

**DOMESTIC VIOLENCE - IMPLICATIONS OF
THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW TO
THE COURTS PRACTISE IN SERBIA**

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Abstract

Domestic violence has existed in rudimentary forms of the family, and has persisted until today. It is considered as a manifestation of control and power over family members. Studies have shown that domestic violence leaves grave consequences for the bio-psychosocial condition of the victim, especially if it is a child victim. The European Court of Human Rights was still dealing with this issue, primarily in cases of violation of Article 8, where right to respect for private life stipulated. In addition, the Court dealt with domestic violence, when considering the violation of the right to life, the prohibition of torture, the prohibition of forced labor, the right to a fair trial, the right to an effective legal remedy, and the prohibition of discrimination. Violence in Serbia is a phenomenon, that is, according to statistics, continues to increase. Although in Serbia there is a legal framework for protection against domestic violence, but in the practice of the courts was observed mild penal policy. Inadequate coordination of state authorities in preventing and combating domestic violence, may lead to violation of the positive obligations under the Convention for the country, both in terms of protection of the right to life and the prohibition of torture, inhuman and degrading treatment. A chronic disease of the judicial system of Serbia, excessive length of judicial proceedings, is directly contrary to the realization of the right to trial within a reasonable time, as well as the effectiveness of the legal remedies. The authors is dealing with relevant cases from the European Court, quoting and noting the conclusions of the judgment, which serve as support to national legislators, in order to create an adequate legal framework for effective action in the case of identifying domestic violence, as well as sanctioning the perpetrators of this crime.

Keywords: domestic violence, the right to life, prohibition of torture and inhuman treatment, discrimination, right to fair trial

1. THE TERM AND FORMS OF DOMESTIC VIOLENCE

Violence manifests itself in all spheres of life and it is an immanent characteristic of interpersonal communication. Domestic violence existed in rudimentary forms of the family, and has survived to this day. The family is understood as a sphere of security, love and support, and the manifestation of violence is opposite to the function of this form of social organization. This is also the reason why this form of crime has been considered to belong to the domain of privacy, so it was referred to as “violence in silence”. On the other hand, the inferior position of women in society and in the family influenced the existence of a large dark number of crimes, because domestic violence was rarely reported. In the UK, for example, men had the right to beat their wives (Ajdukovic, 2000). In addition, corporal punishment of children was also considered a permissible form of behavior (Kostic, 2013, p. 142).

Until the 1960s, this important social problem was not taken seriously. The turning point came under the influence of the development of the protection of human rights, but also the strengthening of the feminist movement. During the seventies of the last century, the first shelters for victims of domestic violence were opened and the first education programs were implemented, with the aim of recognizing and combating this form of crime (Kostić, 2006, pp. 235 - 254).

There is no universal definition of domestic violence. One definition is that domestic violence is any act of physical, psychological, sexual or economic abuse against family members, regardless of whether it is criminalized as a criminal offense and reported to law enforcement (Konstantinović-Vilić, Kostić, 2008, p. 302). This definition expresses the effort to cover all forms of domestic violence, as well as the inclusion of unprocessed cases of domestic violence, which is actually a “dark number of crimes”. For the existence of domestic violence, the existence of marriage is not important, but the extramarital union is also included, as well as persons in an emotional relationship, as well as former marital and extramarital partners. It follows from the definition that violence can be physical, psychological, sexual and economic. Physical abuse is the use of any kind of physical superiority. It is any action that can cause or threaten to cause physical pain. Some of the forms are physical assault regardless of the consequences, violent intrusions and expulsion of the victim from the common place of residence or from the place where the victim lives, impact on the victims so that they start to fear for their physical well-being, kidnapping, etc. Psychological abuse is the use of psychological pressure, ie. any action that may cause psychological suffering, feelings of fear, personal vulnerability or endangered dignity, then insults, attacks or the use of derogatory names and other forms of violent intimidation, repetitive behavior aimed at humiliating the victim, unlawful restriction of the victim’s freedom of movement, as well as the impact on victims so that they begin to fear for their emotional well-being. Sexual abuse manifests itself as forcing sexual intercourse without consent and as sexual harassment. Economic violence is

the damage to property or its destruction or the threat to do so, as well as the impact on victims so that they begin to fear for their economic well-being. It is important to mention passive abuse, as a special type of domestic violence, which is not easy to notice, and which usually leads to physical violence. This type of violence is very subtle and includes victimization, ambiguity, neglect, spiritual and intellectual abuse.

