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DOMESTIC VIOLENCE BETWEEN FELONY AND MISDEMEANOUR LAW OF THE REPUBLIC OF SRPSKA **

ABSTRACT: Since May 2020, a new legal solution which treats domestic violence exclusively as a felony has been in force as part of the legislature of the Republic of Srpska. In this article, the author argues against the exclusive treatment of domestic violence as a felony by pointing out that it should also be treated as a misdemeanour but with a clear dividing line. This article presents the results of research conducted to establish the attitudes of judicial bodies concerning the felonization of domestic violence and also present the statistical data from the Basic Court in Bijeljina in connection with this crime. By interpreting the results of the survey, it was concluded that the participants were familiar with the new legal solution regarding the felonization of domestic violence and the consequences that such solutions produce in practice. The majority of them are of the view that the solution that treats domestic violence exclusively as a felony is not beneficial nor is it beneficial for the court to issue urgent/protective measures in misdemeanour procedures. Instead, the court should issue such measures in felony

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procedures. Also, the participants agree that there has been no increase in the number of prison sentences nor a more stringent penal policy with regard to the perpetrators of domestic violence, and they agree that these individuals typically receive suspended sentences, which is supported by the abovementioned statistical data.

Keywords: domestic violence, felony, misdemeanour, family member, protective measures, emergency measures

INTRODUCTION

Domestic violence is characterized by a multidisciplinary approach and the interest in this phenomenon is expressed in both domestic and international legal regulations. From a legal standpoint, domestic violence can be addressed in the domain of family,¹ misdemeanour, and felony law. In essence, this should represent an advantage because it is rare for a phenomenon to be grounded in so many areas of the law. However, in practice, this form of multi-layered regulation creates problems given that many solutions are not made compatible with one another, which leads to conflicts with fundamental legal principles. For example, qualifying domestic violence both as a misdemeanour and as a felony without a clear demarcation line² leads to legal insecurity and possible violations of the *ne bis in idem* principle.³

This article addresses the problem of domestic violence taking into account both legal and theoretical definitions, while special emphasis is placed on the misdemeanour law and felony law aspects of this phenomenon. The choice of this topic was the consequence of the fact that new legal solutions create an array of problems in practice, which are pointed out in the article. While analysing the subject matter, the author used the normative analysis of

¹ Marital and family relations are primarily protected by family law while other forms of protection such as criminal-justice protection should be subsidiary, i.e., they should be resorted to only when the protection of those values cannot be adequately achieved through the norms of the other branches of the law. Matijašević – Obradović, J., Stefanović, N. (2017). Nasilje u porodici u svetlu Porodičnog zakona, Krivičnog zakonika i Zakona o sprečavanju nasilja u porodici. *Pravo – teorija i praksa* (4–6), 14.

² Dragičević Prtenjača, M. (2017). Dihotomija pristupa u rješavanju nasilja u obitelji putem prekršajnogpravnog i kaznenopravnog regulative. *Hrvatski ljetopis za kaznene znanosti i praksu.*, 24 (1). Zagreb: Faculty of Law, 143.

³ A possible violation of this principle may occur when the same act is the subject of both a misdemeanour and a felony procedure which can happen when the legal descriptions of a felony and a misdemeanour are the same. “The best illustration of this situation is the crime of domestic violence.” Buha, M. (2017). Pravne poteškoće u razgraničavanju krivičnog djela od prekršajnog djela. *Crimen*, (1), 62.

the relevant legal acts, the presentation of cases from legal practice and court data pertaining to misdemeanour and felony cases of domestic violence. In addition, an online survey was conducted with the aim of obtaining a clearer and more comprehensive grasp of this phenomenon and the attitudes of legal and other bodies regarding the way domestic violence was treated in the legislation of the Republic of Srpska.

GENERAL REMARKS ABOUT DOMESTIC VIOLENCE

If we want to observe the phenomenon of domestic violence in its entirety, we should first define the notions of family and violence and then look at their intersection.⁴

In the legislature of the Republic of Srpska, family is defined as a living community of parents and their children and other relatives.⁵ Such a definition has served as a basis for other laws to define the notion of a family member. Family is theoretically defined as a basic unit of society and as such, it is still considered to be the most beneficial environment for the growth and development of a person. However, family relations are sometimes not perfect and harmonious and in those altered family environments, violence can take place as well so it is necessary for state organs to intervene in an appropriate way.⁶ Family law does not contain a definition of violence, which is only logical because this is primarily a criminological notion. Such a definition is also absent from positive criminal law, which is why we must turn to theory.⁷ Violence can be defined as an illegal use of force or serious threat in order to injure or threaten a legally protected good.⁸

⁴ Violence and family - two words which should never be found next to one another. Grozdanić, V., Škorić, M., Vinja, I. (2010). *Nasilje u obitelji u svjetlu promjena Kaznenog zakona. Hrvatski ljetopis za kazneno pravo i praksu Zagreb*, 17 (2), 670.

⁵ Family Law of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, No. 54/02, 41/08, 63/14, Article 2, Paragraph 1.

