

# THE PROVISIONAL PROTECTION ORDER, A NEW LEGAL INSTRUMENT FOR THE PROTECTION OF HUMAN RIGHTS IN ROMANIA

*Alexandru Cristian RADA\**

## **Abstract**

*With a lower number of registered cases of violence against woman than the medium at european level, domestic violence in Romania is still a concern for the public authorities. At the european level states are not only to refrain from acts of violence against their citizens, but they have also a duty to undertake active measures that this kind of acts do not happen because of non-state actors.*

*European institutions such as the European Agency Fundamental Rights and the European Institute for Gender Equality offer support to member states to help them implement policies for human rights protection. Romania has ratified the Council of Europe's convention on preventing and combating violence against women and domestic violence and now is taking effective actions and implementing it.*

*The provisional protection order is a new legal instrument that has been introduced by the National Agency for Equal Opportunities between Women and Man in Romania, through the provisions of the Law 174/2018 regarding the amendment and completion of Law no.217/2003 on the prevention and combating of domestic violence.*

*Its purpose is to help offer a more effective legal support to victims of domestic violence, through the provisional protection order in correlation with the protection order, with a wider understanding of the different types of domestic violence.*

**Keywords:** *Provisional protection order, Human rights justice in Romania, Domestic violence, Violence against women, Istanbul Convention.*

**JEL Classification:** [K3, K36].

## **1. The european context regarding the protection of victims of domestic violence**

In 2018, human rights in Romania outline a new legal instrument for the protection of victims of domestic violence, the provisional protection order as a result of the need to respond to the needs of society, a necessity which is

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\* Counselor, National Agency for Equal Opportunities for Women and Men

materialized by the transposition into national legislation of the commitments assumed by our country at international level.

On June 27, 2014, Romania signed the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence<sup>1</sup>, also known as the Istanbul Convention. On May 23, 2016, Romania has ratified the Istanbul Convention<sup>2</sup>, which is now ratified by a number of 30 member states of the Council of Europe, namely: Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Switzerland Estonia, Finland, Former Republic of Macedonia, France, Georgia, Germany, Greece, Iceland, Italy, Malta, Monaco, Montenegro, Norway, the Netherlands, Poland, Portugal, San Marino, Serbia, Slovenia, Spain, and Turkey.

The Istanbul Convention entered into force on 1 September 2016. By doing so, Romania takes concrete steps to protect women against all forms of violence and to prevent, prosecute and, implicitly, eliminate violence against women and domestic violence.

The Convention aims to contribute to the elimination of all forms of discrimination against women and to the promotion of equality between women and men. Its purpose is to design a framework of policies and measures to protect and assist all victims of violence against women and to provide support and assistance to law enforcement agencies and agencies for effective co-operation in order to adopt an integrated approach to tackling this social phenomenon.

An European's Institute for Gender Equality survey, which is estimating gender equality in 2005-2015, the European Union gender equality index places the European Union at a level of 27.5 on a scale of 1 to 100 (the higher it is, the level of violence being higher) and the index for Romania being at the level of 25, below the European average<sup>3</sup>. Even if statistically the situation is better than in the rest of the Europe, many cases of domestic violence happen in Romania without registration to the authorities.

The domestic violence affects society on many different levels. According to a survey conducted by the European Institute for Gender Equality (EIGE) in 2014, the cost of marital violence in Romania amounts to 4.3 billion euros per year, the domestic violence phenomenon being one with ramifications on the general welfare of romanian society<sup>4</sup>.

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<sup>1</sup> Treaty no. 210 - The Council of Europe Convention on the prevention and combating violence against women and domestic Violence.

<sup>2</sup> Law no. 30/2016 of 17 March 2016 ratifying the Council of Europe Convention on the prevention and combating violence against women and domestic violence, adopted in Istanbul on 11 May 2011.

<sup>3</sup> Gender Equality Index 2017- Measuring the gender equality in the European Union 2005-2015 report – European Institute for Gender Equality.

<sup>4</sup> Combating Violence Against women: Romania 2016 Study - European Institute for Gender Equality.

