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Within four walls: a portrait of court's challenges vis-à-vis domestic violence

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LIST OF ABBREVIATIONS

BARD	"beyond any reasonable doubt"
DV	Domestic Violence
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IRO	Immediate Restraining order
LDV	Law on Domestic Violence
RO	Restraining order

Domestic violence is a wound that spares no country; it is a wound to humanity.¹

Opinion of the Head of the OSCE Presence in Albania, Ambassador Vincenzo Del Monaco

Introduction

In a world troubled by the fatality of domestic violence (hereafter: DV), the case of Albania brings to the surface a tangible reality of this grave problem.² While DV is sought to exist in every society, its entrenched ties with the social, economic and cultural status remain prevalent. Figuratively speaking, the victims of this in-house battle resemble those of a civil war. The global figures display a shocking picture: 137 women are killed by a member of their family every day; out of 87,000 women, who were globally intentionally killed in 2017, more than half of them (50,000 women) were killed by intimate partners or family members;³ and less than 40 % of these women refer to institutions for help.⁴ The Covid-19 pandemic, as literature refers,⁵ brought another pandemic within the pandemic. Following this, the Covid-19 crisis brought along an increase of the DV risk factors against women.⁶ Having said this, the statistics display a worrisome situation in Albania in terms of ‘popularity’ of DV in the country.⁷ The ideas on this topic were clarified by interviews with our newly appointed

¹ Available at: <https://www.osce.org/files/f/documents/7/7/475667.pdf>. Accessed on 20 April 2021.

² The 2020 Report of the European Commission regarding Albania has identified 4,629 cases of domestic violence processed during January - December 2019. Among these, 2,836 cases of domestic violence were assessed by the court after the filing of the lawsuit “*On the issuance of IRO/RO*”, available at https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/albania_report_2020.pdf, accessed [18 April 2021];

³ United Nations Office on Drugs and Crime, *Global Study on Homicide 2019: Gender - related killing of women and girls*, pg. 10, available at: https://www.unodc.org/documents/data-and-analysis/gsh/Booklet_5.pdf, [Accessed 18 April 2021].

⁴ United Nations Economic and Social Affairs (2015), *The World's Women 2015, Trends and Statistics*, pg.159, available at: https://unstats.un.org/unsd/gender/downloads/worldswomen2015_report.pdf, [accessed 18 April 2021].

⁵ See: Evans, M. L., Lindauer, M., & Farrell, M. E. (2020). A pandemic within a pandemic—Intimate partner violence during Covid-19. *New England journal of medicine*, 383(24), 2302-2304.

⁶ World Health Organization, on behalf of the United Nations Inter-Agency Working Group on Violence against Women Estimation and Data (2021), *Violence against women prevalence estimates, 2018. Global, regional and national prevalence estimates for intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women*, available at: https://cdn.who.int/media/docs/default-source/documents/violence-prevention/vaw_report_web_09032021_oleksandr.pdf?sfvrsn=a82ef89c_5&download=true[accessed 18 April 2021].

⁷ The Ministry of Justice of the Republic of Albania, *Statistical Yearbook 2019*, p.340, available at: <https://drejtesia.gov.al/wp-content/uploads/2020/07/VJETARI-STATISTIKOR-2019.pdf>, [accessed 18 April 2021]; National Population Survey (INSTAT), *Women and Men in Albania 2020*. (During 2019, out of 58 homicides, about 24.1 % of them have been homicides resulting from family relations), available at <http://www.instat.gov.al/en/themes/demography-and-social-indicators/gender-equality/publication/2020/women-and-men-in-albanian-2020/>, [accessed 18 April 2021].

colleagues and experienced family section judges, which reinforced the importance of this topic, closely related to the quality of life and the essence of freedom and human rights.

Taking into consideration the fact that DV is a ‘within four walls phenomenon’, the court faces a number of challenges, e.g. victims are fragile and ready to withdraw from the process. However, the nature of this problem requires the involvement of all relevant institutions and stakeholders in the system to work closely and address the glitches of the system.

Although serious efforts and interventions have directed towards bringing the national legal and institutional framework in line with international standards, it can be concluded that a lot remains to be done yet. Looking deeper into the problem, it results that when tackling DV, it is not sufficient to merely have an adequate legal and institutional framework in place – above all, and in the context of Albania, addressing DV is a matter of mentality of the displays roots, which go as far linking the problem to the mentality of the population. This paper aims to provide an overview of the role of the Albanian judiciary as well as some of its challenges in light of DV. Furthermore, the study highlights the importance of harmonized institutional efforts within, and beyond Albania.

1. Reacting promptly and assessing adequately

In November 2016, a tragic incident took place in the city of Fier, Albania.⁸ A 42-year-old woman, mother of two, was taken to the bathroom, stripped naked, beaten and then thrown out of the bathroom window of the fourth floor (finding immediate death) by her husband, against whom she had secured a Restraining Order (hereafter: RO) by the court, shortly before the incident occurred. The competent authorities, namely the court, police, bailiff offices and social services showed to have failed in protecting her. The RO was valid for one year, and the respondent was ordered to not intimidate, harass, contact or threaten the victim. He was obliged by the RO to keep *at a distance of more than two meters* away from her, while the both of them would continue to live in the same apartment.

