

THE DEVELOPMENT OF THE REGULATIONS ON GENDER BASED VIOLENCE IN ROMANIA AND SPAIN

Lavinia Mihaela VLĂDILĂ*

Abstract

In this article, I will present the evolution of the regulation of gender based violence in Romania and Spain. This new theme is one of actuality, due to the situations that frequently happen in our social life. Both Romania and Spain have a high level of gender based violence, even if nowadays in our country are few statistics on this matter. But also, both countries now enjoy good legislations, which have been developed in the last 10 years.

Keywords: *gender based violence, evolution, crime, family, legal protection*

Introduction

The present study aims to present the evolution of the regulation of gender based family violence, by comparison between Romania and Spain in the last decades. It is a general analysis of the phenomenon, without emphasizing a certain aspect of this large area.

The importance of this approach lies in the very existence of the phenomenon.

Though it is widely spread and with an ancient existence, in Romania the number of official statistics on gender based violence is nearly inexistent. In our country, family violence has “generously cohabited” with our ignorance and the acceptance of the great majority of population. Based on the principle that “*beating is torn of heaven*” it often had serious forms of violence, representing only means of an inhuman expression of frustrations, dissatisfaction and lack of personal control. This is why the ignorance of this phenomenon lasted until, taken out to the surface, it managed to generate a mass effect which subsequently determined various legislative projects, in total agreement with different European and international regulations. In Romania there is a law¹ which directly regulates gender based violence and other ones which are indirectly linked to the first one². Also, in accordance with these special regulations comes the new Criminal Code of 2009, which specifically states the protection of family against any form of violence, especially domestic violence.

By comparison, in Spain, the development of the legislation went hand in hand with the expansion of various statistics in all autonomous communities, and national ones. Moreover, for the Iberian state the initiation of some staggering statistics on the existence and expansion of this

* Senior Lecturer, Ph.D., Faculty of Juridical Sciences, Socials and Politics, “Valahia” University of Târgoviște (U.V.T), Romania; Counselor of the Department of Continuing Education and Distance Learning of U.V.T, (email: laviniavladila@yahoo.com)

¹ We are talking about Law No 217/2003 on the preventing and fighting against family violence, published in the Official Gazette No 367/29.05.2003, modified by Government Emergency Ordinance No 95/2003, published in the Official Gazette No 13/8.01.2004

² We can consider among these Law No 211/2004 with regard to certain steps to secure the protection of crime victims, published in the Official Gazette No 505/4.06.2004; Law No 272/2004 on the protection and promotion of the rights of the child, published in the Official Gazette No 557/23.06.2004; Law No 202/2002 on equal opportunities between women and men republished in the Official Gazette No 150/1.03.2007; Law No 47/2006 on social assistance published in the Official Gazette No 239/16.03.2006

phenomenon lead to new regulations or, in other words, to special regulations in this area, being an additional reason for these statistics to develop and to lead to new regulations.

Regarding the scientific-juridical analysis of family violence, in Romania we have found several psychological, epistemological debates, but few pure juridical debates, based on the law and on jurisprudence.

In exchange, in Spain there are many juridical studies, presenting the phenomenon under all its possible aspects: historical, phenomenological, juridical, sociological etc.

To start the debate of this subject, we must state that nowadays, at the European and international level, as well as in Spain, is made the differentiation between family violence and gender based violence. Thus, family violence comprises all forms of violence within the family (physical, psychical or sexual committed with intention) against women, men, children, elder persons or against any close relative³, while gender based violence, as defined in Spain, represents violence as the result of discrimination, inequality and of domination of men over women, exercised against the latter one by her actual or ex concubine (*the notion also includes the quality as husband*), or by the person to whom the women was or is in an affective relationship, even if they do not share a household together⁴. Therefore, our study will refer to family violence to analyze the Romanian penal framework, and both to family violence and to gender based violence to compare the Romanian⁵ and Spanish situations.

This is why we strongly consider that such a comparative analysis will enrich our juridical area with new perspectives on this phenomenon.

I. International awareness of the problem – a few legislative landmarks

The awareness of the existence of a problem on family violence occurred at an international and European level at the end of the 1970s, so that in the next decade there were elaborated a series of judicial documents aiming the protection of women against domestic violence. Thus, on 26 March 1985 the Council of Europe drafted its first Recommendation R (85)4 on violence in the family⁶. Internationally, the General Assembly of the United Nations on its plenary meeting adopted Resolution 40/36 of 29 November 1985 on domestic violence⁷ and Resolution 44/82 of 8 December 1989 proclaiming 1994 as International Year of the Family⁸. Another special interest for knowledge and combat of this phenomenon was expressed by the Recommendations of the World Conference of the UN held in Nairobi on 15-16 June 1985, by the Recommendations on family violence drafted by a group of experts reunited in Vienna on 8-12 December 1985 or by the Resolution 46/8 March 1993 of the Commission on Human Rights incriminating violence and violation of human rights, especially referring to women⁹. This first decade of positive reactions was followed by numerous international measures which, with the spreading of the phenomenon, aimed and determined an important involvement of the world states.

³ According to Art 2 and 3 of Law No 217/2003

⁴ According to Art 1 of the preliminary title of the Spanish Law 1/28 December 2004 on the measures for protection against gender based violence, published in the *Boletín Oficial del Estado* (the official Spanish state bulletin) No 313/29 December 2004 and republished with modifications in B.O.E. No 87/12 April 2005

⁵ Such statement is necessary because, after the entrance into force of Law No 1/2004 also the autonomous communities have adopted their own regulations as a completion of the national law. Due to the fact that the analysis of such subject is extremely comprehensive, it cannot be the subject of our study, but remaining opened to a subsequent debate.

⁶ See the official Council of Europe website <http://www.coe.int/portal/web/coe-portal>

⁷ See the official UN website <http://www.un.org>

⁸ Ibid.