As forms of domestic violence, the literature cites marital violence, violence against family members and violence against children (Konstantinović-Vilić, Nikolić – Ristanović, Kostić, 2009, p. 121). Violence against women, violence against the elderly, violence against children and violence against men are also highlighted. The consequences of domestic violence are very severe. The safety of family members is endangered and the relationship of trust is violated. Domestic violence is considered a manifestation of control and power over family members. Research has shown that domestic violence has severe consequences for the victim's bio-psycho-social condition, especially if it is a child victim. There is a significant risk factor for adopting violence as a model of behavior. Children who have been victims of domestic violence are likely to abuse their own partners and children. The consequences of domestic violence are not only individual, but also for society as a whole. For this reason, developed countries are continuously improving methods for assessing the damage that the community suffers due to this problem.

2. INTERNATIONAL REGULATIONS

Many international documents, adopted under the auspices of the UN and the Council of Europe, refer to domestic violence. Because this phenomenon is most often understood as violence against women and as the most widespread form of violation of women's rights (Konstantinović – Vilić, Kostić, 2008, p. 306), the goal of international regulations is to achieve the protection of women, who appear in criminal proceedings as witnesses - victims. It is proposed to implement measures, such as the establishment of special state bodies for providing assistance to victims, the participation of non-governmental organizations in the procedure, as well as the application of other measures that would encourage reporting of domestic violence and participation of victims in criminal proceedings.

A document of fundamental importance for the protection of women's rights is, of course, the Convention on the Elimination of All Forms of Discrimination against Women. The Convention requires Member States to adopt appropriate regulations to eliminate discrimination against women. Among other things, prevention of discrimination and protection of women is achieved through courts and other state bodies. General recommendation no. 19 of the Committee on the Elimination of Discrimination against Women emphasizes the importance of establishing victim support and protection services, educating judges and the police, and the right of victims to restitution and to appeal in an effective procedure (special

recommendations, paragraph 24). We recommend that states treat domestic violence as a criminal offense (Article 23). UN Declaration against Violence against Women (A/Res/48/104, 1993) from 1993 pleads for access to justice for victims and for the provision of an efficient system of real medicines, and for compensation to victims of domestic violence (Article 4, item d). Beijing Declaration and Platform for Action (A/CONF.177/20, 1995) emphasizes the need to provide free and all other forms of legal assistance to victims of domestic violence.

According to the 1993 Council of Europe Declaration on Policies to Combat Violence against Women in Democratic Europe, the prevention of violence against women is considered a key factor in combating structural inequality between women and men. In Recommendation R (85) 4 on domestic violence, it is envisaged to take measures to ensure the protection of the interests of victims in criminal, civil and administrative proceedings. The need for protection of witnesses, family members, in case of domestic violence was especially emphasized. Adequate counseling should be provided to juvenile witnesses. Comprehensive protection of women victims is contained in Recommendation R (2002) 5 on the protection of women against violence. Within the general measures for the prevention of violence against women, it was recommended that the member states of the Council of Europe, within the framework of improving national policy, pay due attention to the affirmation of safety and protection of victims, empowerment of victims, prevention of secondary victimization. and the application of adequate measures in court proceedings (item 3 of the Recommendation). Council of Europe Convention on Preventing and Combating Domestic Violence and Violence against Women, was adopted in Istanbul in 2011. It is an international legal document, which establishes a comprehensive legal framework for the protection of women from violence. It regulates issues of prevention, prosecution and elimination of all forms of domestic violence. This Convention establishes mechanisms for monitoring implementation at the national level.

Domestic violence is not the *seades materiae* of the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, the European Court of Human Rights has addressed this issue, primarily in cases of violation of Article 8 of the Convention, which stipulates the right to respect for private life. In addition, the Court encountered domestic violence when considering violations of the right to life, Article 2, prohibition of torture, Article 3, prohibition of forced labor, Article 4, right to a fair trial, Article 6, right to an effective remedy, under Article 13 and the prohibition of discrimination, under Article 14 of the Convention. Due to the importance of the right to life, which is guaranteed by Article 2 of the Convention, cases from the case law of the Court, in which a violation of this right has been established, will be exposed first.