At European level, a key human rights role is played by the European Agency for Fundamental Rights (FRA)<sup>5</sup>, which provides independent advice based on evidence and statistical data at the level of the European Union institutions and national governments and decision-makers for better results on issues such as access to justice, gender equality, information society, privacy and data protection, LGBTI community rights, racism and assimilated forms of discrimination, the rights of the child, the rights of people with disabilities, asylum and migration, hate crimes and the Roma population.

According to the FRA's study "Violence against Women - An EU Survey"<sup>6</sup> published in 2014, the scale of physical violence at EU level requires a renewed policy in this area. European Union's Fundamental Rights Agency considers it necessary for states to revise their legislation in order to ensure that it complies with the Convention on the Prevention of and Fight against Violence against Women and Domestic Violence and the EU Victims Directive (EU 2012 Directive 2012/29 / EU laying down rules minimum rights, support and protection of victims of crime).

## **2. The national legal framework in Romania in the field of domestic violence and its relationship to european legislation and EU recommendations**

Law no. 174 from 18 July 2018<sup>7</sup>, regarding the amendment and completion of the Law no. 217/2003<sup>8</sup> on the prevention and combating of domestic violence is the instrument through which the provisional protection order, is introduced in the legislation of Romania as a legal instrument for protection of victims of domestic violence.

At national level, we find in the Constitution of Romania<sup>9</sup> art. 22 (the right to life and to physical and mental integrity, including provisions regarding the prohibition of torture and inhuman or degrading punishment and treatment) as well as art. 26 (on intimate, family, and private) by which the Romanian State assumes certain general obligations not to violate these rights and implicitly to protect them from non-state actors. Moreover, by the provisions of Law 217/2003, the state assumes that, through its competent authorities, develop and implement programs and policies to prevent and combat domestic violence and to protect victims of domestic violence.

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<sup>5</sup> Regulation (s) no. Council Regulation (EC) No 168/2007 of 15 February 2007 establishing an Agency for Fundamental Rights of the European Union.

<sup>6</sup> Study "Violence Against Women - An EU Survey" published in 2014 by the Fundamental Rights Agency (FRA).

<sup>7</sup> Law no. 174/2018 regarding the amendment and completion of the Law no. 217/2003 on the prevention and combating of domestic violence.

<sup>8</sup> Law no. 217/2003 on the prevention and combating of domestic violence.

<sup>9</sup> Constitution of Romania.

At national level, the State is monitoring the respect of human rights through several public entities: the National Agency for Equal Opportunities for Women and Men, the National Council for Combating Discrimination, the People's Advocate and the National Institute for Human Rights etc. Starting with the year 2014, the National Agency for Equal Opportunities for Women and Men (ANES)<sup>10</sup>, a new body of the Romanian state for the protection of human rights, responsible for drafting and putting public policies in the field of preventing and combating violence in family, the initiator of the draft amendment of the Law no. 217/2003 introducing the provisional protection order into the Romanian legislation, transposing the Romanian State's obligations under the Istanbul.

Art. 5 of the Istanbul Convention expressly provides that the seeding parties shall refrain from engaging in any act of violence against women and shall ensure that the authorities, officials, representatives, state institutions and other actors acting on behalf of the State will act in accordance with this obligation while taking the necessary legislative and other measures to make every effort to prevent, investigate, sanction and provide compensation for acts of violence within the scope of the Convention which are committed by non-state actors.

Moreover, these provisions are made in the context in which the European Court of Human Rights confirmed, through the resolutions given in the cases, that, as regards the provisions of articles no. 2 (right to life), 3 (prohibition of torture) and 8 (right to respect for private and family life) of the European Convention on Human Rights imply that Member States not only abstain from violation of these rights but also they have legal measures and instruments to target non-state actors.

As stipulated by the provisions of art. 52 of the Convention, the signatory parties have to undertake legislative measures to ensure that the competent authorities have the power to dispose of, in immediate danger situations, an author of domestic violence to leave the victim's or the person's place of residence for a period of time sufficient to eliminate this risk, as well as forbidden access of the abuser to the home and contacting the victim or the person at risk.

Also, under the same article of the Convention, it is foreseen that the safety of victims or persons at risk will take precedence. All of these issues are covered by art. 52 of the Convention under the Emergency Barring Orders, suggesting that this set of measures is a specific legal instrument.