⁹ Ortansa Brezeanu, Aura Constantinescu, *Violența domestică. Reflecții* in the Romanian Penal Law Review No 2/2007, p. 68

United Nations continued the campaign against domestic violence, so by Resolution 48/109/20 December 1993 of the General Assembly was concluded that the most familiar situations of family violence are¹⁰: Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

Likewise, after the recommendation of 1985, the Council of Europe drafted until 2008 no less than 11 recommendations and resolutions, as well as a declaration of the Parliamentary Assembly in Vienna concerning this matter¹¹. The purpose of these regulations is to offer a definition of family violence and to identify the common European feature regarding the civil or penal norms and procedures which are applicable. Also, in the past few years, were made several differences between general regulations on domestic violence and those on gender based violence, namely those which regard the violence against women in a family or sentimental framework. For instance, in the last decade, the majority of the recommendations made by the Council of Europe emphasize the violence against women, leaving aside the general framework of the domestic violence. We must note that in April the European Parliament debated on the incrimination of violence against women, which will be stated in a future directive. But the development of the subject on violence against women, as part of the domestic violence, must be framed in the larger area of discrimination. In the case *Opuz v Turkey* (2009) the European Court of Human Rights showed that violence against women is considered a form of discrimination which violated the European Convention on Human Rights. The situation of this type of violence, as form of discrimination, is not fully clarified and supported by enough criminal texts, but especially by criminal procedural law texts, which should be supported by financial measures. This is why the debate is still open, including for new legislative projects.

II. The evolution of the regulation in Romania

a. Stage I. General and special regulations of the Criminal Code. In Romania, family violence has been considered as a negative social phenomenon with a great delay, the first positive reactions from the legislator coming in 2000. One of the reasons of such a delay can be that in the former communist states, when *any social institution had to be integrated in the public space and subjected to exterior exigencies. On the other hand, in the communist regime, family violence was not even officially recognized as a social issue*¹², despite its existence.

Until the modifications of the Criminal Code in 2000, the protection of family was made in a general framework¹³, by incriminating the offence of first degree murder against the spouse or a close relative (Art 175 Para 1 Let c) or of particularly serious murder against a pregnant murder (Art

¹⁰ According to Art 2 of the UN Resolution 48/109/1993, available on its official website

¹¹ These recommendations and resolutions of the Council of Europe are: Recommendation R(85)11 on the position of the victim in the framework of criminal law and procedure, Recommendation R(87)21 on assistance to victims and the prevention of victimization, Recommendation R(90)2 on social measures concerning violence within the family, Recommendation R(91)9 on emergency measures in family matters, Recommendation R(98)1 on family mediation, Declarations and Resolutions adopted by the 3rd European Ministerial Conference on equality between men and women, organized by the Council of Europe (Rome, 1993), Recommendation R(2000)11 on the action against trafficking in human beings for the purpose of sexual exploitation, Recommendation R(2002)5 on the protection of women against violence, Recommendation R (2004)1681 on the Campaign to combat domestic violence against women in Europe, Resolution 1512(2006) "Parliaments united in combating domestic violence against women", Recommendation 1759(2006) "Parliaments united in combating domestic violence against women", Resolution R(2007)1582 of the Council of Europe "Parliaments united in combating domestic violence against women".

¹² Olivian Mastacan, *Violența în familia. Aspecte teoretice și practice*, Valahia University Press, Târgoviște, 2005, p.3

¹³ Ortansa Brezeanu, Aura Constantinescu, *op. cit.*, pp. 75-76

176 Para 1 Let e). Beside these regulations, violence causing bodily harm or heath of the victim, usually woman and child, was stated by Art 180-182¹⁴ or Art 305-306¹⁵ of the Criminal Code. Also, until 2002, marital rape was not considered as a form of family violence, not being sanctioned¹⁶. Because the latter situations, except the offence of *ill treatment applied to minors*, the offences for which criminal action is initiated upon prior complaint from the injured person, the police not being able to take action, despite all kind of complaints, the violence against women and children continued unimpeded, without the state being able to interfere in an efficient way.

As it was shown above, after the adhesion of Romania to the Council of Europe¹⁷, as well as for the future adhesion to the European area, in 2000 there were taken the first steps for the special incrimination of family violence. We can state that in 2000 were also taken the first steps for the recognition of this phenomenon as a social danger big enough as to the offences of family violence to be considered as aggravated forms of some already existing offences.

The first legislative text which brought to the attention family violence was Law No. 197/13 November 2000 which modified and completed some dispositions of the Penal Code¹⁸. This law modified Art 180-181 of the Penal Code, the two offences becoming aggravated when the subjects are family members. According to Art 149¹ of the Penal Code, “family member” means the spouse or the close relative, as defined by Art 149, if living and sharing a household with the perpetrator. The terms *living* and *sharing a household* were not explained by the legislator. The doctrine has appreciated that *living* refers to certain permanence in the common coexistence relationships, while the term *sharing a household* is complementary to the first and refers to the engagement of family members in the administration of their common life. The two aspects – living and sharing a household – has to be simultaneous. Just living without sharing a household, as only sharing a household without living with the perpetrator, do not fulfil the conditions of the legislative text (for instance, a close relative caring for an apartment while the owner is on vacation)¹⁹. From the definition of the “family member” term, results that in the Penal Code, only the offences occurring in a home are sanctioned as forms of family violence, representing a higher social danger than the other forms of family violence (we hereby refer to the offences incriminated by Art 180-181 of the Penal Code). We shall see the inconsistency resulted from the existence of two parallel regulations on family violence, with the entrance into force of Law No. 217/2003. We must add the fact that the appreciation of the “family member” statute is made in relation to the moment of the offence²⁰.

Returning to the regulation resulted from the modification of Art 180-181 of the Penal Code, the protection of family relationships is made in the same framework, when the hitting or other forms of violence occur against a family member (Art 180 Para 1¹ of the Penal Code), when hitting or acts of violence that caused an injury needing medical care of up to 20 days (Art 180 Para 2² of the Penal Code) and when acts causing to corporal integrity or health needing medical care of up to 60 days (21 to 60 days, including) – *simple* bodily harm – Art 181 Para 1¹ of the Criminal Code. Procedurally, the text of the two offences, as modified by Law No. 197/2000, states that if the

¹⁴ According to these articles are incriminated as offences *hitting or other forms of violence* (Art 180), *bodily harm* (Art 181) and *serious bodily harm* (Art 182).