⁶ If the goal is to allow interference in family relations and prescribe behaviors and punishments, and then apply them, then, this should be done in a clear and precise way. Reljić, D. (2017). *Svrha i preventivni značaj kaznenih odredbi po Zakonu o zaštiti od nasilja u porodici Republike Srpske, Glasnik prava*, 8 (1), 79.

⁷ Đorđević, Đ. (2014). *Krivičnopravna zaštita od nasilja u porodici. Nasilje u porodici: uzroci, oblici, posledice i društvene reakcije*. Belgrade: Criminological and Police Academy, Hanns Seidel Foundation, 64.

⁸ Jovanović, S. (2006). *Krivičnopravna zaštita od nasilja u porodici: nova rešenja. Nauka, Bezbednost, Policija*, 11 (2), 86.

In contrast to the legislator of the Republic of Srpska, the family law of the Republic of Serbia defines domestic violence as a form of behaviour whereby one family member violates the bodily integrity, mental health, or well-being of another member.⁹

A simple combination of these two notions would give us a definition of domestic violence as the illegal use of force or serious threat with the aim of injuring or threatening some legally-protected good between family members, i.e., in relations between parents, children and other close relatives. This rough definition still requires a more precise and detailed formulation on the part of the lawgivers, which is what has been done in misdemeanour and felony legislation.

MISDEMEANOUR ASPECTS OF DOMESTIC VIOLENCE

The Law on the Prevention of Domestic Violence of the Republic of Srpska was passed in 2012.¹⁰ This law is one of the sources of misdemeanour law because its text qualifies certain behaviours as misdemeanours and prescribes sanctions for them. Until the latest amendments to this law from 2019, which entered into force on May 1, 2020, domestic violence was classified as a misdemeanour and defined as any action on the part of a family member which threatened the well-being, psychological, bodily, sexual, and economic integrity of another family member or the family community.¹¹ In the continuation of the legal text, it was stated that any action that does not contain elements of a felony represents a misdemeanour, and relevant actions are listed taxonomically.¹²

⁹ Family Law, *Official Gazette of the Republic of Serbia*, No. 18/2005, 72/2011 and 6/2015, Article 197, Paragraph 1.

¹⁰ The Law on the Protection from Domestic Violence of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, No. 102/12, 108/13, 82/15, 84/19.

¹¹ The Law on the Protection from Domestic Violence of the Republic of Srpska, Article 6, Paragraph 1.

¹² Those are the following actions: the threat of bodily injury to a family member of a person close to them, the threat of taking children away or evicting a family member from the family apartment; exhaustion through labour, denying food, depriving a family member of sleep or necessary rest; the use of humiliating methods in the upbringing of children; denying the means of existence to a family member, denying the right to economic independence through the prohibition of work or by keeping a family member in a state of dependency and subordination through threat or by withholding the means for life or other forms of economic domination; verbal assault, swearing, name-calling or insulting a family member in other ways; restricting a family member's freedom to communicate with other family members or other persons; damage, destruction or sale of common property

For the understanding of this misdemeanour, it is necessary to pay attention to the definition of a family member. Until the latest amendments from 2019, this legal text defined family members as spouses and former spouses, and their common children and the children of each of the spouses, unmarried partners or former partners, their common children or the children of each of them, in-laws up to the second degree, regardless of whether a marriage community in question has ceased to exist, parents of present or former partners, adopted relatives in a straight line without restrictions and up to the fourth degree in the collateral line as well as relatives from incomplete adoption, persons in foster relationships, persons who live or have lived in the same family household regardless of kinship and persons who have a common child or a conceived child even though they have never lived in the same family household.¹³

The interpretation of the abovementioned provision leads to the conclusion that the lawmaker excludes from the members of the family or family community some close relatives (for instance, not all blood relatives in the straight line or collateral line are included so that violence against one's grandfather, brother or sister could not be considered as domestic violence in the sense of this law).¹⁴ Whether the lawmaker created this exclusion accidentally or they truly intended to exclude these persons from the family community remains unknowable. It is also possible that family is not what this provision seeks to protect but the physical location where partners meet.¹⁵ In any case, the courts have qualified violence among excluded family members as domestic violence or more precisely as a misdemeanours (until the latest amendments to the law), which is certainly a mismatch between reality and the normative.¹⁶

The latest amendments to this law, among other things, expanded the circle of persons who are considered family members or members of a family community, but not in the direction that the present author hoped for, but by simply listing, in addition to the already included members, the persons who

or property in possession as well as the damage or destruction of the property in the ownership or possession of another family member, or the attempt to do so; stalking a family member or causing fear, humiliation or a sense of lower value as well as other actions that do not exhibit the features of the crime of domestic violence (The Law on the Protection from Domestic Violence of the Republic of Srpska, Article 6, Paragraph 2).

¹³ The Law on the Protection from Domestic Violence of the Republic of Srpska, Article 7.

¹⁴ Čeranić, D., Sladić, Lj. (2019). *Nasilje u porodici i nasilje nad porodicom i državnopravni instrumenti reakcije. Zbornik radova*, LIX. 285–306. Serbian Association for Criminal Law and Practice.