A number of questions arise from this typology of ROs issued by the court: Could the court (or the judge) prevent the violence? Could the victim be protected by living under the same roof as the perpetrator? Can the effectiveness of the RO be determined simply by the distance between the victim and the perpetrator? Does the issued RO make any difference in the victim’s life, and does it really protect the victim?

⁸Decision no. 149, dated 25 November 2016 of the Fier District Court, *L.R v. F.R.*

The same situation has been recurring also in other cases: the victim and perpetrator still living together and trying to maintain a two, three or five-meter distance.⁹ These cases show that the protective measures issued by the court have not delved or taken into consideration other circumstances such as who the situation of the perpetrator and the victim. The vulnerability of the victim, and the aggression and risk posed by the perpetrator are not the same in every case, but they require a thorough case-by-case court analysis.

Dreadful consequences can result from cases when extrajudicial authorities continue to treat violence as a private matter and do not take appropriate action to address it. A 26 year-old woman, mother of two, had been taken to hospital several times in critical condition caused by the violence exerted from her husband. Her family and relatives were well aware of the occurring violence, however no one denounced the case. The toothless mouth of this young woman unmasked the whole system. A TV show made the case public in order to bring in front of responsibility and accountability the institutions, and to trigger a reaction from their side. Once again, the consequences of the delayed reaction of the institutions responsible for preventing and combating DV were clearly demonstrated.

In 2006, the Albanian Parliament approved Law No. 9669, dated on 18.12.2006 “On measures against violence in family relations” (hereafter: LDV) as amended. In addition to the novelties this legislation introduced in terms of content, interestingly it also marks the first Law, which was proposed by 20,000 voters.¹⁰ Furthermore, as of 2012, the Criminal Code of the Republic of Albania, under Article 130(a) considers DV as a criminal offence.¹¹ The already introduced amendments to the legal framework clearly display willingness to bring the national legislation in line with international standards. In addition, efforts in this direction also show the positive intention to explore and find adequate solutions, which are responsive to the local context and the operating environment of such a phenomenon. Worth highlighting is that Albania has ratified the majority of the international Conventions related to the protection of fundamental human rights and women's rights.¹²

⁹Decision no. 4100, dated 08 October 2020 of the Tirana District Court, *H.Z. v. O.Z.*

¹⁰ According to the article 81 (1) of the Constitution of the Republic of Albania, *The Council of Ministers, each deputy, and 20 thousand voters have the right to propose laws.*

¹¹Law no. 7895, dated 27 January 1995, “*Criminal Code of the Republic of Albania*” available at: <https://euralius.eu/index.php/en/library/albanian-legislation/send/10-criminal-code/11-criminal-code-en>.

¹² Albania has ratified the Convention on the Elimination of all Forms of Discrimination against Women; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention); United Nations Convention on the Rights of the Child (CRC), etc.

From a more institutional point of view, in order to prevent and combat DV, the authorities and the court specifically, should act within very short legal deadlines and must issue an Immediate Restraining Orders (hereafter: IROs) within 24 hours, if a child is the victim; and within 48 hours if an adult is the victim, meaning *without undue delay*.

The law implies that the courts must bear in mind that “perpetrator’s rights cannot supersede the victim’s human rights to life and physical and mental integrity”.¹³ The vulnerability of DV victims requires that the court and other extrajudicial actors involved in DV (referral mechanism) have an effective and prompt involvement marked by due diligence, as the cornerstone of their action, in order for them to effectively fulfil their positive obligations towards safeguarding human rights.¹⁴ Apart from the action and reaction of the court, a better-coordinated effort is of paramount importance to making the legislation and the decisions of the court effective but also successful in practice. The above-mentioned cases demonstrate that even a 20 or 25-years old law can defeat its purpose if not applied and enforced with due diligence, and not only by the court, but by the system as a whole and particularly those actors immediately involved in the protection of victims, whose lives are at stake.

2. Protected subjects under LDV

Under the LDV, 15 years following the approval of this law, the category of protected “family members” changed, mainly by including additional members falling under the family umbrella, and giving another perspective to family life. Taking into account the occurring incidents, the amendments of 2018, have foreseen under ‘family members’ those who are in an intimate relationships (not necessarily cohabitating) and children or adults under custody and their guardian (LDV, Article 3). Nonetheless, these changes did not include protection of homosexual couples. As it is the case in some other European countries,¹⁵ the Albanian Family Code does not recognize same sex marriages or same sex civil partnerships, and this way these cases are not addressed to the court under LDV.

The amendments of 2018 included, in article 3, under the category of protected subjects, also the foreign nationals or stateless persons, who regularly reside in Albania. Prior to these amendments, it was not specified whether the foreign nationals committing acts of DV were

¹³ECtHR, *Opuz v. Turkey*, Appl. no. 33401/02, Judgment of 9 June 2009, paragraph 147. All ECtHR decisions are available at <http://hudoc.ecthr.coe.int/>.

