

AN ANALYSIS OF PENAL POLICY IN DOMESTIC VIOLENCE CRIMINAL AND MISDEMEANOR PROCEEDINGS IN MONTENEGRO

Council of Europe
Women's rights Center



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**An analysis of penal policy in domestic violence
criminal and misdemeanor proceedings in Montenegro
in 2017**

Council of Europe
Women's Rights Center

Podgorica, April 2019

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The views expressed here do not in any way reflect the official opinion of the European Union and the Council of Europe.

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List of Abbreviations

| | |
|---------------|--|
| CEDAW | Convention on Elimination all Forms of Discrimination of Women |
| CoE | Council of Europe |
| CC | Criminal Code |
| DV | Domestic Violence |
| ECHR | European Convention of Human Rights |
| EU | European Union |
| ECtHR | European Court of Human Rights |
| GREVIO | Group of Experts on Action against Violence against Women and Domestic Violence |
| LPDV | The Law on Protection from Domestic Violence |
| UN | United Nations |
| UNDP | United Nations Development Program |
| ToR | Terms of reference |

Introduction

This publication is the result of the co-operation between the Council of Europe, Women's Rights Center and International consultant Bistra Netkova and was created within the project of Council of Europe and European Union "Fighting ill-treatment and impunity and enhancing the application of European Court of Human Rights case-law on national level in Montenegro", as a part The European Union/Council of Europe Horizontal Facility for the Western Balkans and Turkey (Horizontal Facility), co-operation initiative of the European Union and Council of Europe for South East Europe.

One of the goals of project activities is to align case-law with the standards of the European Convention on Human Rights (ECHR) and Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) in Montenegro. Therefore, this report deals with the analysis of the existing penalty policy in relation to domestic violence as gender-based, in the light of the requirements of the Istanbul Convention and case-law of European Court of Human Rights.

Despite considerable efforts by the Montenegrin authorities to eradicate all forms of violence against women, concerns remain regarding the limited understanding of the gender component of violence against women and domestic violence among legal professionals. Impunity continues to be a problem, not only for perpetrators but also for state actors who have failed to take appropriate action on domestic violence cases.

The recent report Council of Europe's Group of experts on Action against Violence against Women and Domestic Violence in Montenegro (GREVIO) also confirms these observations. European Court of Human Rights also has a very rich case-law on all forms of violence against women. The European Court of Human Rights has often been in a position to rule on these cases in the context of Article 8 of the Convention, but also of Articles 2, 3 and 14.

In the *Opuz v. Turkey* case, the ECtHR ruled for the first time in a domestic violence case that there had been a violation of Article 14 (non-discrimination) of the Convention, in conjunction with Articles 2 and 3. The Court found that domestic violence mainly affected women, while the general and discriminatory judicial passivity in Turkey has created a conducive climate for this. The violence suffered by the complainant was recognized as a gender-based and discriminatory treatment of women.

This analysis would not have been possible without cooperation with the Supreme Court of Montenegro, with which the Women's Rights Center has signed a Memorandum of Cooperation, which has so far unambiguously supported our activities related to overcoming the problems of violence against women and domestic violence. We also owe gratitude to all courts in Montenegro that provided us with anonymized copies of final court decisions. This work required a special effort on the part of the magistrates' courts because of the large number of cases and the fact that they did not have an electronic database. In this regard, we

would particularly like to thank Sasa Simun, the Office of the Superintendent of the High Court for Misdemeanors and employee Danilo Djurovic.

We would also like to thank all the associates hired at research, and in particular the Council of Europe, which made this analysis possible.

We hope that the product of our work will contribute to more effective case law on gender-based violence against women and domestic violence, and accordingly inspire and direct the action of all relevant actors towards the effective protection of victims and the prosecution of perpetrators of violence.