2.1. Right to life

Article 2 of the Convention provides: *“The right to life of every human being is protected by law. No one shall be deprived of his life intentionally except in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life shall not be considered contrary to this article if it results from the use of force, which is absolutely necessary: for the purpose of defending a person from unlawful violence; to make a lawful arrest or prevent the escape of a person lawfully deprived of his liberty; during legal measures, which are taken with the aim of suppressing riots or riots.”*

The right to life is a precondition for the exercise of all other rights and freedoms guaranteed by the Convention, and as one of the fundamental provisions of the Convention, cannot be derogated from in the piecetime, pursuant to Article 15 of the Convention (Makaratzis v. Greece, 2004, §56; Soering v. the United Kingdom, 1989, §88; Cruz Varas and others v. Sweden, 1991, §99; Esmukhambetov and others v. Russia, 2011, §138). To restrict the right to life, a standard of “absolute necessity” is prescribed, which the Court has found to require a stricter and more demanding test than that applied in determining whether the State’s conduct was “necessary in a democratic society” (Yasin Ateş v. Turkey, 2005, § 119; Kişmir v. Turkey, 2005, § 103; Çelikbilek v. Turkey, 2005, 77; Vachkovi v. Bulgaria, 2010, § 71; Anık and Others v. Turkey, 2007, § 53). Situations in which the right to life may be restricted are therefore listed numerus clausus and must be interpreted narrowly (Esmukhambetov and others v. Russia, 2011, §138).

From the case law of the Court (Makaratzis v. Greece, 2004, §56; Kılıç v. Turkey, 2000, §62; Akpınar i Altun v. Turkey, 2007, §49) the duty to protect the right to life consists of three main aspects: the duty to refrain from unlawful taking of life (so-called negative obligation), the duty to provide an adequate legislative framework, which protects the right to life (so-called positive material obligation) and the duty to conduct an effective investigation, in case of potentially unlawful taking of life, so-called positive procedural obligation (INTERRIGHTS, article 2, 2006, p. 4).

In the case of *Opuz v Turkey* it is about domestic violence against the ex-wife and her mother (Opuz v Turkey, 2000). Namely, in several separate incidents, the ex-husband threatened and was violent towards the applicant and her mother. In addition to threatening with a knife, medical documentation established beatings and an attempt to step on the car. However, as prosecution for domestic violence in Turkey requires the approval of the injured party, the perpetrator was fined only for trampling on a car, because the applicant and her mother dropped the criminal charges. He was later fined for bodily injuries inflicted on the applicant by stab wounds. A couple of years later, the ex-spouse shot the applicant’s mother, who succumbed to her injuries. He was convicted of murder, but was released to defend himself until the end of the appeal procedure. He then threatened the applicant again. In the present case the Court finds a violation of the substantive positive obligation under Article 2 of the

Convention. The State failed to protect the life of the applicant's mother, and the Turkish legislative framework was not adequate, due to the necessity of the injured party's initiative for criminal prosecution, in the event of domestic violence (Carić, 2012, pp. 25-26).

In the case at hand, the Court considered a violation of the conduct of an effective investigation, ie a violation of the procedural obligation under Article 2 of the Convention. The court found that a thorough investigation had been conducted in this case. However, the criminal proceedings lasted for more than six years, which challenges the criterion of promptness of the investigation. Therefore, the Court also found a violation of the procedural obligation.

In the case of *Kontrova v Slovakia*, the applicant's husband killed their two children after years of abuse of his wife, after which he committed suicide. A few weeks before the critical event, the applicant withdrew the criminal complaint against her husband for domestic violence (*Kontrova v. Slovakia*, 2007). The Court found a violation of Article 2 of the Convention due to the failure of the competent state authorities to take adequate measures, with the aim of protection from domestic violence. The court also stressed the need for the state to provide effective legislation, which would enable the application of preventive and urgent repressive measures.