¹⁴Ramunė Jakštienė, *Domestic Violence in Case Law of European Court of Human Rights*, p. 84, available at: <https://repository.mruni.eu/handle/007/14947> [accessed 20 April 2021].

¹⁵ ECtHR, Case *Schalk and Kopf v. Austria*, Appl. no. 30141/04, Judgment of 24 June 2010, paragraphs 61-63.

subjects under LDV, thus the courts were often faced with the issue of jurisdiction. Through navigating case law, the *B.D. v B.S case* draws the attention. In a nutshell, a married couple is living in London, and the wife requested the issuance of a RO on December 24, 2015, immediately after arriving in Albania. The plaintiff B.D, an Albanian national, whose habitual residence was in London, explained that her husband, a UK national, often exercised psychological, physical and economic violence against her. The last act of violence was committed in the premises of the Tirana Airport, where the plaintiff was saved by the intervention of the airport police. The respondent claimed that, in accordance with Law No.10428/2011 “*On Private International Law*”, the Court of Tirana did not have jurisdiction because of the following reasons: the respondent was a UK national; his habitual residence was in the UK; the marriage was never registered in Albania, so they were not "family members" according to the LDV. The Supreme Court¹⁶ ruled that LDV aims to prevent any form of DV that occurs in the territory of the Republic of Albania, without any consideration to the place of residence that the plaintiff or the respondent may have responding thus to the rather hesitant stance of the lower courts. According to the Supreme Court, under LDV “the victim” and “the perpetrator” are not linked to their nationality, and the law offers equal protection to Albanian and foreign nationals. The Supreme Court has preceded the LDV amendments, by stating that the request for the issuance of a RO may be filed either in the court of the place of residence of the victim or that of the perpetrator, a choice which belongs to the victim.¹⁷

The courts have been faced sometimes with difficulties in defining who constitutes a “family member”. For example, in Article 130(a) of the Criminal Code, violence perpetrated between “close relatives” or “close in-laws” is considered a crime. The LDV does not provide with a definition of “close relatives” or “close in-laws”, thus the courts, pushed by the vagueness of the law, are obliged to define these relations based on the norms on the conflict of interests of judges in criminal proceedings.¹⁸

The 2017 amendment to the Criminal Procedure Code and the Criminal Code, along with the introduced changes of 2018 to the LDV, did not bridge the gap between DV subjects in civil

¹⁶Decision no. 99, dated 23 March 2016 of the Albanian Supreme Court.

¹⁷ Decision no. 11, dated 13 January 2011 of the Albanian Supreme Court.

¹⁸Article 16 of the Albanian Criminal Procedure Code states that: “*Persons who, between them or to any of the parties in a trial, are spouses, cohabitants, close relatives (antecedents, descendants, brothers, sisters, uncles, aunts, nephews, nieces, children of sisters and brothers) or close in-laws (mother-in-law, father-in-law, son-in-law, daughter-in law, sister-in-law, brother-in-law, stepson, stepdaughter, stepmother, stepfather) may not participate as judges in the same proceeding.*”

and criminal proceedings. In the case of *A.S v R.S*, the court examined the request for the issuance of a RO, presented by the aunt against her nephew. Before deciding on the merits of the case, the court examined whether the request met the conditions set out by LDV. According to the Article 3(7)(b), niece(s) and nephew(s) are considered subjects under LDV when they are members of the household. A “household”, according to the Article 3(6) of the LDV, means a dwelling or any environment used and adapted as such, regardless of whether it is owned or is in use by the family. The plaintiff and the respondent lived in two separate houses, situated in the same yard, but they did not have financial relations with each other. The court stated that the plaintiff was not included in the category of protected subjects by LDV, since the plaintiff and the respondent did not live together in the same dwelling, and they were not a single economic unit. For this reason, the plaintiff’s request lacked standing for the issuance of a RO. If the same case was referred to the Prosecution Office, even though the LDV does not consider as “family members”, the aunt and nephews that do not live together, the respondent would have been found guilty for committing a DV crime and, most probably, would have been convicted by the criminal court.

The opposite scenario would happen in cases of intimate relationships. The changes effectuated by LDV in 2018 included in the concept of family members, also those persons who are or have been in intimate relationships, not necessarily accompanied by cohabitation. In the case of *V.V. v B.F.*¹⁹ the plaintiff and the respondent were in a relationship for a short period of time, without actually living together. The court issued the RO, because it considered that the parties were in an intimate relationship and as such, they were “family members”. If the same case was to be referred to the Prosecution Office, the respondent would have not been charged with DV, because according to the Criminal Code, the persons in an intimate relationship are not considered as "family members". The Prosecution Office would have charged the respondent with the “minor injuries” misdemeanour instead.