1. Background Information

It is estimated that 35 per cent of women worldwide have experienced either physical and/or sexual intimate partner violence or sexual violence by a non partner (not including sexual harassment) at some point in their lives.¹

The recognition of domestic violence as a human rights violation under international law required decades of work by activists around the world. Now, international legal instruments and policy statements make clear that states have a duty under international law to prevent domestic violence and violence against women and punish offenders.

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention)², being the most comprehensive, legally binding international treaty on violence against women and domestic violence, sets a milestone in tackling this serious violation of women's human rights. The Convention was ratified by 33 countries including the European Union in 2017.

Montenegro has ratified the Istanbul Convention in 2013, as well as a number of conventions on protection of children and women from violence, among which the most specific are the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),³ UN Convention on the Rights of the Child,⁴ the Council of Europe Convention on the Exercise of Children's Rights,⁵ the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention).⁶ A comprehensive national legal framework regulating violence against women and children has been put in place: the Criminal Code with Amendments 2017,⁷ The Code on Criminal Procedure⁸, the Family Law

¹ UN Women facts and figures, Ending violence against women.

²Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No.210.

³Convention on the Elimination of All Forms of Discrimination against Women entered into force 3 September 1981.

⁴Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49

⁵European Treaty Series - No. 160 European Convention on the Exercise of Children's Rights.

⁶Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS 210.

⁷The Criminal Code of Montenegro ("*Official Gazette of Montenegro*", No. 70/2003, 13/2006 ii 47/2006 i "*Official Gazette of Montenegro*" No. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013 , 14/2015, 42/2015, 58/2015, 44/2017 i 49/2018).

⁸Code on Criminal Procedure ("*Official Gazette of Montenegro*", No. 57/2009, 49/2010, 47/2014 – Decision of the Constitutional Court of Montenegro, 2/2015 - Decision of the Constitutional Court of Montenegro, 35/2015)

2015,⁹ that explicitly prohibit mediation in all cases of violence against women and domestic violence, as well as corporal punishment, in all settings, the Law on Protection from Family Violence 2010,¹⁰ the Treatment of Juveniles in Criminal Proceedings Act 2011,¹¹ the Law on Social and Child Protection 2017 with by-laws.¹²

The Law on Protection from Domestic Violence, adopted in July 2010, contains a broad definition of domestic violence, prescribing more immediate and effective measures for the protection from violence and measures of support to victims including the right to psycho-social support, free legal aid, social and medical care, material assistance and accommodation.

As the Policy framework regards, the Strategy for the Protection from Family Violence (2016-2020) was adopted in 2015. According to the Strategy 2016-2020, it can be clearly identified that there are generally three groups of problems: a) the discrepancy between the number of cases in the centers for social welfare and cases before the judicial authorities, b) a large number of recidivism in cases of domestic violence and c) a large number of victims who return to the perpetrator because they are economically dependent on him and do not have the appropriate institutional support.¹³

According to the first Study on domestic violence and violence against women in Montenegro, which was done in 2012 for the needs of the Gender Equality Program UNDP and the Ministry for Human and Minority Rights, 92% of respondents recognizes the existence of domestic violence in Montenegro, but only 13% shared personal experiences of exposure to this form of violence, while one in four (mostly men aged 18 to 30 and 51- 60) considers that in some cases physical violence is justified, especially when it comes to partner relationships. In the same study, an overview of the results of qualitative research that included 100 victims of violence shows that 89% of them experienced violence by a current or former spouse. A third of them have already been exposed to violence in primary family, and every other victim was economically dependent on a violent partner.¹⁴ A newer study by UNDP on Domestic Violence conducted in 2017 found that 42% of women in Montenegro have experienced violence in their life, mostly in the family setting/domestic environment.¹⁵

⁹ Family Law, (*"Official Gazette of Montenegro"*, No. 053/16 from 11.08.2016);

¹⁰ Law On Protection From Domestic Violence, (*"Official Gazette of Montenegro"*, No. br. 46/2010);

¹¹ Law on Treatment of Juveniles in Criminal Proceedings (*"Official Gazette of Montenegro"*, No. 64/2011 od 29.12.2011);

¹²Law On Social and Child Protection (*"Official Gazette of Montenegro"*, No. 27/13, 1/15, 42/15, 47/15,56/16, 66/16, 1/17 i 31/17.);

¹³Strategy On Protection From Family Violence 2016-2020, Montenegro, available at: www.gov.me/ResourceManager/FileDownload.aspx?rId=223283.