¹⁵ Ristivojević, B. (2017). *Da li je novi Zakon o sprečavanju nasilja u porodici opredmećenje pojave tzv. bezbedonosnog prava?*, *Crimen* (1), 8.

¹⁶ For examples, see: Čeranić, D., Sladić, Lj. (2019). *Op. cit.*, 294, fn. 61.

were or still are in an emotional or intimate relationship regardless of whether the perpetrator shares or has shared a household with the victim.¹⁷ Nevertheless, the most important novelty prescribed by these amendments is that domestic violence is no longer classified as a misdemeanour and exists solely as a felony.¹⁸ Even though the Law on the Protection from Domestic Violence eliminated the qualification of domestic violence as a misdemeanour, still, the protective measures that can be issued in order to protect victims of domestic violence are issued by a court¹⁹ in a misdemeanour process. Also, a court in a misdemeanour case issues emergency protective measures, which can be issued against a perpetrator of domestic violence before the process is started or while the process is on-going with the purpose of removing an imminent danger for physical and psychological integrity as well as for the purpose of preventing the repetition of violence and guaranteeing the security of the victim.²⁰

Here, one can ask the question of why even include a court in a misdemeanour process in a case that is now defined as strictly a felony. If the goal was to justify this move on the part of the lawmaker by the fact that misdemeanour procedures are faster and shorter, this would still be unacceptable because felony cases, if they are based on an emergency, allow the possibility of a quick response (as is the case, for example, in cases involving decisions on detention). On the other hand, if a certain behaviour is not classified as a misdemeanour, on what ground can a misdemeanour procedure be initiated and conducted? According to the Law on Misdemeanours of the Republic of Srpska,

¹⁷ The Law on the Protection from Domestic Violence. Article 7. Line z).

¹⁸ Only misdemeanours in the domain of domestic violence retained in the text of this law can be committed by an employee in an educational, social, or healthcare institution who does not report domestic violence, or a citizen who does not report domestic violence as well as a family member or a member of a family community who does not report domestic violence except in case they are themselves a victim of domestic violence. Moreover, a punishment for a misdemeanour will also be issued to the subjects of protection and other bodies that are in charge of implementing this law if they do not act in accordance with Article 34 of the Law, which refers to keeping a record of the undertaken actions and the data on the number of initiated and completed procedures and the submission of the reports on these matters to the ministry in charge (The Law on the Protection from Domestic Violence. Article 34).

¹⁹ In Austria and Switzerland, protective measures as a response to domestic violence can also be issued by the police. Dragičević Prtenjača, M. (2017). Dihotomija pristupa u rješavanju nasilja u obitelji putem prekršajnogpravnog i kaznenopravnog regulative. *Hrvatski ljetopis za kaznene znanosti i praksu Zagreb*, 24 (1), 156.

²⁰ The Law on the Protection from Domestic Violence Article 13, Paragraphs 1 and 2. In Paragraph 4 of the same article, it is stated that the emergency protective measures are the temporary restraining order preventing the perpetrator from accessing the apartment, house or other residential object and/or a restraining order preventing the perpetrator from approaching or contacting the victim. In contrast to the legal solution in the Republic of Srpska, in the Republic of Serbia, emergency measures can be issued by the police as well.

no one can be issued a misdemeanour sanction if they are not responsible for a misdemeanour, i.e., if their action was not prescribed as a misdemeanour by law or a regulation based on the law before they committed it.²¹ Furthermore, Article 36, Line 3 of the same law prescribes that a misdemeanour sanction can be issued only in a misdemeanour process that was initiated and carried out in accordance with this law. Therefore, since the latest amendments to the Law on the Protection from Domestic Violence no longer treat domestic violence as a misdemeanour and it is treated exclusively as a felony, a misdemeanour process should not be initiated and conducted in response to it.

If we delve deeper into the practical application of the new legal solutions, we could encounter two interesting situations. The first situation has already been confirmed on the concrete example of the decision of the Basic Court in Bijeljina,²² in which the court suspended a misdemeanour case because there were other circumstances that ruled out the execution of a misdemeanour case. Namely, in the substantiation of this decision, the court stated that the responsible police precinct had submitted a request for the initiation of a misdemeanour case against a perpetrator of domestic violence M.Š. from J. for the purpose of issuing a protective measure of obligatory treatment of addiction from Article 23, Paragraph 3, Line d of the Law on the Protection from Domestic Violence. The explanation further states that the proposed evidence included an order from the District Attorney's Office not to conduct an investigation because the reported act did not include the essential features of the felony of domestic violence from Article 190 of the Criminal Code of the Republic of Srpska. Further explaining its decision, relying on the stance of the District Attorney's Office that the reported act did not include the essential features of a felony and since it no longer represented a misdemeanour either, according to the new Law on the Protection from Domestic Violence, the court states that there are no grounds for issuing the requested protective measure.