¹⁵ Art 305 incriminates deserting of family and Art 306 incriminates ill treatments applied to minors

¹⁶ Regarding the incrimination of marital rape and until the modification of Art 197 Para 2 of the Penal Code, see the comments of Valerian Cioclei, *Drept penal. Partea specială. Infraacțiuni contra vieții*, C.H. Beck Publishing-house, Bucharest, 2009, pp. 243-245

¹⁷ The adhesion took place in 1993

¹⁸ Law 197/2000 amending the Penal Code was published in the Official Gazette No 568/15 November 2000

¹⁹ Lavinia Mihaela Vlădilă, Olivian Mastacan, *Drept penal. Parte generală*, Universul Juridic Publishing-house, Bucharest, 2011, p.187

²⁰ Laura Maria Crăciunean, *Violența în Familie. Circumstanță agravantă*, Romanian Penal Law Review No. 4/2005, p.52

offence is committed against a family member the criminal action is initiated *ex officio*²¹; in other words, it can be initiated both upon prior complaint from the injured person, as well as *ex officio*, in the ways stated by the Penal Procedure Code, according to its Art 221 and following. In both cases, even if usually the prior complaint is joined to the involvement of the parties, for violence against family members – despite the fact that the criminal action was initiated *ex officio*, the legislator allows the reconciliation of the parties²².

But the modifications brought by Law No 197/2000 did not stop here. In addition to these judicial instruments protecting against family violence, the above-mentioned law added to the general part of the Penal Code another aggravated circumstance, applicable for all offences for which it was not previously stated as aggravating form or as element of other offences²³, namely *the offence of violence against family members* (Art 75 Para 1 Let b), Thesis II). The law does not define the term of *violence* which incorporated it in this aggravating circumstance, but in our and other doctrinaires' opinion²⁴ it can be interpreted as representing any form of violence, from hitting causing bodily harm to hitting needing medical care from 1 up to 60 days, or which causing the results stated by Art 182 Para 2 of the Penal Code, namely loss of a sense or of an organ, cessation of their functioning, a permanent physical or mental disability, mutilation, abortion or jeopardy on the person's life.

We also must note that the law for the modification of the Penal Code has not stated the same aggravating circumstance for the offence of serious bodily harm, limiting only to the two offences stated by Art 180 and 181. This can only be an unfortunate inconsistency. However, if the serious bodily harm occurs, in any of its forms (typical or aggravated), against a family member we consider as applicable the already analyzed aggravated circumstance, stated by Art 75 Para 1 Let b) of the Thesis II of the Penal Code. Nevertheless, in the Romanian penal system, the effects of an aggravated circumstance are not mandatory for the court, being optional²⁵. This introduces an unjustified different regime, between the protection of family relationships against soft and serious violence – where the perpetration of such violence determines the aggravation of the offence and the application of a higher penalty, towards the serious bodily harm, where the perpetration against a family member shall optionally determine an increase of the penalty, by applying Art 78 corroborated with Art 75 Let b) of the Criminal Code.

Another novelty inserted by Law No 197/2000 has a penal and a criminal procedure feature. It refers to the introduction of a new security measure, namely the “prohibition to return to the family home for a determinate period”²⁶. In terms of criminal procedure, the new security measure is the only mean to keep the perpetrator away from its victim. The measure is insufficient and inefficient. Moreover, the fact that we never met a sentence to valorise this measure should “ring a bell” for the legislator. On one hand, this measure can only be invoked by the court when the decision of conviction is issued, which means that during prosecution and trial the victim, in lack of alternatives for a home, should have to bear the manifestations of the perpetrator at her address. The fear for even more serious violence, constant threats can determine the victim to stop the penal trial, thus the “*reconciliation of the parties*” shall be the best solution for powerless victims.

On the other hand, the court shall use the measure only if the defendant shall be convicted to at least one year of imprisonment. Such decisions of conviction shall rarely be used for the offence of

²¹ According to Art 180 Para 3 and Art 181 Para 2 of the Penal Code

²² According to Art 180 Para 4 and Art 181 Para 3 of the Penal Code

²³ As the case of the offences stated by Art 180-181 or Art 197 of the Penal Code

²⁴ Laura Maria Crăciunean, *op.cit.*, p.52

²⁵ According to Art 78 of the Penal Code: “*In case of aggravating circumstances, one may apply a penalty up to the special maximum*”

²⁶ The new security measure is stated by Art 112 Let g) and Art 118¹ of the Penal Code

hitting and other violence²⁷. And this is not all. Another condition imposed by the law, states that the victim should request the use of this security measure. Previous commentaries regarding the fear of the victim for even serious violence and constant threats, shall determine her to not request this measure to the court. We showed in a different article that, based on its active role, the court should ask the victim if intends to request the application of this measure. The emotion, lack of judicial knowledge, if the victim is not assisted by a lawyer, shall determine the court to have a minimum moral and judicial support for the victim²⁸.

The inefficiency of the regulation is incremented also by the *serious danger* for which this criminal sanction can be applied. In other words, leaving to the court's appreciation, as if all the other conditions would not be enough to restrain the framework of its application, the legislator states that the danger for the victim to be very serious. The legislator considers that "soft" violence does not impose such measure. So, the victim should be supporting more violence, without reacting, because the state is not able to protect her until she ends up in a hospital with three broken ribs, full of bruises, unconscious or almost dead?! Therefore, how long should the victim endure violence, for the court to apply a security measure? Such rhetorical questions judicially aim the core of the issue. Several states have stated in their penal legislation the situation of family violence and gender based violence, have stated penal and criminal procedure means for the victim to enjoy security and to detach herself from a humiliating situation. Such measures, which we have encountered in a project for a legislative modification, sustained by deputies from all the parliamentary parties – considered to be a valorous initiative, are the *restraining order* and the *interdiction order*, with the possibility to invoke temporary measures, even by the prosecutor in the stage of criminal prosecution.

Finally, without debating too long this issue, which is not the object of our analysis, we must add, that along with other authors²⁹, we consider that this security measure can be invoked not only for the offence of hitting and other violence – *the law being vague* – but for all types of offences committed in family imply violence or physically or bodily harm the victim.