¹⁴UNDP Study On Domestic Violence and Violence Against Women, 2012 available at: www.me.undp.org/Studija%20o%20nasilju%20u%20porodici%20i%20nasilju%20nad...

¹⁵ UNDP study on violence in family and violence against women, 2017.

The *Women's Rights Center* and UNDP Montenegro Study on the perceptions of the judiciary concerning domestic violence and violence against women from 2015 showed that, on average, every other representative of the judiciary considers domestic violence as a phenomenon that necessarily does not have to be referred to competent institutions but can sometimes be resolved within the family and 41% of the respondents stated, according to their colleagues' experience, that there are cases where the victim contributed to acts of violence.¹⁶

Finally, the GREVIO Committee, as the body responsible for monitoring the application of the Istanbul Convention, published its first evaluation report on Montenegro on 15 October 2018.¹⁷ The report particularly highlights the mild penal policy of Montenegrin courts when it comes to sanctions for domestic violence crimes. The GREVIO Report notes that the majority of domestic violence cases are resolved in minor offense courts, including cases of sexual violence by counter-intelligent partners. The misdemeanor offence sanctions are very mild, ranging from fines to up to 60 days in prison. The GREVIO report further states that fines and conditional sentences are more often imposed than imprisonment, reducing the impact of sentences on perpetrators of violence. Instead, such punishments create additional insecurity for women and children who are victims of violence, having in mind their personal safety, as well as the creation of financial difficulties in the case of fines.¹⁸ GREVIO finds that resolving cases of domestic violence predominantly through misdemeanor procedures represents 'a drastic shift toward much milder domestic violence penalties than before', emphasizing that 'it is a trend that should be changed'.¹⁹ The widespread use of suspended sentence and admonition as a warning measure available under the Misdemeanors Act does not indicate that sanctions are deterrent.

In this regard, GREVIO strongly encourages the Montenegrin authorities to ensure, through legislative measures and effective training of the representatives of the prosecution and judiciary, that penalties and measures imposed in domestic violence cases are effective, proportionate and deterring, harmless for the victims and their children.²⁰

¹⁶ Women's Rights Center and UNDP Montenegro 2015 study on the perceptions of the judiciary concerning domestic violence and violence against women.

¹⁷ GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Montenegro, 2018.

¹⁸ GREVIO's Report Montenegro paragraph, 198.

¹⁹ Ibid 199

²⁰ Ibid 199

2. Research framework

Research purposes, objectives and scope

- **Research purposes**

The analysis of criminal policy in criminal and misdemeanor cases in the area of domestic violence in Montenegro was carried out within the framework of the European Union and Council of Europe project "Fighting ill-treatment and impunity and enhancing the application of European Court of Human Rights case-law on national level in Montenegro". For this purpose, an international consultant was engaged, which, in co-operation with the NGO *Women's Rights Center* from Podgorica prepared the methodology of this research and developed an **analysis of the penal policy in the area of family violence**.

1. The purpose is to obtain data and information that will reflect on the current trends and challenges in application of the legal framework in the area of violence against women and to create concrete recommendations for further harmonization of penal policy in this field with the international standards.