3. The procedural legitimacy of children: victims and/or perpetrators

The main issues affronted by the courts are: are the children of any age capable of suing or being sued under LDV proceedings; is there an age limit to be respected by the courts in defining the standing of children in such proceedings? The patterns of the violent behaviour and lifestyle of the parents are often transmitted to children, who start manifesting an aggressive behaviour towards their loved ones. Usually, parents surrender to the actions of a

¹⁹ Decision no. 122446, dated 11 October 2020, of the Tirana District Court, *V.V. v. B.F.*

violent minor, and refer the case to court only after they have exhausted all possibilities and other out-of-court available mechanisms. When looking at the cases referred to court, it appears that parents requested issuance of ROs against children up to 13 years of age.²⁰

Forced by the absence of the age criteria in the LDV, the court examines the standing of the respondents by referring to the norms of the Civil Code regarding legal capacity and liability for damages.²¹ The courts have ruled that the minors under 14 years of age do not have standing to be respondents in court, and cannot be considered as perpetrators. As such, a RO cannot be issued against them. As for children above 14 years of age, following the LDV, Albanian courts consider them as possible perpetrators, since they possess legal capacity to act and are liable for the damages caused by them.

Children are included amongst the victims of DV. Even in the cases where they are not direct victims, the violent act is committed in their presence. Usually, it is the child's mother who demands the initiation of the proceedings, even in the cases where children are victims of DV. However, in 2019 almost 2.5% of the DV cases²² were initiated by subjects under 18 years of age, which is a positive development regarding this issue.

The District Court of Tirana has registered various cases of children as plaintiffs. For example, in the case of *A.A v O.V.*,²³ the plaintiff, a 17-year-old girl, represented by her adult brother, requested the issuance of a RO against the respondent, a 17-year-old boy, represented by his father. The plaintiff explained that she was in a relationship with the respondent O.V, but he was jealous and one day abused her physically, by slapping her in front of her classmates. The court stated that the relationship between the two teenagers should be considered an “intimate relationship”. As such, the plaintiff A.A was legitimate to seek remedy, triggering thus the protective measures guaranteed under LDV.

²⁰ Decision no. 12446, dated 11 October 2020, of the Tirana District Court, *D.L. v. A.L.* .The court examined the request of the mother D.L for the issuance of a RO against her 13-year-old son A.L.

Decision no. 12445, dated 09 October 2020, of the Tirana District Court, *H.K v. M.K.* The court examined the request of a mother for the issuance of a RO against her 15-year-old son.

²¹ The Albanian Civil Code provides in the articles 7-8 that the minors under 14 years of age do not have any legal capacity but the children of 14-18 years of age have limited legal capacity to act. Articles 613- 614 of the Civil Code provide that the minors under 14 years old of age are not liable for damages caused by them but the children older than 14 years of age are liable for the damages caused by them.

²² The Ministry of Justice of the Republic of Albania, *2019 Yearly Statistics*, p. 340, available at: <https://drejtesia.gov.al/wp-content/uploads/2020/07/VJETARI-STATISTIKOR-2019.pdf> [accessed May 8, 2021].

²³ Decision no. 12444, dated 09 October 2020, of the Tirana District Court, *A.A. v. O.V.*

Even though in the abovementioned cases the court has ruled that minors under 14 years of age do not have legal standing to be respondents, it decided differently in the case *I.D v E.D.*²⁴ In this case, the plaintiff was a 10-year-old, who requested the issuance of a RO against his father, and was legally represented by his mother. The plaintiff, interviewed by the court's appointed psychologist, explained that his father had verbally abused him many times, and that he did not want to meet him [the father] anymore. The court ruled that the minor I.D was a victim of DV and had the right to request a RO via the representation of his legal guardian, although he lacked legal capacity to act.

4. Standard of proof versus court 'inner conviction'

The court has a very important role in preventing DV and protecting DV victims, by providing quick and prompt responses to the situation at hand and by becoming a visionary actor, meaning always considering that the factual situation can at any moment take a turn for the worst with regard to the situation of the victim. These aspects have been properly underlined by Article 50 of the Istanbul Convention. The provision of a quick response means that there shall be a reasonable "deviation" from the classic standard of proof. Article 15 of the LDV provides for a guideline regarding possible type of evidence expected to be submitted to court.²⁵ However, the possibility to effectively receive and assess the evidence, while providing a thorough and quick analysis remains one of the biggest challenges of the court. In this regard, the court should always keep into consideration that the behaviour/conduct of the perpetrator with persons outside of the domestic unit, or the level of integration of the perpetrator in society, should not be given weight when assessing the dangerousness and risk for further DV, since the perpetrator is primarily dangerous to women and/or children at home, or similar circumstances.²⁶

The provision of judicial evidence regarding DV cases often constitutes a highly complicated procedure, and is the biggest hindrance for the court to achieve its main objective, which is to arrive at an accurate and well-reasoned final judgment. The aforementioned complications arise from the highly confidential nature and development of these cases, which mainly

²⁴Decision no. 10639, dated 19 March 2021, of the Tirana District Court, *I.D. v. E.D.*

²⁵The evidence mentioned in article 15 includes: witness statements, police reports, medical reports, acts of expertise, statements/explanations by the parties, other documents issued by the social workers of the social services department at the municipality and commune, and documents issued by NGOs.