Another possibility in the given situation would be for the District Attorney's Office in charge to carry out the investigation of the case in question and initiate the felony procedure with the court in charge of the misdemeanour procedure issuing one of the emergency or protective measures prescribed in Articles 13 and 23 of the Law on the Protection from Domestic Violence.²³ If

²¹ The Law on Misdemeanours of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, No. 63/14, 110/16 and 100/17, Article. 3.

²² Decision of the Basic Court in Bijeljina, 80 0 Pr 120870 20 Pr from October 8, 2020.

²³ These are: restraining order preventing access to the apartment, house, or another residential object; restraining order preventing the perpetrator from approaching the victim; the prohibition of harassment or stalking a victim of domestic violence; the obligatory psychosocial treatment or treatment of addiction.

such a felony procedure had ended in an acquittal based on the fact that the act in question was not a felony, such a case would have opened an entire array of questions. The first question to ask would be whether a person who was acquitted while being assigned emergency or protective measures in a misdemeanour case would have any rights given the fact that the protective measures against them were assigned without legal grounds. Could this be subsumed under the existing criminal justice mechanism of the right to damages due to unjustified punishment? Bearing in mind the conditions that the law prescribes for this right,²⁴ it would be difficult to place this situation in the procedure for damages due to unfounded punishment, but it is certain that this person was deprived of their rights by being imposed restrictions through such measures in this way. Even though the case law regarding this crime and the new solutions contained in the Law on the Protection from Domestic Violence is underdeveloped, it is a fact that such situations will arise frequently in the future, which is why it is necessary to act in time through new and adequate legal solutions.

THE CRIMINAL JUSTICE ASPECTS OF DOMESTIC VIOLENCE

Domestic violence was incriminated as a felony in the Republic of Srpska in October of 2000.²⁵ This does not mean that this behaviour had not been sanctioned through criminal justice norms prior to that moment. Instead, the whole complexity of family relations and events in a family community was treated through general criminal laws.²⁶ In addition to this, criminal justice has always been cautious when interfering in the sphere of family relations

²⁴ The right to damages for a wrongful conviction belongs to a person who received a felony sentence or was found guilty while the charges were suspended but following a legal remedy, the procedure was terminated or they were freed of charges or the charges were dismissed in a final verdict, except in cases when a procedure was terminated or a verdict was reached in which the charges are dismissed because the prosecutor did not initiate a process before a court in charge. The Law on Criminal Procedure of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, No. 53/12, 91/17, 66/18 and 15/21, Article 408, Paragraph 1.

²⁵ The criminal justice policy rationale for the introduction of this incrimination in the criminal law of the Republic of Srpska was the adoption of a large number of international documents which provide the protection from domestic violence and associated demands from the member states to incriminate such behaviours. Jeličić, I., Janjuš, Z. (2016). *Nasilje u porodici ili porodičnoj zajednici - uporednopravni osvrt. Bezbjednost – Policija – Građani*, 12 (1–2), 214.

²⁶ Petković, N., Radić G. (2015). *Nasilje u porodici – stara rešenja u novom zakonodavstvu. Kultura polisa*, 12 (26), 78.

because close relationships between family members were the main reason for moderation when it comes to regulating family relations.²⁷

The Criminal Code of the Republic of Srpska prescribes that those individuals who engage in violence or threat against life and body, reckless and cruel behaviour to violate the wellbeing, bodily integrity, and mental health of family members or the family community will be punished with a fine or with a prison sentence of up to three years.²⁸ It is further stated that if a person used weapons, dangerous instruments or other means capable of inflicting serious bodily harm or damaging a person's health in the abovementioned actions will be punished with a prison sentence of at least six months and up to five years.²⁹ The other, more severe, form of this crime will occur if serious bodily injury or severe health deterioration of the victim occurs or if a child was the victim of the act or present during the act. The most severe form of this crime takes place if the death of a family member occurs as a result of the committed act.³⁰ A special form of this crime obtains if the person violates emergency or protective measures issued to prevent domestic violence by a court in charge.³¹

In contrast to the lawmakers of the Republic of Srpska, the Criminal Code of the Republic of Serbia treats the violation of protective measures issued by a court on the basis of the law that regulates family relations,³² while the situation in which a person violates emergency measures issued against them is qualified as a misdemeanour in the sense of the Law on the Protection from Domestic Violence.³³ This means that in the positive law of the Republic of Serbia, a misdemeanour occurs when a person violates emergency measures while a felony takes place when they violate protective measures. In the law of the Republic of Srpska, such a distinction is not made, and the special form of the crime exists if a person violates any of the mentioned measures.

The Criminal Code also contains a definition of a family member, and according to this text, a family includes: spouses or former spouses and their

²⁷ Vuković, I. (2012). *Nasilje u porodici kao krivično delo – pojedini problemi u primeni prava, Nasilje u porodici*. Belgrade: Faculty of Law, University of Belgrade, 127.

²⁸ Criminal Code of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, No. 64/17, 104/18 and 15/21, Article 190, Paragraph 1.

²⁹ Criminal Code of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, No. 64/17, 104/18 and 15/21, Article 190, Paragraph 2.