In another case, the Court found a violation of the substantive obligation under Article 2 of the Convention. It is about the case of *Branko Tomasic v Croatia*. In that case, the applicants were the parents, brothers and sister of the victim, who was killed by the extramarital partner, as well as their child, after continuous violence, to which they were exposed. Due to the threat of violence to the victim, her illegitimate partner was sentenced to five months in prison, with the application of security measures for psychiatric treatment in a health institution. After the release of M.M. killed his illegitimate wife and their minor child, after which he committed suicide (*Branko Tomasić v. Croatia*, 2009). Since this is a person with a severe personality disorder, as well as the fact that death threats were repeated and posed a danger to the life of the illegitimate wife and child, the Court found that the state failed to protect this right. In addition, psychiatric treatment was applied for a short period of time, only while serving a prison sentence. In view of the above, the Court finds a violation of Article 2 of the Convention.

At this point, we will briefly point out the factual situation and legal argumentation in the case *Saoud v France*. In this case, the applicants were the mother, brothers and sisters of Muhammad Saoud, who suffered from schizophrenia. He lost his life during a police intervention in their home, due to domestic violence. Muhammad held his two sisters hostage. When the police entered, he used physical force on his sister. After the fight, in which they themselves suffered injuries, the police overpowered him and immobilized his arms and legs. The bound man was placed in a position where his head was facing the floor, where he remained for more than 30 minutes. Suddenly Muhammad choked and stopped his heart, after which he died. During

the intervention, as well as after the end, until the moment of death, no medical team was called, nor was Muhammad given first aid during the suffocation (*Saoud v. France*, 2007). The Court found a violation of the positive obligation under Article 2 of the Convention, due to the failure to take adequate measures to protect the right to life. Therefore, equal protection of the right to life is enjoyed by both victims and perpetrators of domestic violence during police interventions.

Based on the views of the Court in these cases, it can be concluded that the state is responsible for not taking appropriate measures, after learning of the existence of domestic violence. This view is undisputed in the event of a fatal outcome. This is a consequence of the evolution of the Court's case-law, in terms of the violation of Article 2, ie the understanding that the Convention is a "living instrument". The principle of positive obligations, as one of the principles on which the Convention is based, regarding the right to life is understood more broadly, in the sense that it implies taking concrete actions to protect this right, especially victims of domestic violence, but also perpetrators, especially if it is about a person with a mental disorder (Leach, 2007, p. 166). In addition, the positive obligation under Article 2 of the Convention requires the establishment of an adequate legal framework (Popović, 2012, p. 159), which protects the right to life, as well as the implementation of appropriate training of state bodies, with the same goal. Another important repercussion of cases before the Court is the evolution of the modality of prosecution. Based on the Court's views, state legislation regarding the prosecution of domestic violence is exempt from the influence of the injured party. Therefore, the criminal prosecution for this criminal offense is undertaken *ex officio*, regardless of the motion of the injured party, and continues without affecting the position of the injured party on it.

2.2. Torture, inhuman and degrading treatment

Article 3 of the Convention states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." It is an absolute ban, which "reflects one of the fundamental values of a democratic society." (*Pretty v The United Kingdom*, 2002, § 49). It cannot be revoked even in times of extraordinary circumstances, as expressly provided for in Article 15 § 2 of the Convention, and the Court confirms in its judgment in the case of *Ireland v The United Kingdom* § 163. Article 3 imposes two essential obligations on States Parties to the Convention - substantive and procedural. The material obligation of the state has two aspects - negative and positive. The negative aspect refers to the obligation of the state not to subject persons under its jurisdiction to torture, or inhuman or degrading treatment or punishment, and the positive aspect imposes the obligation to take all measures to ensure that persons under the jurisdiction of the state are not subjected to such treatment. The procedural obligation of the state is derived from Article 1 of the Convention, which prescribes the general duty of the state to "ensure ... the rights and freedoms" guaranteed by the Convention (*Assenov and Others v Bulgaria* 1998,