²⁶ See GREVIO, Third Party Intervention by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) pursuant to article 36 paragraph 2 of the European Convention on Human Rights - Appl. no. 62903/15, *Kurt v. Austria*, 21 January 2020, para. 23, available at <https://rm.coe.int/grevio-inf-2020-3-third-party-intervention-kurt-v-austria/pdf/16809987e9>, para. 23 [accessed 28 April 2021].

consist in conflicts happening within household environments, shielded from the eyes or the presence of third persons. The court, in the absolute majority of cases, is obliged to build its inner conviction mostly from indirect or circumstantial evidence, gathered from analysing the behaviour of the parties before or during the judicial proceedings, their claims and declarations during the judicial proceedings, and if they coincide with the initial claims and declarations of the parties.

Regarding the victim's statements, the court has to carefully assess them, as well as the behaviour of the victim towards the perpetrator. This is of utmost importance, taking into consideration the fact that any behaviour of the victim towards the perpetrator that seems ambivalent should not be interpreted as an indication of a lesser degree of danger posed by the perpetrator, but instead seen as a logical consequence of the abusive relationship, because of the dynamics of power and control typical to DV.²⁷ Moreover, it must be mentioned that victims demonstrate signs of post-traumatic stress, they often face financial difficulties, and the pressure of their relatives, local customs and traditions. Therefore, the above-mentioned conditions often influence the statements of the victims, and make them seem as unclear and contradictory. The testimonies of third persons regarding DV situations must be examined under a case-by-case analysis and in a realistic context, since the perpetrator's real behaviour is often difficult to understand for persons not directly involved in these situations.

The changes of 2020 introduced to LDV define that, in the cases where the victim and the perpetrator live together, the court may order as a protective measure against DV the immediate removal of the perpetrator from the premises in which he/she lives, for a defined period of time. This novelty of the Albanian legislation is in line with Article 52 of the Istanbul Convention, which establishes the obligation of equipping the competent authorities with the power to order a DV perpetrator to leave the residence of the victim/person at risk and to ban the perpetrator from entering the residence or contacting the victim or person at risk, in cases of immediate danger.

In other words, the key elements that need to be guaranteed include not only the protection of victims and persons at risk in their own home (the ordering of the perpetrator to leave the residence of the victim/person at risk and to not return there), but also their protection anywhere else by prohibiting the perpetrator to contact the victim or person at risk for a

²⁷ *Ibid*, para. 19.

sufficient period of time (the order to stay away from the victim or person at risk, or order of no-contact). In addition, Article 19(2/1)) of the LDV lays down another very important provision, which states that the court shall issue the RO even in cases where parties claim that the conflict has been settled, or shall be settled through reconciliation or mediation. It must be mentioned that this provision complies with the rationale and aim of the LDV for the protection of DV victims, considering the pressure and threats the latter may face to withdraw the claim and pretend that the conflict has been settled.²⁸

The connection between the standard of proof in DV cases and the building of the inner conviction of the judge is established by Articles 17 and 19 of the LDV. The aforementioned Article defines that the court shall issue a RO or IRO when there exist sufficient grounds to believe that the perpetrator (the respondent in the judicial claim) has committed or threatened to commit any DV acts; or represents a direct and immediate threat on the safety, health or well-being of the victim or members of the victim's family; or the issuance of the RO or the IRO via a court decision is necessary to protect the safety, health or well-being of the victim or the members of the victim's family. It results that these conditions are alternative and not cumulative, and the standard of proof operates in connection with the concept of the inner conviction of the court.

The court's activity in its daily battle against DV is closely connected with the work of the DV referral mechanism institutions, such as the police departments, municipalities or health centres. Pursuant to Article 15(2) of the LDV, in cases where the information contained in the filed request shows that these units possess written proof on DV cases, they shall immediately issue a certified copy of this information. These provisions mirror the obligations established under Article 13(1) of the LDV, which states that in cases where the risk assessment report shows that violence represents a threat to the life, health and safety of family members, the State Police structures shall immediately take preliminary measures to protect the victim(s) and put an end to violence.²⁹

²⁸ These risks may also derive from the "*pseudo - solving of conflicts*" between the victim and the perpetrator, even when the victims oppose the application of restraining orders against the perpetrators. Furthermore, it results that the ECJ has excluded the recourse to mediation in all criminal proceedings relating to such offences. See: European Court of Justice, Joined Cases C-483/09 and C-1/10, *Magatte Gueye and Valentin Salmeron Sanchez*, Judgment of 15 September 2011.

²⁹ In this aspect, it is also important to mention the Joint Guidance of the Minister of Justice and the Chairman of High Judicial Council of the Republic of Albania no. 9, dated 17.06.2020, which defines the relevant rules for the creation of a specific judicial database regarding domestic violence cases, the subjects which have the obligation to maintain this database, the unification of its registry, and also the modalities of its use and access.