Also, a set of recommendations on how to effectively implement emergency barring orders in situations of domestic violence with specific

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<sup>10</sup> G.D. No. 177 of 23 March 2016 on the organization and functioning of the National Agency for Equal Chances between Women and Man.

articulation on art. 52 of the Istanbul Convention has been established by Council of Europe in 2017, setting out a framework for the emergency barring orders in the European Union and creating the premises for the romanian provisional protection order<sup>11</sup>.

### **3. The implementation of the provisional protection order in Romania**

Through the amendments to the Law no. 217/2003 made through Law no. 174/2018 on the prevention and combating of domestic violence establish clear directions of action in Chapter III, art. 22.1-22.10 which explicitly bears the name "Provisional Protection Order".

So we can easily notice a change of naming the protection order from "emergency" to "provisional" fact which shows its connection with the protection order, but this is a separate legal instrument that can be requested, according to art. 23 of the Law no. 217/2003 by the person whose life, physical or mental integrity or freedom is endangered by a member of the family and who may request the court to eliminate the state of danger, as opposed to the order of provisional protection (established by art. 22.1) issued by police officers who are in the exercise of their service duties have identified an imminent risk as regards the life, physical integrity or freedom of a person who are endangered by an act of domestic violence, being issued for the express purpose to mitigate that risk.

Special emphasis is given by the legislator on the determination of the imminent risk that can be done on the basis of the factual situation: by evidence obtained as a result of the verification of complaints about domestic violence acts (if they are not the object of a crime) or by evidence obtained according to the provisions of the Criminal Procedure Code if they fall under the provisions of art.199 of the Law no. 286/2009.

Once a risk has been established, a risk assessment form (in accordance with art. 22.1 para. 3), which must contain certain specific criteria (in accordance with art. 22 para. 3), is to be drawn up, namely: the form of domestic violence exerted, the repetitive nature of acts of domestic violence, the vulnerability of the person(s) against whom domestic violence is being practiced, the context in which domestic violence acts and the conduct of the person who produces them.

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<sup>11</sup> Emergency Barring Orders in Situations of domestic Violence: Article 52 of the Istanbul Convention – A Collection of papers on the Council of Europe Convention on preventing and combating violence against women and domestic violence – Rosa Logar, Johanna Niemi, Council of Europe, 2017.

It is also foreseen that these criteria will have a methodology for risk assessment and interpretation of the results by applying the above mentioned criteria.

Provisional protection order has to meet some specific form conditions, which are mandatory, such as:

- a) The date, time and place where it is being issued;
- b) The name, surname, the quality and the police unit to which the issuing policeman belongs;
- c) The necessary data to ensure the identification of the aggressor/aggressors against whom obligations or prohibitions are being made;
- d) The necessary data to ensure the identification of the victim/victims or other persons in favor of whom protection measures are available;
- e) A description of the reasons for the fact that determined its disposition and the indication of the evidence on the basis of which the facts were assessed;
- f) Mentioning the legal basis for the issuance of the provisional protection order;
- g) Mention of the date and the time when the protection measures start to enter into force, according to art. 22.4, as well as the date and time at which they cease;
- h) The right to challenge the provisional protection order, the term in which the right to challenge the provisional protection order can be exercised and the court to which the appeal may be lodged by the presumed aggressor.

One very important form condition of the provisional protection order it is that it has to be signed by the police officers who are in the exercise of their service duties that had arrived at the place of the aggression and had established the risk.

Through the provisional protection certain protection measures will be put into force, such as:

- a) The temporary evacuation of the aggressor from the common dwelling, regardless of whether he is the owner of the property right or not;
- b) The reintegration of the victim and, where appropriate, of the children into the common dwelling;
- c) An obligation for the aggressor to keep a minimum distance determined from the victim, towards the members of his family, the residence, workplace or educational establishment of the protected person;
- d) An obligation of the aggressor to wear an electronic surveillance system permanently;

- e) The obligation of the aggressor to hand over his weapons to the police.

The police officer must mention one at least one of these measures, but it can also decide to have more measures to ensure the protection of the victim. Also, if necessary, police can use, in an adequate way force and the tools they have at their disposal to put into force the measures decided through the provisional protection order.