§ 102, *Sevtap Veznedaroglu v Turkey* 2000, § 66- 68, *Elci and Others v Turkey* 2003, § 648), and consists in conducting a formal effective investigation, in the event of a reference to violations of Article 3. In order for Article 3 of the Convention to be considered a violation, the violation must reach a minimum level of severity. The assessment of the minimum is made on the basis of the duration of the procedure, physical and psychological consequences and, in certain cases, the sex, age and health condition of the victim (*Ireland v The United Kingdom* 1978, § 162). That derogations from Article 3 of the Convention were never allowed, even in the case of the greatest danger to the public interest, such as terrorism, the Court concluded in the case of *Tomasi v France* (*Tomasi v France* 1992, §115, *Ramirez Sanchez v France* 2006, § 115-116, *Labita v Italy* 2000, §119, *Selmouni v France* 1999 §95, *Assenov and Others v Bulgaria* 1998, §93).

In the significant case of *Opuz v Turkey* the Court also found a violation of Article 3 of the Convention. The Court is called upon to respect the obligation under Article 1 of the Convention that the State should enable all persons under its jurisdiction to enjoy the right. The state is therefore obliged to take measures to prevent torture or inhuman and degrading treatment. The court characterized the violence suffered by the applicant as abuse. The failure to initiate criminal proceedings in each case of violence, which the police and the public prosecutor learned about, as well as the prosecution and punishment, did not prevent further manifestations of violence. As there was a constant threat to the applicant's physical integrity and the reaction to her ex-husband's conduct was inadequate, the Court found a violation of the positive obligation under Article 3 of the Convention.

The Court found a violation of Article 3 of the Convention in the case *E.S. and others v Slovakia*. In the present case the court sentenced the applicant's husband to four years' imprisonment for physical violence against the applicant but also for sexual violence against her daughter. The court concluded that the national authorities had failed to protect their wife and daughter from domestic violence, inter alia, due to the impossibility of applying a restraining order. For this reason, in the present case the State has violated the positive obligation under Article 3 of the Convention (*E.S. and others v. Slovakia*, 2009).

Based on the conclusions of the Court, in the considered cases, it follows that there is a responsibility of the state in case of failure to prevent domestic violence, which the state authorities found out about, regardless of the fact that the abuse originates from an individual. This implies an efficient and timely response by the police, as well as law enforcement agencies, in the event of reported domestic violence. It is also necessary to impose temporary measures, which prevent physical contact between the perpetrator and the victim.

2.3. The right to respect for family life

Article 8 of the Convention states: “*Everyone has the right to respect for his private and family life, his home and his correspondence. Public authorities shall not interfere with the exercise of this right unless it is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, to prevent disorder or crime, to protect health or morals, or to protect rights and rights. freedom of others*”. This right protects private and family life, home and correspondence. The basic idea of protection of rights, to which Article 8 of the Convention applies, is that there are spheres of life of each individual, in which the state must not interfere. The obligations of the state on this issue are positive and negative. Negative obligation mean that the state is obliged to refrain from interfering with a right, unless permitted by Article 8, paragraph 2. Therefore, it must not in any way interfere with the enjoyment of these rights. On the other hand, positive obligation mean that the state must act actively, in order to enable respect for a right. Article 8 implicitly contains the obligation of the member states of the Convention to ensure the conditions for respecting the rights from Article 8 of the Convention through their positive actions and measures in their legislation, jurisprudence and executive power.

In some of the judgments, the Court has addressed the issue of interpreting the scope of the terms marriage and family (<http://www.coe.ba/pdf/MODUL%20NASILJE%20BR%202.pdf>). In the case of *Marcks v Belgium 1979* the Court found that the notion of family encompasses, in addition to the legal community, also the extramarital union. The court considers that marital and extramarital union are equal in their rights. In the case of *Berrehab v Netherland 1988*, The court stated that living together is not a necessary precondition for the subsumption under the term “family life”. The concept of family includes unmarried couples, who live in a joint household with their children, which the Court found in the case *Johnson v Ireland 1986*. The court is also in the case *Boughanemi v France 1996*, pointed out that the notion of private life implies the existence of a connection between a parent and a child, regardless of whether the child is legal. Applying the above attitude, the Court concluded that the applicant’s relationship with his son fell under family life, regardless of the fact that he had little contact with him, that he admitted the child late, that he did not pay alimony and that he left the child to relatives when he emigrated. The protection of Article 8 of the Convention, with regard to respect for family life, also includes the situation when one of the parents is prevented from maintaining contact and contact with the child (*Keegan v. Ireland, 2006*). From the rich practice of the Court, it can be concluded that there is an effort to cover a wide range of marital and family relations, when deciding on a possible violation of any of the rights under the Convention.