The supra legal framework echoes the conclusions deriving from the practice of the European Court of Human Rights (hereafter: ECtHR), which has underlined the responsibility of state institutions to intervene in cases of DV or abuse, such as in the case of *Bevacqua v. Bulgaria*³⁰ and *Kontrová v. Slovakia*, where the Court stated that in order for a positive obligation to arise, it must be established that the authorities knew of or ought to have known, at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party, and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.³¹ In addition, as also highlighted by ECtHR in *Opuz v. Turkey*, risk assessment is deemed of crucial importance in DV cases.³² Returning to the case of Albania, it results that despite the existence of a consolidated DV referral mechanism, which continuously cooperates with the court, several problems continue to exist in this regard, as illustrated in the decision of *B.C v. E.U.*³³ In this case, the respondent E.U was the ex-husband of the plaintiff B.C and had fathered three boys with the latter, all of minor age (ranging from three to seven years old). Despite the fact that the court had ruled on the custody of children in the divorce decision (leaving them in the custody of their mother B.C) and had issued three ROs for the plaintiff against the respondent E.U, it resulted that the latter kept the children forcefully, against the court's decision, and their mother [the plaintiff B.C] did not have any contact with them for a year and a half.

After the arrest of the respondent, the respective children's psychological reports, showed that they had been severely brainwashed by their father, who was a very violent religious extremist and former soldier in the Afghan war. The father had changed their names to correspond Muslim ones and had radicalized them into hating other religions, while preparing them to commit murder against everyone, who did not believe in the Muslim faith. Furthermore, the children displayed severe behavioural and even physical development problems, for example the youngest of them had not learned to walk properly, because he was being kept tied with ropes to his bed by his father.

Another aspect, which is widely noticeable in the decisions of the Albanian courts, is that in order to issue an IRO or a RO, pursuant to the Article 15(3) of the LDV, the court has mostly

³⁰ ECtHR, Case *Bevacqua v. Bulgaria*, Appl. no. 71127/01, Judgment of 12 June 2008, paragraphs 64 - 65.

³¹ ECtHR, Case *Kontrová v. Slovakia*, Appl. no. 7510/04, Judgment of 31 May 2007, paragraph 50.

³² ECtHR, Case *Opuz v. Turkey*, Appl. no. 33401/02, Judgment of 9 June 2009, paragraph 138.

³³ Decision no. 3013/25 April 2019 of the Tirana District Court, *B.C. v. E.U.*

relied on the description of the circumstances as detailed by the parties (and also in inner conviction) in cases where material evidence was absent. Therefore, Article 15 of LDV arises as a problem-solving provision, since it enlists the relevant evidence for the issuance of a RO; defines the obligations and responsibilities of the referral mechanism institutions regarding DV along with regulating the administration of evidence in these cases; and defines that in cases where the court does not have all the written evidence concerning the case, the court shall issue the RO via a decision that will be based only on the description of the circumstances and facts of the case, based on its inner conviction (Article 15, para. (1), (2), (3) respectively).

The article 15(3) of the LDV appears highly problematic, primarily for two reasons:

Firstly, it specifically implies that the court does not need to have all the relevant written evidence in DV cases (although the construction of the sentence makes it clear that in any case, the court must have some kind of written evidence from the aforementioned authorities), and afterwards it directly contradicts the first part of the sentence, stating that the court shall issue the RO via a decision that can be based only on the description of the circumstances and facts of the DV case (meaning that no written evidence is necessary). Secondly, LDV suffers from an unclear definition of the term "*inner conviction of the judge*", which is a concept that must always be based on judicial evidence (despite its type), which is sufficient for a legally reasoned decision.³⁴ Therefore, the "*inner conviction of the judge*" is a concept that is incompatible in itself with absence of evidence (as mentioned in Article 15(3) of LDV), which means that the inner conviction cannot be constructed upon mere description of the circumstances and facts of the DV case, as this legal provision implies.

Nevertheless, it appears this dilemma has been offered an interpretation (if not definitively solved) by the judicial practice of Albanian courts, as following: 1. In cases of doubt, the decision of the court should always be in favour of the victim's claims; and 2. The standard of proof in these cases may be built on the description of the circumstances and facts of the DV case as provided by the victim or both parties, even if no written evidence is made available to the court.

Despite the positive aspects that the application of Article 15(3) of LDV has regarding the protection of DV victims, Albanian judges in many cases simply quote the circumstances and

³⁴ Mandro, Arta, *Family Law - Family, Children, Marriage, Spouses*, first edition, Emal publishing house, Tirana, 2006, pg. 339-352

facts of the case, without providing a reasoning how their inner conviction was formed, a problem stemming from the confusing description of the "inner conviction" concept under the LDV.

In the case of *E.B v. G.B*, the court stated that it had built its inner conviction that the respondent had committed DV acts, based only on the facts as stated by the plaintiff E.B, the declarations of the respondent G.B [the victim's husband], the report submitted by the police, and the court testimony of the victim's father.³⁵ In this case, it can be easily noticed that the court's reasoning is unclear and confusing. The respective court decision does not state how the judge's inner conviction was formed, but merely quotes Article 15(3) of the LDV. The court concluded that the victim had been submitted to physical and psychological violence, without receiving a medical assessment report of the effects of physical violence, or a psychological report on the effects of the psychological violence inflicted on the victim.

It results that the positive obligation of the Albanian authorities and state institutions [especially the courts] to prevent and respond to the DV phenomenon with due diligence was also underlined with great concern by the ECtHR in the case of *Tërshana v. Albania*.³⁶ In this case, ECtHR underlined that it is the duty of the Albanian courts and other structures operating against DV to provide with a quick and effective reaction, which fulfils the standards imposed by ECtHR, and guarantees the right to life, as defined in Article 2 of ECHR.