A final modification inserted by Law No 197/2000 regarded the abolition of Art 197 Para 5 incriminating rape. According to this paragraph, the active subject of the rape was unpunished if he would marry his victim. Several doctrinaires rose against such provision³⁰, which was the result of the Middle Age's legislation. First of all immoral, such provision offered more chances of getting away with the offence for this person who had no respect for women – *who usually are the passive subject of this type of offence*.

After one year, Government Emergency Injunction No 89/2001³¹ completed the framework of family violence with the special incrimination of rape between family members, especially between spouses³². Many renowned authors consider as auspicious the explanation of such incrimination, except the fact that such incrimination received an aggravated form, pleading for its simple form. Some authors (*Matei Basarab and colab., op.cit*) consider that the simple form is more appropriate

²⁷ Art 180 Para 1¹ states the punishment by imprisonment from 6 months to one year, and Art 180 Para 2¹ states the punishment by imprisonment from one to 2 years.

²⁸ Lavinia Mihaela Vlădilă, Olivian Mastacan, *op.cit*, p.189

²⁹ Ilie Pascu, *Interdicția de a reveni în locuința familiei*, in the Romanian Penal Law Review No 4/2002, pp.44-45.

³⁰ Valerian Cioclei, *op.cit*, p. 248. Ortansa Brezeanu, Aura Constantinescu, *op.cit*, p.76

³¹ Government Emergency Injunction No 89/2001 amending the Penal Code's offences on sexual life, published in the Official Gazette No 338/26 June 2001, was approved with amendments by Law 61/2002, published in the Official Gazette No 65/30 January 2002

³² Matei Basarab, Viorel Pașca, Gheorghită Mateuț, Tiberiu Medeanu, Constantin Butiuc, Mircea Bădilă, Radu Bodea, Petre Dungan, Valentin Mirtișan, Ramiro Mancaș and Cristian Miheș, *Codul penal comentat. Partea specială, vol. II*, Hamangiu Publishing-house, Bucharest, 2009, p.281; Valerian Cioclei, *op.cit*, pp.243-244; Alexandru Boroi, *Drept penal. Partea specială*, C.H. Beck Publishing-house, Bucharest, 2006, p.166

for the incrimination of rape, adding the possibility of reconciliation of the parties. A similar solution – *to the proposal to separately incriminate the rape between spouses, but with the possibility for reconciliation of the parties or the withdrawal of the prior complaint* – is accepted by other doctrinaires, such as Ilie Măgureanu and Alexandru Ionaș, who appreciate as unusual the situation of the spouse, who, *disagreeing the right of the other spouse to intimate life*, must not be considered as inferior towards other persons with who the victim does not have a family relationship³³. From our perspective, though we totally agree with the incrimination of rape between spouses and between family members, we consider that the aggravated form was preferred by the legislator in the context of the separate incrimination of family violence. From our point of view, even if we could agree with the possibility of the offender to reconcile with his victim, or the victim to withdraw her complaint, we consider that in the context of gender based violence, that the aggravated form must be kept. From a person who promises to protect his spouse, to support her in her difficult moments, it is legally expected to act in the same manner regarding their intimate life. Therefore, the failure to respect the sentimental value of the relationship between the parties must be sanctioned with a more serious penalty but in the normal situation of a rape between unknown persons.

b. Stage two. The regulation of the special law. These were the general regulations in the matter of domestic violence until 2003. There have been made considerable progresses after Law number 217/2003 regarding the domestic violence entered into force. Firstly, the novelty that this law brings up is the one regarding the definition of the concept of “domestic violence”. Another new aspect refers to foundation of some bodies in order to support the victims of the domestic violence. But, because we were at the beginning concerning the regulation on this matter, we have noticed a few discordances between this law and the provisions of the penal Code. On the other hand, by comparison with other states, the present regulation of the law and of the penal Code can be substantially improved.

The concept of “domestic violence” is defined for the first time within Law 217/2003 concerning its prevention and fighting against it. According to Art 2 of this law, the domestic violence refers to “...*any physical or verbal action which is deliberately committed by a family member against other member of the same family and that it causes a physical suffering, a mental distress, a sexual suffering or a material prejudice*”. In our opinion, these are some forms of violence which are directly committed by family members ones against the others. Besides this form, the law institutes an assimilated form of violence and that is “*the preventing of woman from the exercise of her fundamental rights and freedoms*”³⁴.

The application frame of the law firstly refers to family members, notion that involves the husband/wife and also the close relatives as this term is defined by Art 149 of the Penal Code: the ascendants, the descendants, brothers, sisters and their children and also the persons that became such relatives by adoption. According to the penal law, in the category of close relatives also enter the natural relatives, on the supposition of adoption³⁵. As Art 3 Para 1 Let b) does not make any difference; we consider that the special law provisions enforce to them too. It can be noticed that Art 3 Para 1 Let b) “*does not impose anymore the condition that the close relatives should live or they should run the house together with the doer*”, thus the term of family member of the special law is larger than the one of the actual Penal Code.

³³ Alexandru Ionaș, Ilie Măgureanu, *Noul Cod penal comentat*, Romprint Publishing-house, Brașov, 2004, pp.170-171; the paper considers the new Penal Code of 2004, but the authors’ commentaries are still valid in the actual context.

³⁴ According to Art 2 Para 2 of Law 217/2003

³⁵ According to Art 149 Para 2 of the Penal Code

The persons that have established relationships which are similar to those which exist between spouses (the concubines) or between parents and children also belong to this category, these relations have to be proved by the social investigation³⁶.

Thus, Art 2 generally defines the forms of violence within we include the physical violence, the mental distress, the sexual violence and the material or moral dependence. At the same time, Art 1 Para 2 of the same normative act clearly states the offences which are considered as forms of domestic violence. Thus, amongst the offences which harm the family life are those mentioned in articles: 175, 176, 179-183, 189-191, 193, 194, 197, 198, 202, 205, 206, 211, 305-307, 309, 314-316, 318 and other similar offences provided by the penal Code and also the provisions of Law number 47/2006 concerning the national system of social assistance³⁷. We notice that two important regulations on this matter haven't been included in the category of legal texts that state offences which are related to the domestic violence: Art 177 regarding infanticide, Art 203 concerning incest and Art 203¹ concerning sexual harassment. Also, the definition of "family violence" includes only the offences committed with intention, but not those committed out of negligence, as the case of Art 178 – homicide out of negligence or Art 184 – bodily harm by negligence, both stated by the Penal Code, opposite to the opinion expressed by some authors, who include bodily harm by negligence in the category of domestic violence³⁸.