In the case of *Airey v Ireland*, Mrs. Airey spent eight years trying to divorce her husband, who had left the family home. But, as at that time in Ireland there was only

the possibility of an amicable divorce, or separation from a table and a bed, she failed to persuade her husband to sign a divorce agreement. The Court concluded that there had been a violation of the right to respect for private and family life under Article 8 of the Convention, because a positive obligation sometimes required the State to allow spouses to be relieved of the duty to live together. As Ms Airey did not have any legal possibility to initiate divorce proceedings by a unilateral declaration of will, the Court ruled that there had been a violation of Article 8 of the Convention.

The court decided on the violation of the right to respect for family life in the case *Bevacqua v Bulgaria*. It is a case of domestic violence, primarily verbal, but also physical abuse, as a result of which the applicant left her husband and went to live with her parents, after which she filed a suit for divorce. During litigation proceedings for divorce, they reached an agreement to see the child. However, the father failed to return the child, after one of the appointments. The applicant took the child home from kindergarten a few days later, which led to her husband aggression. He came to her apartment, knocked on the door, and after the applicant had opened it, he pushed, hit and forcibly took the child with him. After that, the abduction of the child and the violent outbursts of the husband occurred several more times.

The Court recalled the previous position that the right to respect for family life implies an obligation for the state, which is not absolute, to apply measures aimed at the reintegration of parents and children (*Šobota-Gajić v. Bosnia and Herzegovina*, 2007, § 51). It also underlined that private life encompasses physical and mental integrity. The obligations under Article 8, in conjunction with Article 2 or Article 3 of the Convention, imply a positive obligation for the State to establish an adequate legal framework, which protects the individual from violence. Bearing in mind that the national court failed to apply interim measures in the event of domestic violence without delay, as well as the ineffective response of the authorities, in a situation where the applicant's safety was threatened, the Court ruled that there had been a violation of Article 8 of the Convention. , that is, that the right to respect for private and family life has been violated.

Domestic violence, according to the jurisprudence of the Court, may constitute a violation of the mental and physical integrity of an individual, leading to a violation of Article 8 of the Convention. The boundary between a violation of Article 3 and Article 8 may be fluid. If the Court finds that the treatment of the victim does not reach a degree, which is considered a “minimum degree of severity”, the Applicant may ask the Court to find a violation of Art. 8. of the Convention, in the form of the right to respect for private life, if there are sufficient negative consequences for the physical and moral integrity of the victim (*Costello-Roberts v United Kingdom*, 1993).

Especially interesting is the case of *V.A.M v Serbia 2007*, in which the Court also ruled on a violation of Article 8 of the Convention. After the end of the marriage, the applicant's ex-husband prevented her from having any contact with her daughter

due to her HIV illness. The father deceived his daughter that the mother had died, and that he could therefore not see her, which could be characterized as covert domestic violence (Carić, p. 114). The daughter learned that her mother was alive only after reaching adulthood. The Court first found that the relationship between the applicant and her daughter fell within the domain of family life, under Article 8 of the Convention. The court further considered the existence of a violation of Article 8 due to non-execution of a temporary measure for exercising parental rights. The court concluded that the state authorities had not taken effective measures, with the aim of executing the interim measure, regardless of the internal field of free assessment. In addition, the length of the civil proceedings, at the national level, also contributed to a violation of Article 8 of the Convention. Accordingly, the Court finds a violation of the right to family life, ie a violation of the positive obligation under Article 8 of the Convention, because the State authorities failed to take adequate measures to protect the applicant's rights. In addition to the awarded damages, the Court ordered the competent state authorities to carry out an interim measure and terminate the civil proceedings, the execution of which is taken care of by the Committee of Ministers of the Council of Europe.