In accordance with the ToR, the report aims to be used as a source of information by several **intended users**:

- The Judiciary and Prosecution;
- Ministry of Justice;
- Relevant institutions involved in providing support and protection to the victims of domestic violence and violence against women;
- CoE;
- Non-Governmental Sector;

- **Research objectives**

The goal of this analysis is to assess the national legislation and provide analytical presentation of court proceedings for criminal and misdemeanor acts of domestic violence, with a special focus on the penal policy of Montenegro courts and to draw conclusions, recommendations on key identified problematic issues. In conclusion, this analysis deployed various qualitative and quantitative methods.

The following table details Key Research Questions (KRQs):

Table 1: Key Research Questions

| <i>Reviewing court practice in penal policies concerning the domestic violence</i> |
|---|
| What are the international legal standards and case law regarding DV? |
| What are the national criminal and misdemeanor legal aspects and how they relate to international legal standards? |
| What is the national judicial practice regarding sanctioning of DV in criminal and misdemeanor proceedings and what are the problems identified? |
| What needs to be done to improve the national legislation and practice in DV cases regarding sanctions in line with international standards? |

- **Research scope**

As mentioned in the ToR, the Report has analyzed legislation and court practice/enforceable judgments during 2017.

- **Expected outcome of the research**

The expected outcome of the research is delivering key recommendations in order to improve penal police and make sure that sanctions for the acts of domestic violence are, above all, of deterrent character.

3. Data collection methods and sampling

The research team²¹ has adopted assorted qualitative and quantitative methods of data collection and analysis in order to ensure reliability and validity of data through triangulation, review of literature, collection of quantitative data and case study.

- **Qualitative methods**

Review of literature enables the consultant to gather contextual information. Documents are also important sources of information that reflect the current situation regarding domestic violence in Montenegro.

²¹ The team was comprised of international consultant, consultant from 'Women's Rights Center' and national consultant.

The analysis of documents was an important aspect of the preparation of the inception report. The literature consulted included *inter alia*:

- National legislation;
- Reports, evaluations and analyses on the situation of DV in Montenegro;
- International legal documents such as: Istanbul Convention, UN CEDAW Convention, and ECHR.
- Case law of basic and misdemeanor courts in Montenegro and case law of the ECtHR.
- National statistics;
- Any other documents that are relevant for the research;

A review of enforceable court judgments/verdicts enabled the consultant to conduct an up-close, in-depth, and detailed examination of a subject of study (the cases), as well as its related contextual conditions.

- **Quantitative data collection**

The consultant and the project team have developed indicators for monitoring the impact of the judicial system regarding penal policies. Collecting numerical data was used to explain the phenomena analyzed using mathematical methods (statistics in particular).

The data collected was disaggregated by gender and age, whenever possible, to ensure the research gender-sensitivity. The unavailability of this data is, however, identified as a limitation, despite the existence of official statistics.

4. Sampling method

The consultant has spent time in **Podgorica** to meet with the representatives of national institutions relevant for implementing the penal policy in Domestic Violence cases prior preparation of the methodology. The following sampling method is also a product of consultations with relevant professionals.

The number of criminal convictions analyzed by the survey to provide qualitative data is 108 final criminal convictions, while 126 criminal convictions were analyzed for the purpose of obtaining quantitative data, all from 2017. The survey covered 1370 final misdemeanor decisions to provide quantitative data and 327 final decisions for qualitative analysis, all from 2017.

Regarding the qualitative data gathering process, a representative sample of 100 % of all judgments (verdicts) in criminal and 30% of decisions in misdemeanor proceedings was utilized.

5. Data management and analysis

All data were analyzed according to the Research Matrix for analysis of results. The matrix represents the data sources, and the methods of data collection for the research are presented in Annex 1.

6. Limitations of the research and mitigation measures

Several limitations were projected during the mapping and research implementation phase.