The law encourages non-governmental organizations to support the assistance programs offered to the victims of the domestic violence³⁹.

The law has initially instituted a body – *The National Agency for the Family Protection* which had a role in controlling the domestic violence and it also had the obligation to draw up annual reports concerning the evolution of this phenomenon and the measures that were taken in this respect. Because of the difficult financial situation, by Law number 329/05.11.2009 regarding the reorganization of some public authorities and institutions, the rationalization of the public expenses, the support of the business medium and the observance of the frame-agreements with the European Commission and with the International Monetary Fund, the National Agency for Family Protection was dissolved and it has been fused with the National Authority for the Protection of Child Rights, thus it resulted a new body with legal personality – The National Authority for the Protection of Family and Child Rights (ANPFDC). At the same time, all the provisions regarding the role, the objectives and the attributions of ANFP stated in Law 217/2003 were repealed. Then, the Decision of the Government No. 1385/18.11.2009 concerning the setting up, the organization and the functioning of the National Authority for the Protection of Family and Child Rights it was approved; this decision provides only minimal attributions for ANPFDC regarding this matter.

In order to sustain the activity of ANPFDC, the law disposed the formation of a body of social experts that are named *family assistants*; they have to deal with the cases of domestic violence and they have general attributions as: they identify and they keep a list with the families where there are conflicts which can cause violence, they develop activities in order to prevent the domestic violence; they find non-violent solutions by keeping contact with the respective persons, they can request the help of some natural or legal persons in order to solve the situations that generate violence in the family and they also can monitor the observance of the rights that belong to the persons that are forced by the circumstances to appeal to these public shelters⁴⁰.

³⁶ According to Art 4 of Law 217/2003

³⁷ The text of Law 217/2003 refers to the provisions of the Law 705/2001, but this law was abrogated by Law 47/2006 which was published in the Official Gazette of Romania No 239/16 March 2006, thus we can consider the text as implicitly repealed.

³⁸ Ortansa Brezeanu, Aura Constantinescu, *op. cit.*, p.75

³⁹ Ortansa Brezeanu, Aura Constantinescu, *op. cit.*, p.76. According to Art 7 Para 3 of Law 217/2003

⁴⁰ According to Art 13 Para 1 of Law 217/2003 as it has been modified.

Another institution that was inserted in order to solve the domestic violence cases is the mediation. The mediation can develop only at the interested person's request. The proceeding develops by the agency of the family council or it can be developed by authorized mediators. The attempt to mediate the situation does not impede the development of the criminal proceeding or the enforcement of the actual law provisions⁴¹.

In order to help the victims of the domestic violence, the law has instituted the so-called *shelters* which are bodies with or without legal personality. Their principal role is that to ensure the protection, the housing, the care and the counselling of the victims of domestic violence that have to resort to this social assistance service⁴². Besides these shelters, the law has disposed the setting up of *recovery centres* that beside housing and care, they firstly ensure their rehabilitation and their social reintegration. The law didn't forget the aggressors; for them it has disposed the organization of some *assistance centres* which are created as bodies with or without legal personality which ensure, in a residential or semi-residential regime, their rehabilitation, their social reintegration, educational measures, counselling and family mediation measures. For them, the measures of family counselling are completed with those of specific treatments, for example: psychiatric treatment, addiction treatment which is developed within medical structures with which there have been drawn up conventions. No matter the situation, the victims' or the aggressors' assistance and internment in the centres mentioned before can be made only having their consent. For the minor, the agreement is given by the non-aggressor parent or by the legal representative⁴³.

From the procedural point of view, the law states that the security precautions provided by art. 113 and 114 and also the one provided by art. 118¹ can be taken by the court with a provisory character not only during the criminal prosecution but also during the trial⁴⁴. In our opinion, this stipulation seems to be very interesting. Concerning the safety precaution that refers to the interdiction to come back to the family residence, it has to be noticed that the special law departs from the general one, which is the penal Code. This derogation enforces only during the criminal prosecution and during the first stage of trial, when the court analyses the situation and it disposes that the measures taken with a temporary character should cease or they should become definitive, according to the legal text which enforces to them. The provisory measures are disposed by findings which are only submitted to recourse in a term of 3 days which runs from the pronouncing for the present persons and it runs from the communication for those who were absent.

Although Law 217/2003 regarding the domestic violence brought some improvements by comparison with the previous situation, it is not deprived of criticism. Unfortunately, in Romania there is not a restriction or an interdiction order which would give a real protection to the victims of domestic violence, as it exists in other European legislations. As we have already commented, the victims of domestic violence have to live with the aggressor even if they initiate a juridical approach. In our country, the family violent actions for the most frequent situations (Art 180 and 181 of the Penal Code) are not prosecuted *ex officio* or as a consequence of the denunciation of any person who has information about these actions, as it happens in the majority of the European states, thus, the reconciliation of the parties absolves the doer from criminal liability. The measure provided by the Penal Code in Art 118¹ can be taken after the aggressor is convicted to imprisonment for at least one year and if he represents a serious danger for the other family members. The decision of conviction of the aggressor is the only measure for protection of the victim. Consequently, the actual measures cannot avoid the imminent danger in the case of domestic violence. Besides, there are no measures of protection with a preventive character that could eliminate the danger and prevent the offences stated

⁴¹ According to Art 19 and 20 Para 1 and 2 of the Law 217/2003 as it was modified.

⁴² According to Art 23 and 24 of Law 217/2003 as it was modified.

⁴³ According to Art 25-25¹ of Law 217/2003 as it has been modified.

⁴⁴ According to Art 26-28 of Law 217/2003 as it was modified.

in the category of domestic violence; detention and remand are subjected to some restrictive conditions and thus, inapplicable in most cases of domestic violence.

c. Stage three. The new Penal Code, adopted in 2009, but did not come into force⁴⁵, inserts new important modifications in the system of penal protection of the family.