³⁰ Criminal Code of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, No. 64/17, 104/18 and 15/21, Article 190, Paragraph 3 and 4.

³¹ *Ibid.*, Paragraph 5.

³² Criminal Code, *Official Gazette of the Republic of Serbia*, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019, Article 194, Paragraph 5.

³³ The Law on the Prevention of Domestic Violence, *Official Gazette of the Republic of Srpska*, No. 94/16, Article 36.

children as well as the children of either of them, unmarried partners or former unmarried partners, their children, and the children of either of them, in-laws up to the second degree regardless of whether a marriage community has ceased to exist, the parents of present or former unmarried partners, adopted relatives from full adoption in the straight line without restrictions and in the collateral line up to and including the fourth degree as well as the relatives from incomplete adoption, persons related through the foster relationships, persons who live or have lived in the same family household regardless of kinship and persons who have a common child or a conceived child even if they never lived in the same family household as well as persons who are or have been in an emotional or intimate relationship regardless of whether the perpetrator shares or has shared a household with the victim.³⁴

This formulation of the notion of a family member or a member of a family community can be criticized in the same way as in the case of the same notion included in the Law on the Protection from Domestic Violence since both legal texts do not include certain close relatives among family members or members of the family community. This essentially leads to the possibility of qualifying a given behaviour as a general felony such as bodily injury, a threat to personal security, or some general misdemeanour, which certainly points to a longstanding theoretical stance that without a special incrimination of domestic violence, this act would be covered by other existing incriminations.³⁵

Classifying domestic violence only as a felony adds to the burden of the already overloaded criminal departments of the courts, which will now be obliged to handle the less serious cases of domestic violence. Criminal procedures in response to these cases last longer and they end in a decision that involves a felony sanction, which typically does not achieve the effects of prevention nor does it contribute to the removal of the causes that have led to the emergence of this form of violence, which should certainly be the primary goal.³⁶

³⁴ Criminal Code of the Republic of Srpska, Article 190, Paragraph 6.

³⁵ “If the Criminal Code could be changed simply and easily with a stroke of a pen, and if someone who had such a power of the pen suddenly decided to simply erase the existing felony of domestic violence on a whim, nothing of significance from the standpoint of the criminal justice protection of family members (even assuming the broad definition of this concept as the one in the Family Law) would happen. Every existing form of this crime would still be some other crime starting from any form of bodily injury, threat to an individual’s security or even murder,” Škulić, M. (2012). *Nasilje u porodici. Revija za kriminologiju i krivično pravo*, (1–2), 120.

³⁶ Instead of issuing a sentence in the form of a felony sanction, a better effect can be achieved by applying protective measures, especially those that are directed at the psychosocial treatment of individuals. Radić, I., Radina, A. (2014). *Zaštita od nasilja u obitelji: obiteljskopравни, prekršajnopравни i kaznenopravni aspekt. Collected Papers of the Faculty of Law in Split*, 51 (3), 741.

A bad move on the part of the lawmaker was that, instead of responding to and solving the problem of domestic violence gradually, they prescribed a criminal sanction as the only step. It remains unclear why such a strong emphasis is placed on a punitive approach in this particular case where the non-punitive options, which are nowadays so frequently mentioned in the public discourse, could produce positive results.³⁷ It was a major mistake to skip the misdemeanour option in the reaction to this form of violence,³⁸ primarily because certain forms of domestic violence are indeed milder forms of crimes and they do not deserve a felony-based intervention. If domestic violence was committed only in the form of a threat or insult,³⁹ it can, nonetheless, be qualified as a milder offense in comparison to a situation in which physical violence against a child has been committed. Precisely because of such a variety of forms and situations, one should draw a demarcation line and qualify milder offenses as misdemeanours and more severe ones as felonies.

Second, misdemeanour cases are faster and are finished in a shorter period of time, and third, but not less important, misdemeanour sanctions have a prominent preventive effect in addition to the punitive one, which is of special significance for the perpetrator of domestic violence and the society as a whole because it can achieve the true goal of preventing domestic violence. Misdemeanour-based punishments should be the first step of the state's response to domestic violence because they can simultaneously achieve significant goals in the domain of preventing future criminal behaviour of the perpetrator.⁴⁰ On the other hand, it is clear that the actions that have now been subsumed under the legal description of the felony of domestic violence as a special type of felony had been incriminated through other forms of incrimina-

³⁷ Vuković, I. (2012). *Nasilje u porodici kao krivično delo – pojedini problemi u primeni prava, Nasilje u porodici*. Belgrade: Faculty of Law, University of Belgrade, 139.

³⁸ It is even believed that a misdemeanour-based protection could have a preventive effect if the perpetrator were not registered as a convicted felon. Oset, S. (2014). *Prekršajnoppravna zaštita od nasilja u obitelji. Hrvatski ljetopis za kazneno pravo i praksu Zagreb*, 21 (2), 614.