Table 5 Limitations of research and mapping and mitigation measures

| Limitation | Mitigation measures proposed by the consultant |
|--|---|
| Not all quantitative data is reliable | The analysis of data when preparing the inception report showed inconsistencies of data between stakeholders. |
| Short time span of research exercise | The research is projected to last one month which is a tremendously short period of time, given the scope of the exercise. The consultant and the team intend to utilize the time in the most effective way, relying on support from CoE. |

7. International Legal Standards regarding Domestic Violence with accent on penal policy

“The element of deterrence underlying the criminalization of domestic violence can only be fulfilled if the perpetrators are tried convicted and punished.”²²

²² Hart, B. - Battered Women and the Criminal Justice System. American Behavioral Scientist 36 (5). 1993;

The need for punishment to be proportional with the crime, is a requirement of international law and appropriate punishment is part of the due diligence obligation prescribed by the Istanbul Convention. However, sentencing in domestic violence cases has often resulted in “reduced or inappropriate sentences.”²³ Gender stereotypes and various forms of discrimination against women have been used as mitigating circumstances in domestic violence cases.²⁴ The failure to impose commensurate sanctions on perpetrators of domestic violence falls short of deterring the occurrence of these crimes and seriously hampers prevention of domestic violence. There is several international legal documents that set the standards regarding prevention, prosecution and protection of victims of domestic violence, that, along with CEDAW and the Istanbul Convention, have been specifically designed to address violence against women as a form of discrimination and violation of women’s human rights. The problem of domestic violence has been recognized as a violation of human rights and through the case-law of the European Court of Human Rights (ECtHR). All the above mentioned standards set the requirement of appropriate and proportional sanctioning of perpetrators as a precondition for successful prosecution, prevention and protection of victims of domestic violence.

7.1. Convention for the Elimination of all forms of Discrimination of Women

In the period after the UN decade for women²⁵, several initiatives from states and NGOs were started with the aim to recognize gender based violence as a root cause for women’s subordination and asked for its eradication. Creating the threshold for this movement, the UN’s 1979 Convention for the Elimination of all forms of Discrimination of Women²⁶ sets out to assure respect of women’s human rights through elimination of all forms of discrimination against them²⁷. However, at the time, the Convention only implied that violence against women is a product of the ongoing discrimination against women.²⁸ The primary focus of the CEDAW

²³Due Diligence Report, §59; Secretary General’s report, §54;

²⁴Case of OPUZ v. TURKEY (Application no. 33401/02);

²⁵ UN decade of women (a period ranging from 1975 to 1985) focused on policies and matters that affect women, such as equal pays, gender based violence, land ownership and other human rights. On December 15th 1975, The United Nations General Assembly adopted the Resolution 31/136;

²⁶ Convention on the Elimination of All Forms of Discrimination against Women entered into force 3 September 1981, Office of the High Commissioner for Human Rights, <http://193.194.138.190/html/menu3/b/e1cedaw.htm>, visited: 12.07.2004;

²⁷ Sheila Dauer, *Indivisible or Invisible, Women’s Human Rights in Public and Private Sphere*, in *Women, Gender, and Human Rights A Global Perspective*, edited by Marjorie Agosin, 65-82, pg. 67, 2001;

²⁸ Sheila Dauer, *Indivisible or Invisible, Women’s Human Rights in Public and Private Sphere*, in *Women, Gender, and Human Rights A Global Perspective*, edited by Marjorie Agosin, 65-82, pg. 67, 2001;

was originally set on political and economic discrimination and issues that emerged in the public spheres of women's lives until 1993, when the CEDAW Committee officially included gender based violence in its general recommendations (General Recommendation 19, and 12). The General Recommendation 12, demands that States parties include information on violence against women in their reports to the Committee, including information on legislative and other measures they have taken concerning this matter.²⁹ The General Recommendation 19 is more comprehensive and it asserts that state parties are obliged to fight gender violence based on the definition of discrimination in Article 1 of the CEDAW Convention:³⁰

"[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

General Recommendation 19 thus declares that state parties are obligated by CEDAW to work against violence against women.