Thus, to speak about family violence we must, first of all, define the notion of *family* or *family member*. According to the new provisions of Art 177, family member includes: (1, a) *ascendants and descendants, brothers and sisters, their children, as well as persons who gained this statute through adoption, according to the law* (until here the text is identical with Art 149 Para 1 of the actual Penal Code); (1, b) *the spouse* (here it is added the hypothesis stated by Art 149¹ Thesis I of the actual Penal Code); (1, c) *persons who have established relationships similar to those between spouses or between parents and children, if they share a household* (it is a new text for harmonizing the Penal Code and Law 217/2003, in accordance also with other European codes, especially with its source of inspiration, the Spanish Penal Code – Art 173 Para 2⁴⁶. The introduction of concubines in the legal content of the notion of family member, it is justified by the existence of a large number of couples who live in a free union, there is no legal reason to deny their protection similar to that offered to married couples⁴⁷); (2) the provisions in the criminal law with regard to close relatives, within the limits of the previous paragraph letter a), shall apply in case of adoption with full effects, both for the adopted person, as well as for his/her descendants and with regard to the natural relatives (text identical to Art 149 Para 2 Thesis I of the actual Penal Code; the text was adapted and harmonized with the actual provisions on adoption, which no longer differentiate between full adoption and restrictive adoption for more than 15 years).

Another significant modification regards the regime of the penalties. The security measure of the *prohibition to return to the family home for a determinate period* was eliminated, among other security measures – as previously shown it was inoperable anyway. But the new Penal Code replaces it by introducing as elements of the complementary penalty the prohibition of certain rights in the following situations:

- The right to communicate with the victim or her family⁴⁸;
- The right to come near the house, workplace, school or other places where the victim unfolds social activities, in the conditions established by the law⁴⁹.

Though the Penal Code does not associate these two situations with domestic or gender based violence, we note that they are very close to the content of the restriction and interdiction order.

These two rights can be prohibited for 1 to 5 years, are expressly applied by the court when the law states it, and optional when the court decides for a fine or for imprisonment and when, given the nature and gravity of the offence, the circumstances and the offender consider the penalty as necessary⁵⁰. As well as in the situation of the *prohibition to return to the family home for a*

⁴⁵ The new Penal Code was stated by Law 286/2009, published in the Official Gazette No 510/24 July 2007

⁴⁶ According to this text of the Spanish Penal Code, which represents an aggravated form of the offence of *torture and other offences against moral integrity*, it is considered as passive subject the *concubine or the person to whom the aggressor was or still is involved in an affective relationship, even if they no longer share a household, descendants, ascendants, natural or adopted siblings, or other related persons of the victim or of the person with whom the aggressor shares a household, minors, incapable persons, who lived with the aggressor or who are subjected to the active subject by a relation of power, guardianship, care or protection, or any person who is involved in any type of relationship assuming his integration in a household, as well as against persons, who as a result of a particular type of vulnerability, are under the care of a public or private centre.*

⁴⁷ The exposure for reasons at the new Penal Code

⁴⁸ The situation is stated by Art 66 Para 1 Let n) Thesis I of the new Penal Code

⁴⁹ The situation is stated by Art 66 Para 1 Let o) Thesis I of the new Penal Code

⁵⁰ According to Art 67 Para 1 of the new Criminal Code

determinate period, in this situation the efficiency of the penalty *versus* domestic or gender based violence can be questioned as long as it remains the single way of protecting the victims of such offences. This is because the penalty is executed, partially like in the actual regime, after the decision for conviction or fine or imprisonment suspended under supervision has remained definitive, and in case of imprisonment by execution after it was executed or when it is considered to be executed⁵¹. Hence, the measure cannot be decided during criminal trial, so that the victim's life, medical condition or freedom shall be subjected to higher risks.

In the area of aggravating circumstances, the new Penal Code introduces some modifications that affect the situation of domestic and gender based violence. Art 77 of the new Penal Code no longer states as aggravating circumstance the perpetration of an offence by violence against family members, maybe because the new Code dedicates an entire chapter to this matter, without considering the situation of other offences which, according to Art 1 Para 2 of the Law 217/2003 represent domestic violence (such as the lack of liberty, rape etc). The impossibility to state one or more aggravating circumstances, as a consequence of the abolition of Art 75 Para 2 of the actual Code – *motivated by the aggravation of the criminal liability by violating the principle of predictability* – the only possibility to aggravate the criminal liability in case of gender based violence is represented by Art 77 Para 1 Let h) (stated by the actual Code in Art 75 Para 1 Let c)) the commission of the offence as a form of gender based discrimination, and in the case of the other forms of domestic violence by applying Art 77 Para 1 Let h), or by using the new introduced aggravating circumstance regarding *the commission of the offence by taking advantage of the victim's vulnerability due to her age* (in the case of minors and elder persons), *health condition* (sick persons), *disability or other causes*.

The special part was enriched with a new chapter⁵² dedicated to domestic violence and including two offences. The first offence is stated by Art 199 and it is called "*Family violence*". The offence has two means of perpetration and refers to, because it borrows the content of other criminal offences, and subordinating its content to the norms from which it has borrowed that content.

The first mean, settled by Art 199 Para 1 *consists of the offences stated by Art 188* – murder, *Art 189* – first degree murder, *Art 193* – hitting and other violence, *Art 194* – bodily injury and *Art 195* – hitting or injuries causing death. The second paragraph refers to the possibility that for the offence stated by Art 193, the criminal action to be initiated *ex officio*, making possible the reconciliation of the parties, by comparison with the text of this offence where the criminal action is initiated only upon prior complaint of the victim⁵³. But, in addition, though the previous paragraph does not state that family violence includes the offence of bodily harm out of negligence, stated by Art 196, Para 2 refers to the fact that in the situation of this offence if committed by and against a family member the criminal action can be also initiated *ex officio*. It is just a simple omission? The amended text no longer corresponds with Law 217/2003, stating that family violence is represented *only by offences committed with intention*. So, we must understand that bodily harm out of negligence is not domestic violence, but though, talking about the protection of family members, it is possible that criminal action to be initiated *ex officio*, even if the offence is committed out of negligence.

Returning to the content itself of this offence, it is noticed that the new Penal Code has eliminated all those texts – aggravating circumstances of murder, hitting and other violence and bodily injury from the actual code and inserted them in a new text, called *family violence*.