³⁹ "An argument between spouses presupposes a raised tone and saying words that are frequently not meant. Such a relationship cannot be viewed as something lifeless, foreign to the human experience. It is an emotional relationship in which people share all the good and bad sides of communal living, and it is not an encounter of two strangers. This is why an adequate response to the primary disputes of lower intensity between family members is provided by misdemeanour law ..." Vuković, I. (2012). *Nasilje u porodici kao krivično delo – pojedini problemi u primeni prava, Nasilje u porodici*. Belgrade: Faculty of Law, University of Belgrade, 133, fn. 40.

⁴⁰ Mrvić-Petrović, N. (2014). *Sprečavanje nasilja izricanjem mere zabrane okrivljenom da pristupi oštećenom u prekršajnom postupku. Nasilje u porodici: uzroci, oblici, posledice i društvene reakcije*. Belgrade: Criminological and Police Academy, Hanns Seidel Foundation, 97.

tion such as bodily injury, the threat of personal security, etc. This essentially means that even by removing domestic violence from the list of felonies would not result in a real loss, and the criminal justice organs would have a uniform practice, which would be beneficial for everyone because up to now it was a rather frequent occurrence that certain actions of an identical or similar character were qualified in different ways. There are authors Nonetheless, there are authors who still believe that domestic violence should exist as a felony because it provides comprehensive criminal justice protection and because of the significance of this phenomenon.⁴¹

EMPIRICAL RESEARCH ABOUT THE MANNER OF INCRIMINATION OF DOMESTIC VIOLENCE IN THE LEGISLATION OF THE REPUBLIC OF SRPSKA

The subject matter and aim of the study

Bearing in mind the previous legal solutions and the new one according to which domestic violence is defined solely as a felony, the author believes that the attitudes of criminal justice and other organs that deal with cases involving this crime are of exceptional importance. The study was based on several hypotheses. The first one was that domestic violence as a crime requires both a felony and misdemeanour-based norm. Second, misdemeanour courts should not be implicated in the felony procedure with respect to cases of domestic violence. Finally, the stringency of the sanctions in cases involving domestic violence has not increased after domestic violence was classified as a felony. The goal of the study was to gather information about the attitudes of courts, district attorneys, and lawyers in relation to the way in which domestic violence was incriminated in the law of the Republic of Srpska and to test the abovementioned hypotheses. The indicators that were used to test the hypotheses were among others, a high percentage of highly qualified participants who are of the opinion that the legal solution whereby domestic violence is classified only as a felony is not good, and they also believe that a legal solution according to which misdemeanour courts would issue emergency/protective measures is also not optimal. Instead, the majority of them believe that those measures should be issued by a court in a felony procedure. Moreover, the participants are mostly in agreement that there has been no increase in the number of prison sentences or the stringency of sanctions for the perpetrators

⁴¹ Stojanović, Z. (2012). *Komentar Krivičnog zakonika*. Belgrade: Službeni glasnik, 572.

of domestic violence, and the majority of them agree with the proposition that most of the perpetrators receive suspended sentences. The results of the study and the conclusions based on them can be used in future research where they can be further supported or challenged.

The choice of the research strategy and techniques

When choosing the methods that would be used for the study, the author first excluded the less suitable ones. First off, the interview method could not be used because of the epidemiological measures which are in force due to the COVID-19 pandemic. On the other hand, the statistical data for the entire Republic of Srpska were not used because they do not exist as an official dataset. Instead, the data that was presented was received from the Basic Court in Bijeljina with which the author established cooperation.

The most suitable method for the study, which was ultimately implemented, was an online survey because it could be addressed at a large number of individuals, who have taken part in cases related to domestic violence on the territory of the entire Republic of Srpska. 87 individuals accepted to participate in the survey. The survey included questions that dealt with the way in which domestic violence was incriminated in the Republic of Srpska, but also questions that pertained to the potential changes in the domain of penal policy regarding this crime.

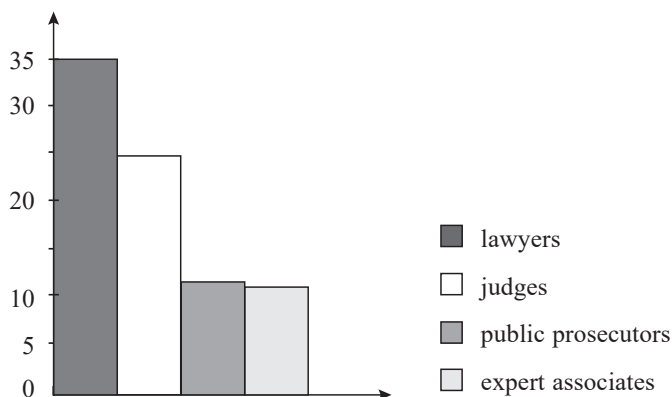
Instruments and research procedure

The study was carried out based on the principle of chosen participants. More precisely, the survey was forwarded to judges in basic courts, district attorneys, lawyers enlisted in the Bar Association of the Republic of Srpska as well as legal associates employed in these institutions. The author chose this sample because they considered that the attitudes of these subjects, most of whom have acted in cases involving domestic violence, can supply the most informative opinions on the questions that are of relevance to this article. The participants answered 10 multiple choice questions in which they chose one of two or more possible options for response. The survey was conducted anonymously and voluntarily and the data in this article is presented strictly in a general way. Once the survey was completed, data analysis was carried out.