2.4. Prohibition of discrimination

Article 14 of the Convention reads: *“The enjoyment of the rights and freedoms set forth in this Convention shall be ensured without discrimination on any grounds, such as sex, race, color, language, religion, political or other opinion, national or social origin, a national minority, property status, birth or other status.”*

The prohibition of discrimination and the principle of equality are considered the foundations of the protection of human rights, which are contained in the most important international and regional human rights instruments. The purpose of Article 14 is to protect individuals from discrimination in the enjoyment of their rights and freedoms, as guaranteed by the provisions of the Convention and the Additional Protocols. Article 14 cannot be applied independently, but must be linked (in conjunction with) to some other right, which is guaranteed by the Convention. However, other right does not necessarily have to be violated, and therefore Article 14 has some autonomy (Abdulaziz, Cabales and Balkandali v. The United Kindom, 1985, §71; Rasmussen v. Denmark, 1984, § 29; Van der Mussele v. Belgium, 1983, § 43; Gaygusuz v. Austria, 1996, § 42; Gutl v. Austria, 2009 § 30; Koppi v. Austria, 2009, § 25). The Convention does not contain a precise definition of the term discrimination. In *Belgium linguistic* case the Court found that discrimination implies different treatment, without objective and reasonable justification, towards persons in the same or similar situations (“relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium, 1968, 10). Such different behavior is discriminatory if it does not serve a legitimate aim, or if there is no proportionality between the means employed and the aim pursued (Burden v. the United Kingdom, 2008, § 60).

In the case *Opuz v Turkey* The applicant complained of discriminatory legislation, primarily certain provisions of the Criminal Code, which placed a woman inferior to a man. In addition, domestic violence remains unprocessed. The applicant alleged that she was a victim of a violation of Articles 2, 3, 6 and 13, solely because she was a woman. The Court referred to the CEDAW Convention, which defines discrimination against women as follows: “any difference, exclusion or restriction based on sex, which has the consequence or aim of endangering or preventing women from recognizing, exercising or enjoying human rights and fundamental freedoms in political life, economic, social, cultural, civil or other field, regardless of their marital status, and on the basis of equality of men and women ”(Article 1). The CEDAW Committee treats domestic violence as a form of discrimination against women. It follows from this, as well as from other international documents, that failing to protect women from domestic violence is a form of discrimination, regardless of the existence of intent. The court emphasized that the action on the filed criminal report for domestic violence was inadequate, considering that it was trying to convince the victim to withdraw the criminal report and to give up the prosecution. The mild penal policy towards the perpetrators of this crime was also pointed out. Due to the tolerance of domestic violence, and due to the ineffectiveness of legal remedies, the Court found discrimination on the grounds of sex, ie a violation of Article 14 of the Convention.

2.5. The right of access to a court

Article 6 § 1 reads: “*Everyone, in deciding on his civil rights and obligations, or on criminal charges against himself, has the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal established by law. (...)*”

It follows from the Court’s case-law that an integral element of the right to a fair trial is the right of access to a court (Mol, Harbi, 2007, p. 74). The court, for the first time, established this right in *Golder v. The United Kindom*, when he took the position that the detailed guarantees of the right to a fair trial under Article 6 of the Convention would make no sense if it were not possible to initiate legal proceedings (*Golder v. The United Kindom*, 1975, § 35). The right of access to a court implies that everyone has the right to address the court to resolve a particular issue, without any legal or practical obstacles (INTERRIGHTS, 2006 p. 20). The impossibility of access to court is present in a situation when the person has not been able to address the competent court, in order to review the factual and legal issues related to the subject matter of the dispute and to make a binding decision (*Le Compte, Van Leuven and De Meyere v. Belgium*, 1981, § 59).

In the considered case *Airey protiv Irske*, the applicant also alleged a violation of her right of access to a Court, namely a violation of Article 6 § 1 of the Convention. She based her own claims on the impossibility of obtaining the professional assistance

of a lawyer in the divorce proceedings. The Court has pointed out that the provision of Article 6 § 1 of the Convention sometimes requires the State to provide free legal aid in civil proceedings. This enables the effectiveness of the remedy. Due to the non-existence of the right to free legal aid for the applicant, the Court, in the specific case, established the existence of a violation of the right to access to court.