⁵¹ According to Art 68 Para 1 Let a) - c) of the new Penal Code

⁵² We are talking about Chapter III – *Offences committed against a family member*, from Title I – *Offences against persons*

⁵³ According to Art 193 Para 3 of the new Penal Code

Thus, it appears a new inconsistency with Art 1 Para 2 of the Law 217/2003 which defines domestic violence not only from the perspective of the offences assuming a direct physical violence committed with intention, but also other offences harming the rights of a person, such as rape, privation of freedom, robbery, referring only to those offences regarding the spouse-victim of gender based violence, but not for the case of other family victims.

So, what is the logic conclusion in this case? A first hypothesis, starting from the principle of *specialia generalibus derogant*, would be of the application of the special law to the detriment of the Penal Code; the new text is subsequent to this special law, so that the legislator intended to modify the special law by this new provision?! If we use such interpretation, we would deprive Art 1 Para 2 of the Law 217/2003 of its judicial effects and also the definition given by this law to family violence. It only remains of this law the organizational provisions on the assistance of victims and the possibilities for involvement of local authorities and of specialized organisms created by law or non-governmental organizations with the aim to combat this phenomenon. But this would not be much towards the majority of the Western and European penal texts, which develop the situation and do not restrain it to a minimum physical violence. Thus, Romania would fail in respecting its international and European obligations, to which it has subscribed⁵⁴.

Finally, for the dysfunctions between the two texts that would settle family violence, in the case of entering into force of the new Penal Code, we might add that the second text named by the Penal Code as form of family violence is *the killing or harming of the newborn by the mother*, offence stated by Art 200⁵⁵. Art 200 Para 1 is the new version of infanticide with significant modifications. But, as we previously mentioned, Law 217/2003 states infanticide as form of domestic violence. It is true that nowadays infanticide originates in a medical disorder suffered by the mother after giving birth, while in the new text, the disorder considers all possibilities, *without differentiating on its nature*. Extending the reasons of the disorder, in the new context, infanticide as well as harming the newborn, occurred in the same conditions as those stated in the first paragraph, comprises the situations of family violence, but regarding the minor, given his impossibility to defend himself and his early age.

Finally, the last changes in the area of family violence are those regarding offences against sexual freedom and integrity. The new text of rape⁵⁶ no longer states the aggravating circumstance on the perpetration of the offence by and against a family member, stated now by Art 197 Para 2 Let b¹). In exchange, it has partially incorporated provisions regarding incest, thus eliminating the debates on the existence of plurality of offences between rape and incest, and leaving without core the provisions of the appeal for the law resulted from the decision of the High Court of Cassation and Justice No 17/2008 point 2⁵⁷. The same aggravating circumstance is also found in the case of a new offence – Sexual aggressions – Art 219 Para 2 Let b) of the new Penal Code.

⁵⁴ For instance, it would not respect the European Convention on Human Rights or Recommendation R(2002)5 on the protection of women against violence, Recommendation R(2004)1681 – Campaign to combat domestic violence against women in Europe, Resolution 1512(2006) “Parliaments united in combating domestic violence against women”, Recommendation 1759(2006) “Parliaments united in combating domestic violence against women”, Resolution R(2007)1582 of the Council of Europe “Parliaments united in combating domestic violence against women”.

⁵⁵ According to Art 200 of the new Penal Code, *killing or harming the newborn by the mother* consists of: (1) *The killing of a newborn infant, committed immediately after birth, but no later than 24 hours, by the mother who is in a state of confusion, shall be punished by imprisonment from 1 to 5 years;* (2) *If the offences stated by Art 193-195 are committed against the newborn infant immediately after birth, but no later than 24 hours, by the mother who is in a state of confusion, the special limits of the penalty are from 1 month to 3 years.*

⁵⁶ See Art 218 Para 3 Let b) of the new Penal Code

⁵⁷ See the official High Court of Cassation and Justice’s website www.scj.ro

As a conclusion, we can state that both the current, as well as the new provisions on family violence of the Penal Code, especially gender based violence, which is in our special interest for the moment, does not enjoy the most comprehensive, coordinated and clear regulations. Moreover, though many recent European texts explicitly refers to violence against women, and in Spain the regulations have reached the protection of this type of violence, as a gender based violence, the Romanian texts are still clumsy and without efficiency.

III. The evolution of the Spanish legislation

The protection order may contain also penal law measures, as well as civil law protection measures. The latter ones can be taken only upon the request of the victim (as previously shown, the protection order containing penal measures can be issued *ex officio* by the judge), of her legal representative or of the prosecutor, but only if minor children or incapable persons are concerned, if the measures were not already taken by a civil court. The civil law protection measures consist of a decision attributing the exclusive use of the common housing of two persons to the protected person, the establishment of the regime of custody, visits, communication and residence with children, as well as the regime of offering food to them. The civil law protection measures are taken for maximum 30 days. The protection order shall be communicated to the parties and to the public authorities competent in insuring the protection, security, social assistance, juridical, health, physiological measures or any other kind of measures. Also, the protection order shall imply permanent information of the victim on the situation of the defendant, on the status of the adopted protection measures, as well as on the detention of the offender, if necessary. We also considered as very interesting the establishment and existence of a Central Register for the Protection of Victims against Violence (*Registro Central para la Protección de las Víctimas de Violencia Doméstica*) where are registered all the protection orders, representing a mirror of the national situation of domestic violence and also a type of record dedicated to this phenomenon.

Finally, one of the last measures adopted by the Spanish legislator to prevent and stop domestic violence and to protect its victims is the Organic Law 1/28 December 2004 on the measures for protection against gender based violence, called Integral Law, as a consequence of the stated measures.

It is for the first time when Spain evolves from generally debating domestic violence to specifically debating gender based violence, the last name not very popular among the Romanian jurists. Besides the entrance the European and international view of the gender based violence was made in the early 1990, but mostly after 2000⁵⁸. For María Luisa Maqueda the domestic and gender based violence are different from the perspective of the victims: for the first, it is the family, and for the second it is the woman, even if she recognizes the majority of cases of gender based violence occur within the family⁵⁹.

