danger was entered in the legislation in order to provide a remedy for the length of time required for carrying out the judicial procedure for the establishment of the restraining order, while the aggressor was not under any of the restrictive measures imposed by the restraining order (Gardikiotis, 2020, p. 114).

In such situations, the time in which state bodies react is essential for the protection of domestic violence victims. For this reason, Law no. 174/2018 (Romanian Parliament, 2018) was adopted, which entered the possibility of immediate issuance of a temporary restraining order by the

police, and this order following to be confirmed by the prosecutor, in order to ensure the legality of the restrictive measures imposed.

Based on the amendments to the Law for preventing and combating domestic violence, it was adopted the joint Order of the Minister of Internal Affairs and the Minister of Labour and Social Justice no. 146/2578 (Minister of Internal Affairs and Minister of Labor and Social Justice, 2018), which created the framework required for actually determining the risk posed by each situation separately so that there can be taken measures to take away the danger found.

According to the above-mentioned order, in cases of domestic violence, the risk situation determination is performed by the policemen, through the form of risk assessment, and if, applying the methodology provided by law, it follows that it is required a provisory restraining order, which will be issued in the conditions set by the legal provisions. If, on the contrary, following the assessment, it does not arise the need to issue such an order, the policemen must inform those who claim to be victims of some forms of domestic violence that they have the possibility to request a restraining order from the competent court, under the terms provided by Article 38 of Law No. 217/2003 (Romanian Parliament, 2020). At the same time, the legislator orders the compulsoriness to make available to these persons the standardized form, required for entering the request.

The procedure and the risk assessment form are regulated by the above-mentioned Order, which details the provisions of Law no. 217/2003 (Romanian Parliament, 2020).

In cases where police officers are notified or refer the matter to themselves a situation involving domestic violence, it will be determined mandatorily whether there is an imminent risk to the life, integrity or freedom of a person after filling in the risk form. Its content is included in the order and, based on the answers given to the standard questions set by the normative act, the state of danger will be determined on a case-by-case basis.

The risk assessment form contains two parts, the first being filled in by the victim and the second part will include the findings of the police officer. The questions regard the behavior of the aggressor not only from that moment but also refer to the aggressive manifestations of the previous one, if they have known a possible increase in intensity in the last period. As concerns the person of the aggressor, the following aspects are relevant: the consumption of alcohol or psychoactive substances, certain mental illnesses, if he/she has weapons and if a restraining order has previously been issued against him/her. Moreover, it is taken into account the emotional state of the victim, respectively the intensity of the fear inoculated by the aggressor.

Following the issuance of the temporary restraining order, it is subject to the confirmation procedure by the prosecutor's office attached to the court in whose jurisdiction it was issued. In order to ensure the procedure expedience, the term of sending to the prosecutor's office provided by law is 24 hours from the issuance, and the prosecutor's office will decide within 48 hours on the maintenance of the set measures. In case the prosecutor considers that the maintenance of the protection measures is not justified, he/she will give a reasoned order for their cessation and will set the time when they will end. On the supposition of confirmation, this is done by resolution applied to the original copy of the restraining order issued.

Pursuant to the provisions of paragraph 6 of Article 34 of Law no. 217/2003 (Romanian Parliament, 2020), in case of confirming the temporary restraining order, the prosecutor will refer the matter to the competent court with a view to issuing the restraining order. The request form and the manner of filling in are provided by Article 40 paragraph 3 letter a) and Article 41. The legislative provisions provide that the notification of the competent court has the effect of automatically extending the duration of the temporary restraining order, the measures taken being in force until the end of the judicial procedure.

The request form for the restraining order issuance has a simple form, includes clear questions, of which answers are relevant to the de facto situation of the case, which is intended for assisting the victim in presenting and supporting his/her request.

In case of issuing the temporary restraining order, the law stipulates that it can be challenged within 48 hours calculated from the time of notification, at the court in whose jurisdiction it was issued. The procedure for resolving the appeal is provided by Article 35 of Law No. 217/2003, in the sense that the judgment is made by summoning the parties and the ascertaining agent, as a matter of urgency, and the decision pronounced by the court is final.

3 Aspects from the Jurisprudence of the Romanian Courts.

From the official data, provided by the General Inspectorate of the Romanian Police, it results that, from the time of its introduction in the legislation, the temporary restraining order was often issued in the reported cases of domestic violence signalized. Thus, in 2019, 7986 temporary restraining orders were issued and, out of these, 2958 were turned into restraining orders by the courts in our country (Romanian Police*).

The latest official data regard the period January-October 2020, for which it is shown that 7112 temporary orders were issued, out of which 3312 were turned into restraining orders by the courts (Romanian Police**).

We note that not in all cases it happens that the temporary restraining orders be transformed into a restraining order by the court. In the proceedings before the court, the legal provisions stipulate that these requests are judged as a matter of urgency, while complying with the right of defense, with the mandatory participation of the prosecutor.