Results of the study and their analysis

87 participants took part in the online survey and the professional structure of the sample is presented in Figure 1.

Chart No. 1 – Professional structure of respondents



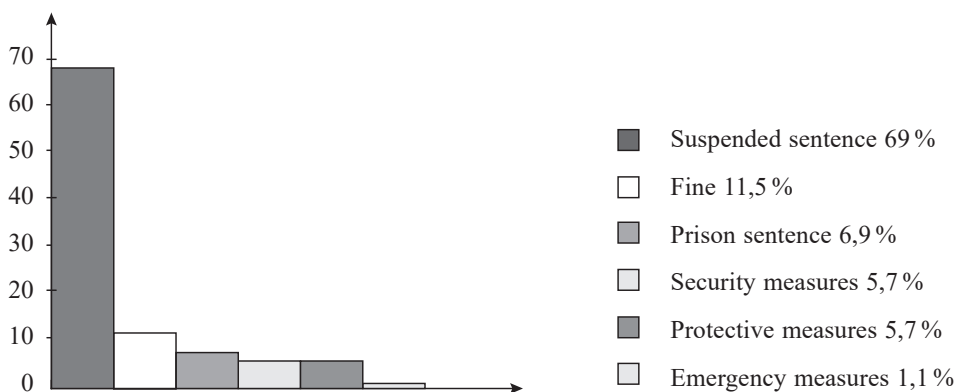
The results of the survey showed that 62.1 % of respondents thought that the solution according to which domestic violence was designated only as a felony was not good. Moreover, 67 % of respondents thought that domestic violence should be recognized both as a felony and as a misdemeanour. This indicates that the majority of criminal justice and other organs that deal with cases of domestic violence believe that the previous solution according to which domestic violence was treated both as a felony and as a misdemeanour was better, which confirmed the initial hypothesis that domestic violence requires both misdemeanour and felony norms. It is interesting, but not surprising, that none of the respondents thought that domestic violence should be treated only as a misdemeanour. 78.2 % of respondents stated that domestic violence should be prescribed as a separate felony while 21.8 % of the participants believe that domestic violence can be incriminated via other “classical” felonies, where the family relationship between the perpetrator and the victim would be considered as a special circumstance. When it comes to the authority for issuing emergency and protective measures, 64.4 % of the respondents stated that the solution according to which these measures are undertaken in a misdemeanour procedure is not good because the authority to decide on these measures is given to a court that is not authorized to make decisions in cases that involve felonies. This confirmed one of the initial hypotheses as well. A

somewhat larger share of participants, 79.3 % of them believed that felony courts should issue emergency and protective measures in cases that involve domestic violence.⁴²

When it comes to the sentencing practices towards perpetrators of domestic violence, 58.6 % of respondents did not believe that perpetrators have been receiving stricter sanctions after it was classified exclusively as a felony, while 69 % of respondents stated that there had not been an increase in the number of prison sentences against such individuals. This confirmed the hypothesis that there has been no increase in either number or stringency of sentencing when it comes to the perpetrators of domestic violence.

Regarding the question of which sanction is most frequently enforced against the perpetrators of domestic violence, 69 % of respondents point out that it suspended sentence while the stances of the remainder of the sample are divided, and the overall pattern is shown in Figure 2.

Chart No. 2 – Sanctions imposed for domestic violence



Having analysed the results of the survey, the author is of the opinion that the respondents are fully familiar with the new legal solutions related to the felonization of domestic violence and the consequences that such solutions

⁴² This percentage is a surprise to the author because there were 35.6 % of respondents who considered a good legal solution the one in which a misdemeanour court issues emergency/protective measures while 20.7 % of them answered the subsequent question by indicating that a misdemeanour court should issue emergency/protective measures, which means that part of the respondents who found the existing legal solution to be good, still think that these measures should be issued by a court in a felony procedure, which is somewhat self-contradictory.

produce in practice. Most of them expressed a negative evaluation of the solution according to which domestic violence is classified solely as a felony or a solution according to which a misdemeanour court issues emergency/protective measures. Instead, these measures should be issued by felony courts in felony procedures.

In the continuation of the text, we provide tabular representations of the data on domestic violence in misdemeanour⁴³ and felony cases carried out in front of the Basic Court in Bijeljina from January 1, 2019 until July 30, 2020.