2.6. Admissibility criteria

Articles 34 and 35 of the Convention lay down the conditions for the admissibility of the application. First of all, it is necessary to be a victim of a violation of one of the rights established by the Convention. Also, it is necessary to exhaust the internal legal remedies, as well as for the petition to be submitted within six months, from the day when a final decision was made.

The Court has accepted in its case-law that Article 35 of the Convention must be applied with a certain degree of flexibility and without unnecessary formalism (Practical Guide on Admissibility Criteria, p. 16, § 48). It is necessary for the applicant to do in advance what can reasonably be expected of him, in order to exhaust the internal avenues of legal protection (*Akdivar and Others v. Turkey*, 1996, § 69). In doing so, facts of the specific case must be taken into account (*Van Oosterwijk v. Belgium*, 1980, § 35). The Court's view is that the applicants are obliged to exhaust only domestic remedies, which are theoretically and practically available to them. This means that they are available, that they can provide fair satisfaction and that they provide a reasonable prospect of success (*Sejdović v. Italy*, 2006, § 46). In addition, it should be emphasized that the existence of specific circumstances may lead to an exemption from the requirement of exhaustion of domestic remedies. In the case law of the Court, it has been held that domestic remedies need not be exhausted when the situation in a particular State against which action is brought is such that there is a marked passivity on the part of the national authorities in matters of serious allegations of abuse, rights or damage by state authorities (*Akdivar and others v. Turkey*, 1996, § 68).

In the case of *Branko Tomašić and other v Croatia*, the State pointed out that the applicant had not exhausted internal remedies, because the applicant's parents, even if they had applied for a remedy, would not have had a reasonable chance of success, and the applicant's siblings were not authorized to claim a remedy because they did not live in a joint household. The court rejected the state's claims and declared the application admissible (*Branko Tomašić and Others v. Croatia*, 2009). In the case of *Opuz v Turkey*, The Court accepted the application after the expiry of a period of six months from the date on which the judgment became final, at national level, on the ground that domestic violence constituted a continuing violation of the Convention.

3. DOMESTIC VIOLENCE IN SERBIA - STATISTIC AND PENAL POLICY

Domestic violence in Serbia is a phenomenon, which, according to statistics, is constantly increasing. In 2012, the Centers for Social Work registered 4,415 women and 3,787 children victims of violence. Out of a total of 9,300 abused, in 96% of cases, the abuse occurred in the family. Compared to 2006, which was the first year of application of the Family Law, the number of reported cases increased three times. A similar trend continued in the following years. Thus, in 2019, there were 9763 criminal charges. Since the enactment of the Law on Prevention of Domestic Violence from 2017., the number of registered cases has increased significantly, but the number of criminal charges has decreased, as has the number of rejected criminal charges. Although there is a legal framework for protection against domestic violence in Serbia, primarily through the provisions of the Family Code, Criminal Code and new Law on Prevention of Domestic Violence, a mild penal policy has been applied in the practice of courts. A large number of suspended sentences leave the possibility of repeated violence, especially in cases where it has been determined that it is a case of recidivism. The question is - would a prison sentence be the most effective. Taking into account the overcrowding of prisons, there is an understanding that such a sanction would have a very bad impact on perpetrators of violence, because in this way the importance of domestic violence as a crime is diminished. In that case, the focus is on the perpetrator, not the victim.

4. CONCLUSION

Inadequate coordination of state bodies in the prevention and suppression of domestic violence can lead to a violation of the positive obligation of the Convention for the state, both in terms of protection of the right to life and the prohibition of torture, inhuman and degrading treatment. An ineffective system of protection for victims of domestic violence can have the same consequence (Ilić, 2013, pp. 149 – 165). The chronic deficiency of the Serbian judicial system, the excessive duration of court proceedings, is directly contrary to the exercise of the right to a trial within a reasonable time, as well as the effectiveness of legal remedies. Since violence disrupts family harmony and private life, insufficient activity, primarily of the Centers for Social Work, but also of other state bodies, can lead to potential violations of Article 8 of the Convention. Therefore, the standards, established in the case law of the European Court of Human Rights, should be most carefully considered and harmonized with the actions of state bodies, in order to ensure the protection of victims of domestic violence at the national level.

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