Regarding the RO and the standard of proof concerning its issuance in DV cases in the Republic of Albania, Article 17(1)(a) of the LDV defines that the existence of the reasonable doubt to believe that the perpetrator presents a danger to commit any violent acts, represents a sufficient reason for the court to issue a RO. It results that the court in these cases uses the standard of "reasonable doubt", which is a substantially lower standard compared to the "beyond any reasonable doubt" (BARD) standard that exists in criminal procedure law. The aforementioned legal provision underlines the substantial legal ratio for the existence of the LDV, which is to protect the general well-being of DV victims, while the criminal procedure legislation aims at the protection of the constitutional and procedural rights of the respondent (the person accused of committing a crime). Therefore, LDV constitutes a valid legal instrument for the court to issue a RO, when it builds the inner conviction that the plaintiff or

³⁵ Decision no. 3135 of the Tirana District Court, dated 3 May 2019, *E.B. v. G.B.*

³⁶ ECtHR, Case *Tërshana v. Albania*, Appl. no. 48756/14, Judgment of 4 August 2020.

its family members face an immediate danger regarding their health, safety and general well-being.

The obligation for cooperation between Albanian authorities for the prevention of DV, mirrors the principles established by the ECtHR in the case of *Osman v. the United Kingdom*,³⁷ and later in *Opuz v. Turkey*,³⁸ where the court underlined that authorities of the states have a positive obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

It results that the professional and fast psychological expertise plays a very important role on the health and well-being of DV victims, and also on the decision-making process of the court. The *L.H v. R.H case*³⁹ may provide an illustration concerning the importance of this type of expertise. In this case, the victim L.H had requested the issuance of the IRO against her husband, R.H, for perpetrating DV acts against her, which were committed in the presence of their two children. During first court session, the judge decided to issue an IRO against the respondent R.H, based on the inner conviction created by the written claim of the victim, and her declarations to the court and police officers.

The court did not stop its verifications, but it ordered a psychological evaluation to assess the effects of violence on the victim and her two children, since the victim claimed that the latter had witnessed a number of violent episodes. Considering that the psychological report detailed the DV effects inflicted on the victim and her children, the court decided to certify the IRO against the respondent R.H, ordering the respondent *inter alia* to not contact, threaten or commit other violent acts against the plaintiff L.H, and ordering his immediate departure from the apartment in which the family lived, thus granting custody of the children to the plaintiff L.H for the whole duration of the RO [1 year].⁴⁰ It has to be underlined that while the IRO does not provide the sufficient time for the court to deliver a well-reasoned decision, the situation regarding the RO is different, and allows for preparation of detailed psychological reports, which provide the court with a detailed scientific reasoning.

³⁷ ECtHR, Case *Osman v. the United Kingdom*, Appl. no. 33401/02, Judgment of 28 October 1998, paragraph 115.

³⁸ ECtHR, Case *Opuz v. Turkey*, Appl. no. 33401/02, Judgment of 9 June 2009, paragraph 128.

³⁹ Decision Reg. no. 10379 of the Tirana District Court, dated 19 March 2021, *L.H. v. R.H.*

⁴⁰ Pursuant to article 17(3)(b) of the LDV, the maximum time limit for the RO is 1 (one) year, but the victim has the right to demand its prolongation after this period.

Although the standard of proof in civil cases involving DV is substantially lower than the one in criminal cases, there exists a number of cases where the courts have refused to issue a RO or IRO, in accordance with Articles 17(1) or 19(1) of the LDV. In the case of *D.K v. S.K*,⁴¹ the plaintiff D.K stated that the respondent S.K [her husband] had inflicted physical and psychological violence on her, which had been also witnessed by their daughter (minor age). Taking into consideration the claims of D.K, the court issued the IRO against the respondent S.K, ordered the preparation of a psychological report regarding the plaintiff and her daughter, as well as appointed the next court session for the certification of the IRO, within 20 days and in accordance with Article 20 of LDV. Taking into consideration that the judicial investigation and the psychological report found no evidence regarding the physical or psychological violence as claimed by D.K, the court stated there existed no legal grounds for the issuance of the RO, since there was no risk that the respondent could undertake any violent acts that could threaten the life and health of the plaintiff or her daughter. The court thus decided to dismiss the claim, despite the fact that it was clear that, in the case at hand, there was no healthy communication between the plaintiff and the respondent (who often argued about trivialities).