It is also important to note that the role of the CEDAW Committee expanded in 2001, as the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women came into force on December 22nd 2000, enabling the committee to receive and consider complaints from individuals or groups within its jurisdiction. There are several complaints brought under the Optional Protocol in which the Committee finds that **adequate punishment of perpetrators in cases of VAW is missing** and calls for **implementation of appropriate penal policy** in such cases.³¹

7.2. The Istanbul Convention

➤ Definition

The Istanbul Convention defines violence against women in Article 3(a) as:

"a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic

²⁹UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 12: Violence against women*, 1989;

³⁰UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992;

³¹ See *S. V. P. v. Bulgaria* (No. 31/2001) and *L. R. v. Republic of Moldova* (com. No. 58/2013);

harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”³²

Article 3 (b) of the Convention defines domestic violence as:

“all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.”³³

The Convention undertakes a definition based on two elements: a) the sphere where violence is committed (domestic unit) and/or b) the relationship between the victim and the perpetrator. Such relationships may be intimate-partner relationships or family kinship as pointed out in the Explanatory Report, paragraph 42: *“the drafters recognized that the violence often continues after a relationship has ended and therefore agreed that a joint residence of the victim and perpetrator is not required.”³⁴*

➤ **Substantive criminal law requirements on violence against women**

The Convention puts a strong accent on criminal law. One of its main achievements consists in defining and **criminalizing the various forms of violence against women**. Consequently, Chapter V of the convention lays out exact behaviors that member states should criminalize such as: psychological violence, stalking, physical violence, sexual violence and rape, forced marriage, female genital mutilation, forced abortion and forced sterilization. Member states should also criminalize or otherwise sanction sexual harassment.³⁵

Besides the offences that constitute violence against women, the convention also calls for a number of criminal law provisions aiming at qualifying certain constituent elements of these offences.³⁶

➤ **Prosecution of domestic violence and penal policy in the Istanbul Convention**

The convention highlights the requirements of the principle of due diligence with regard to investigation and prosecution of all acts of violence against women.³⁷ Thus, the Convention

³² Article 3 of the Council of Europe Convention on Preventing and Combating Violence Against Women And Domestic Violence, CETS No.210;

³³ Ibid.

³⁴ Explanatory Report of the Council of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence, CETS No.210;

³⁵ Council of Europe Convention on preventing and Combating Violence Against Women And Domestic Violence, CETS No.210;

³⁶ Article 41, Council of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence, CETS No.210;

³⁷ Chapter VI, Council of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence, CETS No.210;

obliges states parties to provide for an adequate criminal law response to violence against women, irrespective of the nature of the relationship between the victim and the perpetrator (Article 43).³⁸ Article 45 calls for **appropriate sanctions** and remedies attached to the instituted crimes.³⁹ According to this obligation, states should take into account the seriousness of each crime and provide for a **proportionate sanction**, including the possibility of imprisonment.⁴⁰ Moreover, Article 45 provides for other measures that can be taken in relation to perpetrators, such as the overprovision or supervision of convicted persons and the abolition of the right to parenthood, if the best interests of the child, which may include the victim's safety, cannot be provided in any other way. The "best interest of the child" principle is in line with the ruling of the European Court of Human Rights in the case *Zaunegger v. Germany*⁴¹ stating that "decisions regarding the attribution of custody are to be based on the **child's best interest**". Particularly in cases of domestic violence against one parent witnessed by a child, it cannot be in the best interest of the child to further remain in contact with the abusive parent. Ensuring contact with the abusive parent may not only have a negative impact on the child, but could also pose a serious risk to the safety of the abuser's victim because it often gives the perpetrator a reason to contact or see the victim and may not be in line with a restraining or barring order in place. It is important to ensure that all legal measures taken to protect the victims are consistent and that they are not contrary to legal measures taken in other contexts.⁴²