In the preamble of the Integral Law, it is shown that this form of violence is no longer just an aspect of the private sector, but it represents a problem of the entire society, *manifesting itself as the most brutal symbol of inequality in society*⁶⁰. This law, *the violence that woman are forced to suffer within the extended family stops to be an "invisible offence", generating a collective rejection and an obvious social alarm.*

Let us see how this law defines gender based violence, which are its leading principles and its main novelties inserted in the penal system.

⁵⁸ María Luisa Maqueda, *LA VIOLENCIA DE GÉNERO - Entre el concepto jurídico y la realidad social*, in the Spanish Penal Sciences and Criminology Review nr. 08-02 (2006), p. 02:2

⁵⁹ *Ibid*, p.02:4

⁶⁰ See also in this regard the opinion of María Luisa Maqueda, *op.cit*, p.02:2

According to Art 1, gender based violence represents all types of violence resulted from the discrimination, inequality and domination exerted by the man against women, violence exercised by her ex or actual concubine (*the term also includes the quality of husband*), or by the man with whom the woman is involved in a relationship, even if they no longer share a household. According to professor Luis Arroyo Zapatero the extension of the term “family” as to include fathers, sons, brothers, uncles by alliance of the husband or concubine, minors or incapable persons that shared a household with the victim, the persons who are within the family framework by any relationship, as well as guardians or tutors in centers for vulnerable persons is an exaggeration of the law, despite the fact that he supported the idea of differentiation between domestic and gender based violence, including in the parliamentary sessions that debated the full text of the law⁶¹.

Regarding the equality between men and women promoted by the Integral Law, María Elósequi Itxaso considers that it has a wide meaning, taking into account not the possible rights in politics, economy or the social area, but also the conditions for their full exercise. It is actually equality, according to the author, which starts from the differences specific to the gender that integrates them, without imposing to the woman the man model⁶². The author shows that the guiding principles for the public authorities in applying this law shall be: equal treatment (*it is prohibited any direct or indirect discrimination based on sex, regardless of its manifestation mean*), equal opportunities (*all public authorities shall adopt measures that will guarantee the effective exercise, for women and men, of their political, civil, economic, social or cultural rights*), respecting differences and diversity (*all public authorities shall apply the law by respecting the differences and diversity between men and women*), integration of the gender based perspective (*all public authorities shall integrate the gender based perspective, in the meaning of considering different situations, conditions, aspirations and needs of women and men, aiming to eliminate all inequalities and to promote equality in all the stages of policies and actions: planning, execution and evaluation*), positive action, elimination of stereotypes based on sex⁶³.

Besides these principles applicable for public authorities, Art 2 of the law states certain guiding principles, among which we emphasize: equipping public authorities with efficient instruments in fighting against gender based violence and assisting its victims in an educational, health care and publicity environment, the creation of an emergency information social service for victims of gender based violence, providing an economic support for female victims of this phenomenon, the creation of an administrative guardianship of the state that will impose public policies to support the victims, strengthening the penal framework, offering the possibility for civil entities, associations and organizations to act against gender based violence, ensuring the transversality of the means of support etc⁶⁴.

From the penal perspective, the novelties inserted by the Integral Law refer to the enlargement of the framework of offences – as misdemeanors – of domestic violence, which determines higher penalties, temporary imprisonment, the obligation of adopting the superior limitation of a penalty (it shall be punished by imprisonment from 3 months to 3 years) if the offence is committed by gun or other dangerous instruments threat, in front of minors, in the common domicile or in the victim’s domicile or by trespassing either the temporary separation order, the adoption of the security measure

⁶¹ Luis Arroyo Zapatero, *op. cit.*, p. 202. For his presence in the Parliament see the Congress official website (Spanish Chamber of Deputies) www.congreso.es/publicaciones/ on 19 July and 7-9 September 2004.

⁶² María Elósequi Itxaso, *Los principios rectores de la Ley orgánica contra la violencia de género*, in Pilar Rivas Vallejo, Guillermo Barrios Baudor coord., *Violencia de género – perspectiva multidisciplinar y práctica forense*, Thomson Aranzadi Publishing-house, Pamplona, 2007, p. 121

⁶³ *Ibid.*, pp.121-123

⁶⁴ María Ibáñez Solaz, *Catálogo de principios rectores y derechos previstos en la Ley no.1/2004*, in Pilar Rivas Vallejo, Guillermo Barrios Baudor coord., *op. cit.*, pp. 132-133

of separating the offender from the victim, and the adoption of the plurality of offences between the offence against moral integrity and the offence of ill treatments⁶⁵.

Essentially, the evolution of the Spanish legislation with its latter modifications was appreciated as positive, revealing many situations, but also succeeding to protect all the victims terrorized by violence or who could have been dead by now.

Conclusions

Searching for documentation for a wider study on domestic and gender based violence, from which this article represents only a part, I found a book of a Spanish author Miguel Lorente Acosta – *Mi marido me pega lo normal – Agresión a la mujer: realidades y mitos* (*My husband constantly beats me – Agresion against women: reality and myth*). Noticing the title I could not stop remembering all the *girls' talk* that I have heard in my childhood when a friend of my family got married. Such lines as: “*You have a good husband, he does not beat you, does not drink, what more do you want?*” were natural in those times (in the vision of communist or non-communist mentalities). The debates on women who were beaten by their husbands or indirect realities, lived by other people, were frequent, about two-three decades ago.

We also live painful realities nowadays, within families were women, with a disturbing majority, a little support from a system that starts functioning, manage to survive a severe beating. But after the system offers them and their children shelter and food for one-two-three months, all these women will return in the same violent and dangerous environment due to their financial and household dependence and, why not, their habit of supporting years of beatings.

So, is Romania ready for a special legislation on gender based violence or it shall be the exception? Are Romanian women aware as the Spanish women that a life under terror is not a life of love, but just a life of vices? Are these women aware that they deserve an infinitely better life and if they choose not to hurt the men that beat them by submitting a complaint against them, they could choose to divorce as fast as possible? Shall the Romanian legislation support them, which by comparison with the Spanish one must be improved with measures to be adopted at the beginning of the penal trial, not only at its ending?

This is just a pleading for life and for a mean of stating that the Romanian legislation on domestic and gender based violence must be change in order to effectively support all the women who suffer in silence and ignorance...

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