The measures mentioned above can have a limited duration of time that they apply for. The duration of the provisional order is 5 days. This is computed, as defined by art. 22.5 para. 2, in hours, from the time the provisional protection order have been issued, meaning the total duration of the provisional protection order is 120 hours.

If the aggressor does not respect the measures imposed through the provisions that will be considered an offence and punished as trough the provisions of art.32 with prison from 1 month to 1 year. Provisions of Art.32 from Law 217/2003 refer to the protection order, while the new art 22.5 from Law 174/2018 stipulates that the same provisions will apply to the provisional protection order meaning that also the reconciliation will remove the criminal liability.

The provisional protection order is to be communicated both to the victim and to the aggressor.

The communication is to be made under signature by handing a copy or a duplicate of the provisional protection order. The communication is considered as done also in the cases in which the aggressor refuses to receive the copy or to sign it or if the he leaves after he is informed that it is necessary to wait for the communication of the result of the checks that need to be carried out regarding the domestic violence complaint in cause.

If these cases shall occur the police officer has to register them in the record for the provisional protection order.

The order is also considered to be communicated if the aggressor did not participate at the investigations, but the proof of the communication can be made through electronic or mobile means.

The aggressor can request a duplicate of the provisional protection order from the police at any point of time, during the period of validity of the document.

After being completed, the provisional protection order shall be submitted by the police unit, with confirmation from the officer who has issued the order, to the prosecutor's office attached to the competent court in whose territorial range the order was issued within 24 hours from the date of issue.

The prosecutor will decide on the need to maintain the protection measures ordered by the police body through the provisional protection order, applying an administrative resolution on the original copy of the order.

If the prosecutor considers that it is no longer necessary to maintain the protective measures mentioned by the police officers, the prosecutor may order the termination of the protective measures with the mentioning of the time that they will cease to have an effect.

If there is reason to maintain the measures the prosecutor will submit the provisional protection order, together with the documents that were the basis for its issuance and confirmation to the competent court in whose territorial jurisdiction the provisional protection order was issued.

The duration of the provisional protection order is prolonged with the necessary time to for the judiciary procedure of emitting the protection order, as stipulated by art. 22.7 para. 7.

The provisional protection order can be challenged at the competent court within 48 hours of communication. It is important to note that the provisional protection order guarantees the right of the aggressor to a fair trial because it can be challenged within 48 hours of communication.

This is in line with art. 49 and art. 2 of the Istanbul Convention, which provides that the provisional protection order should not prejudice the rights of the victim's defense and is consistent with the necessity of a fair and impartial process in accordance with art. 6 of the European Convention on Human Rights.

#### **4. The international character of the provisional protection order**

The protection order is regulated at european level by the Directive 2011/99/EU<sup>12</sup> of the European Parliament and of the Council on the Protection Order, as well as by Regulation 606/2013/EU of the European Parliament and of the Council on the mutual recognition of protection measures in civil matters, which aims to protect individuals when there are serious reasons for life, physical or mental integrity, personal freedom and security or sexual integrity being threatened, including the prevention of any form of gender-based violence or of close relationships, such as violence physical harassment, sexual aggression, pursuing intimidation.

According to art. 4 of the EU Regulation 606/2013/EU "a measure of protection ordered in a Member State is recognized in the other Member States

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<sup>12</sup> Directive 2011/99/EU of the European Parliament and of the Council on the Protection Order.

without the need for any special proceedings and is enforceable without the need for a judgment approval of enforcement"<sup>13</sup>.

Thus, the provisional protection order that can be issued in Romania can become a legal instrument with european level effects, through the possibility of its transposition into a european certificate for domestic violence.

### Conclusions

Law 174/2018 regarding the amendment and completion of Law no. 217/2003 on the prevention and combating of domestic violence is the law that implements the provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence, providing a wider area to the definition of violence and also introducing the emergency barring order, in correlation with art.52 of the convention.

The provisional protection order is a juridical tool for making the protection of victims of domestic violence in Romania more efficiently protected, that creates a practical way of approaching this social phenomenon through an administrative measure.

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