With a view to issuing the restraining order, the court will pursue the cumulative fulfilment of the following conditions:

- to be an act of violence in one of the forms provided by legal provisions,
- the violence must be exercised by a family member and
- due to it, to be a state of danger for the life, bodily integrity or freedom of the victim and the temporary nature of the protection measures imposed (Iasi District Court, 2021).

For example, in judicial practice, it has been shown that the finding of very tense relations between the parties is not sufficient for the issuance of restraining order, being necessary to establish if by this it has been created a state of imminent serious danger for the alleged victim (Olt Tribunal, 2020).

Also, the state of danger for the victim is determined not only by the acts of violence that are the object of the request, but also by the facts regarding the behaviour of the aggressor (Targoviste District Court).

In the Romanian jurisprudence, it was shown that not any tension between the parties justifies the restraining order, as the court must determine that the acts of violence are of a certain gravity and also, must be analysed the need of protection of the victim through the specific protective measures, because the intervention of the state authorities is justified by the danger generated by the violent acts. So, the partners problematic relationship is not a sufficient ground for restraining order.

In all cases, it must be taken into consideration the fact that the main purpose of the legal provisions in this domain is the prevention of domestic violence. So, in this regard, it must be determined the risk of acts of violence, in the future, in case that the victim and aggressor would live in the same environments or if they would continue to communicate (Magistrate's Court of Giurgiu).

To the extent that the court finds that the conditions imposed by Article 38 paragraph 1 of Law no. 217/2003 (Romanian Parliament, 2020) are met, it will issue the restraining order and will judge, in concrete terms, on the protection measures that will be imposed in the case. In case law, it

has been shown that these measures constitute intrusions into certain rights and freedoms, so that they must be proportionate to the rights of the aggressor (Iasi District Court, 2021). At the same time, the court must take into account which of the obligations and interdictions provided by Article 38 of Law no. 217/2003 (Romanian Parliament, 2020) are able to diminish the state of danger found.

In practice, it happens in many cases that the persons in favor of whom the request was filed waive its resolution before the court. Although Law no. 217/2003 (Romanian Parliament, 2020) does not expressly provide the possibility of withdrawing the request, there are many situations in practice, in which, for various reasons, the persons for whom these requests are made, waive their judgment, either before the court of first instance or by means of appeal. In such cases, the courts take note of the waiver made by the plaintiff, given that, in civil disputes, the parties benefit from the right to dispose, which includes the possibility to waive the lawsuit in accordance with the provisions of Article 406 paragraph 1 of the Romanian Code of Civil Procedure (2020).

For complying with the measures imposed by the restraining order, it is communicated within maximum five hours to the Police structures in whose jurisdiction live the victim and/or the aggressor.

From the point of view of the legal nature, the obligations and interdictions imposed by the issuance of the protection order are administrative measures.

If the measures ordered by the restraining order are violated, it will be involved the criminal liability of that person, since by Article 47 paragraphs 1 and 2 of Law no.217/2003 (Romanian Parliament, 2020) it is shown that the offence of violating the measures ordered by the restraining order or by the temporary restraining order is a crime, the sanction imposed by law being imprisonment from 6 months to 5 years.

4. Conclusions

We can state that requests for the setting up of the restraining order are quite frequent in Romania, which, on the one hand, underlines that there are many situations that require the establishment of special protection measures and, on the other hand, shows that victims of violence domestic do not stand in passivity, so as not to arrive in serious and difficult to remedy situations. We must keep in mind that shame, fear of victims and the relationships of affection that are among family members are elements that determine reticence about exercising the rights provided by law. With regard to these issues, we reckon that the intervention of state bodies plays a major

role, since, as we showed in the previous sections of this study, a large number of requests for the establishment of the restraining order are promoted by the Public Ministry.

Nevertheless, we also observe the reverse, respectively those situations in which, although the conditions provided by law are not met, this method is used to request the issuance of a restraining order to remove from the common home an unwanted family member, in most cases, the life partner. Such practices constitute attempts to abuse the legal provisions, thus diverting them from their purpose. In such cases, the courts play the part of examining actually whether there are met the conditions for issuing the restraining order and to determine their duration and content in relation to the evidence administered.

To a large extent, the restraining order will produce beneficial effects, in the sense that the aggressor, being confronted with the judicial procedure, with the restrictions implying the removal of the victim, will realize that such acts are harmful also for himself, not only for the other family members. In this way, we judge that in some cases, it is effectively achieved the prevention of the perpetration of more serious criminal acts.

Also, the aggressor being faced with the possibility of undertaking criminal liability on the supposition that he does not comply with the measures imposed by the restraining order should review his behavior and understand the danger posed by an aggressive behavior.

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