Consequently, it results that for claim dismissal cases, the court shall consider all the evidence administered during the judicial proceeding. If parties make contradictory declarations, and if declarations do not converge with the other evidence presented to court, or if the plaintiff alleges that there existed no physical or psychological violence by the respondent, but only a lack of communication between the parties, the court shall decide to dismiss the claim. It must be underlined that, the purpose of the law is not to improve the communication between the couple or other family members, but to protect vulnerable subjects from DV. In order to legitimize a request for the issuance of a RO, the threat of violence must be real, factual and not imaginary. In the words of the court: "*The RO should not be used to regulate other legal and social situations, to take revenge or to hold hostage the other party, because in this case the rights and freedoms of the respondent party would be violated.*"⁴² This case shows that arguments between spouses do not constitute a legally based reason for the issuance of a RO. In the cases where only simple disputes and disagreements

⁴¹ Decision no. 104 of the Tirana District Court, dated 16 January 2020, *D.K. v. S.K.*

⁴² Decision no. 6360 of the Tirana District Court, dated 1 October 2019, *A.Xh. v. F.Xh.*

exist between a couple, the parties can file for divorce, but cannot request the issuance of a RO.⁴³

5. The intergenerational effects of domestic violence

In a case of the District Court of Fier in 2011,⁴⁴ the plaintiff Th.S requested twice the issuance of the IRO against her husband H.S, who had perpetrated acts of physical and psychological violence against the plaintiff, in the presence of their three children, and often even in the presence of the two sons that the respondent had from a previous marriage. The respondent H.S often became very violent due to alcohol consumption, continuously insulting his wife and frequently threatening to murder her with an axe. Despite the above, the plaintiff Th.S renounced twice her request for IRO issuance, perhaps because of the family's difficult financial situation, the fact that her husband was the family breadwinner, and the psychological pressure that the latter inflicted upon the plaintiff. On another case in 2017, the plaintiff Dh.S requested twice the issuance of the IRO against her husband Xh.S, who had perpetrated acts of physical and psychological violence against the plaintiff, in the presence of their three children. Similar to the above-mentioned case (*Th.S v. H.S*), the respondent Xh.S often became very violent due to alcohol consumption, he insulted his wife continuously, and often assaulted her physically. After some investigation, it resulted that the respondent Xh.S was the son of H.S (the respondent of the 2011 DV case *Th.S v. H.S*), who had often witnessed the acts of violence perpetrated by his father against his mother, and had created the same unhealthy and violent climate in his own family. However, as in the first case, the plaintiff Dh.S renounced her request for the issuance of the IRO against her husband, without citing any other reasons besides her own will,⁴⁵ and following this the court terminated the judicial proceeding.

This case, which is not a detached case, but typology,⁴⁶ underlines the fact that DV often has long-lasting intergenerational effects, where children who have witnessed DV acts, execute the same violent acts against the members of their own family in the future, perpetuating thus the same vicious cycle initiated by their parents. As William Wordsworth said, the child is

⁴³ Furthermore, according to the Decision no. 193, dated 12 March 2013 of the Albanian Supreme Court, the refusal of the court to issue an IRO or a RO can not be appealed, and the Appeal Court can not issue an IRO or a RO.

⁴⁴ Decisions no. 425, dated 16 March 2011 and no. 5036, dated 08 August 2012 of the Fier District Court, *Th.S. v. H.S.*

⁴⁵ Decision no. 104, of the Fier District Court, dated 17 September 2017, *Dh.S. v. Xh.S.*

⁴⁶ For the purposes of this paper, Judge AZ was interviewed by our team, during which she explained several cases where she had to issue a RO against the father, and then against the latter's son. The authors would like to thank judges AZ, IP, VV and VZ for their kind help and disponibility during the preparation of this paper.

the father of the man, meaning that the character that we form as children and the experiences we have during this period, influence us into our adult life.

6. Conclusions/Recommendations

Restraining orders alone do not seem to resolve and bring an end to the DV problem. The victims refer their cases to the court one time after another in order to retrieve successive restraining orders, demonstrating that the real problem lies somewhere else.

Thus, an analysis on the causes and consequences of the failure of responsible state institutions to react in accordance with the rules and legislation in place, and with the purpose to adequately provide DV protection and prevention needs to be made. The analysis on the gaps would serve to strategically prepare necessary medium- and long-term interventions, from a legal as well as institutional perspective. The aforementioned analysis should be conducted as thoroughly as possible, and shed light on the reasons behind victim's reluctance to address their case to the court.

Furthermore, we recommend the organization of joint legal trainings with employees of various institutions engaged in the field of and dealing with DV (such as judges, prosecutors, bailiffs, health centres, police, media, NGOs, etc.). This would lead to an increase in awareness concerning the role of each and every institution, the understanding of the respective views and concerns, as well as the strengthening of inter-institutional relations.

Nevertheless, the referred judicial cases demonstrate that simply breaking the silence is not enough. There is an insufficient implementation of legislative measures, and limited availability for the protection of and support services for the victims, particularly in rural areas. In order to fill this gap, it is necessary to make possible access to a sufficient number of state-funded safe shelters, having thus a nationwide geographical distribution. It is also necessary to provide social aid and proper protection for DV victims/perpetrators, and to create special policies regarding the economic conditions of the victims, in order for them to not feel economically dependent on the perpetrators. Institutions have to make visible what is invisible, since "*Domestic violence is not inevitable: if it has been learned, it can be unlearned and prevented.*"⁴⁷ Movements are about moments, and this is the moment.

⁴⁷Esta Soler, *How we turned the tide on domestic violence*, available at: https://www.ted.com/talks/esta_soler_how_we_turned_the_tide_on_domestic_violence_hint_the_polaroid_helped, [accessed 10 May 2021]

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