Table 1. – Misdemeanour cases of domestic violence of Basic Court in Bijeljina in the period from January 1, 2019 until July 31, 2020

Time period	Case status	Total number of cases	Decision	Number of cases
January 1 – December 31 2019	in progress	55	–	-
	solved	41	stay of proceedings	4
			freed of charges	10
			fine	4
			suspended sentence	4
			protective measure	31
unsolved	14	–	-	
January 1 – July 31 2020	case status	27	–	-
	solved	10	freed of charges	3
			fine	1
			suspended sentence	1
			protective measure	11
unsolved	17	–	-	

The analysis of the presented data gives rise to the observation that there has been an increase in the number of case of domestic violence qualified as misdemeanours, which, on the one hand, speaks in favor of the fact that a large portion of acts fitting the description of domestic violence indeed deserves the qualification of a misdemeanour, but, on the other hand, it speaks about a

⁴³ In the period under observation, the courts still ruled on misdemeanours according to the earlier Law on the Protection from Domestic Violence.

potentially higher burden on felony courts now that all the cases of domestic violence are qualified as felonies. Regarding sanctions, it is noticeable that there has been an increase in the number of protective measures.⁴⁴Here, one should point out that some other form of sanction most often accompanies such measures, and, according to the presented data, these accompanying sanctions are usually suspended sentences or fines.

Table 2. – Felony cases of domestic violence in front of the Basic Court in Bijeljina from January 1, 2019 until July 31, 2020

Time period	Case status	Total number of cases	Decision	Number of cases
January 1 – December 31 2019.	in progress	33	–	-
	solved	20	suspended sentence	16
			fine	1
			charges dismissed	3
unsolved	13	–	-	
January 1 – July 31 2020.	In progress	23	–	-
	solved	8	suspended sentence	4
			charges dismissed	4
unsolved	15	–	-	

If we focus on the sanctions for domestic violence in felony cases in this part, it is noticeable that perpetrators typically receive suspended sentences, which is what emerged from the survey data as well. It is interesting that no prison sentences have been issued against perpetrators of domestic violence either in misdemeanour or felony cases in the observed period. All of this speaks in favour of the conclusion that courts rarely decide to issue prison sentences to perpetrators of domestic violence, and the author assumes that such a practice will continue in the future.

CONCLUSION

Domestic violence is a subject that must be approached from various angles. Bearing in mind that it is noticeable that every form of violence will exhibit a degree of expansion and escalation if it is not responded to properly,

⁴⁴ Also, it is possible to issue several protective measures in one court decision.

it is necessary to intervene and react in a timely manner, but this should also be done gradually.

The first step should be misdemeanour law regulation for less serious crimes, which could receive an adequate response through preventive and repressive measures. Only if this fails and domestic violence undertakes the form of a felony, should the legal system resort to felony-based interventions by prescribing a special felony of domestic violence, as has now been done, or without such felonization through other crimes such as murder, bodily injury, a threat to individual's safety, etc. If domestic violence remains incriminated as a special felony, one should draw a clear line of demarcation between it and the misdemeanour form of this crime. In case it is eliminated as a felony and continues to exist only through general incriminations, it is necessary to recognize the fact that the act in question was committed against a family member as an aggravated circumstance.

The interpretation of the results of the survey that was carried out leads to the conclusion that it was not a good solution to treat domestic violence only as a felony. Instead, it is argued that the previous solution according to which domestic violence existed both as a misdemeanour and as a felony was better. Also, the court data that was analysed in the article speaks in favour of the conclusion that a much larger percentage of acts of domestic violence, before the most recent amendments to the Law on the Protection from Domestic Violence entered into force, was qualified as a misdemeanour and not as a felony. This further implies that from now on, all those acts will be subjects of felony trials, which will overburden felony courts. According to the attitudes of the respondents, the authority to issue emergency and protective measures for the felony of domestic violence should be given to felony courts, which the author of this article supports because the existing solution whereby this is done by a misdemeanour court needlessly complicates the work on a case involving domestic violence.

All in all, felony law should not, as is now the case in the Republic of Srpska, be the first and last, i.e., the only, point of decision-making when it comes to domestic violence because the goal of felony law is not to instigate behavioural improvement or to reconcile family members. Instead, the function of felony law is to act as an *ultima ratio* when the reactions of other branches of law no longer provide results. It is noticeable that even now, when domestic violence is treated exclusively as a felony, it still oscillates between misdemeanour and felony law. The evidence that the lawmakers still “desire” misdemeanour law involvement in the reaction to domestic violence can be found in the existing legal solution in which protective measures in cases involving domestic violence are issued by a misdemeanour court. If this incrimination was truly supposed to reallocate domestic violence to the

domain of felony law, then, the authority to issue such measures should have been given to felony courts. That way, one and the same procedure would cover the entire development of a case involving domestic violence.

In light of all of this, other branches of law, primarily family law, should have an opportunity to use their instruments and mechanisms to prevent domestic violence. Misdemeanour law should be harnessed to respond to less serious cases of domestic violence, and only if all these mechanisms do not produce results, felony law should be allowed to become involved in family relations. In addition, in the process of legal regulation, it is necessary to draw a sharp demarcation line between the legal description of a misdemeanour and a felony in order to prevent ambiguity in relation to domestic violence, as well as the authority of various bodies responsible for it so as to avoid causing difficulties for the lawmakers themselves, the parties in a process, and us, the authors, when the subject of domestic violence becomes a subject of our interest again.

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