In addition, in the light of the appropriate punishment of perpetrators, Article 42 establishes the obligation of a member state to ensure that culture, customs, religion, tradition or so-called "honor" cannot be accepted as justification for any acts of violence covered by the Convention. This means that the member states are required to ensure that the criminal law and the law on criminal proceedings do not allow that the allegations in which the accused justify their actions to have been committed with the aim of preventing or punishing violations of cultural, religious, social or traditional norms or customs of adequate behavior that the victim has committed or is suspected to have committed cannot be taken into account as mitigating circumstances.⁴³

³⁸ Article 43, Council of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence, CETS No.210;

³⁹ Article 45, Council of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence, CETS No.210;

⁴⁰ Ibid.

⁴¹ Case of ZAUNEGGER v. GERMANY (Application no. 22028/04);

⁴² Explanatory Report of the Council of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence, CETS No.210;

⁴³ Article 42, Council of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence, CETS No.210;

➤ Aggravating circumstances

Article 46 of the Convention lays down circumstances which, if not already part of the criminal offense, may be considered as aggravating circumstances in the determination of the conviction for the offenses set out in the Convention, in accordance with the relevant provisions of national law.⁴⁴

The first of the aggravating circumstances stated in the Article 46 of the Convention is the offence committed against a former or current spouse or partner, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority. In this paragraph the reference to "partners as recognized by internal law" means that, as a minimum, former or current partners shall be covered in accordance with the conditions set out in internal law, bearing in mind that it is the intimacy and trust connected with the relationship that makes it an aggravating circumstance.⁴⁵

The second aggravating circumstance concerns **offences that are committed repeatedly**. This refers to any of the offences established by this Convention as well as any related offences which are committed by the same perpetrator more than once during a certain period of time. The drafters thereby decided to emphasize the particularly devastating effect on a victim who is repeatedly subjected to the same type of criminal act which is often the case in situations of domestic violence.⁴⁶

The third aggravating circumstance refers to **offences committed against a person made vulnerable** by particular circumstances.

The fourth aggravating circumstance covers offences **committed against a child or in the presence of a child**, which constitutes a form of victimization of the child by itself. The authors wished to highlight the particular culpability of the criminal acts covered by this Convention when committed against a child.⁴⁷

The fifth aggravating circumstance is where the **offence was committed by two or more people** acting together. This indicates a collective act committed by two or more people.

The sixth aggravating circumstance refers to **offences preceded or accompanied by extreme levels of violence**. This refers to acts of physical violence that are particularly high in intensity and present a serious risk to the victim's life.

⁴⁴ Article 46, Council of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence, CETS No.210;

⁴⁵ Explanatory Report to the Council of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence (CETS No. 210);

⁴⁶ Ibid.

⁴⁷ Ibid.

The seventh aggravating circumstance, concerns the **use or threat of a weapon**. By including this, the authors emphasize that behavior that includes the employment of a weapon is particularly culpable, as it may cause serious violence as well as the victim's death.

The eighth aggravating circumstance is where the **offence resulted in severe physical or psychological harm for the victim**. This is related to offences which cause particularly serious physical or psychological suffering, in particular long-term health consequences for the victim.⁴⁸

The last aggravating circumstance is where **the perpetrator has previously been convicted of acts of a similar nature**. By including this, the drafters draw attention to the particular risk of **recidivism** for many of the offences covered by the Convention, domestic violence in particular.

➤ **Compensation of victims**

Article 30 of the Convention sets out the right of compensation for damages suffered as a result of any of the offences covered by this Convention, with the perpetrator being primarily liable for damages and restitution.⁴⁹

The Convention also gives an option for compensation to be sought from insurance companies or from state-funded health and social security schemes. Paragraph 2 of Article 30 establishes a subsidiary obligation for the state to compensate. This provision gives an option for interim state contribution to the compensation of the victim. A victim urgently needing help may not be able to wait for the outcome of often complicated proceedings, therefore, in such cases, the Parties can provide that the state or the competent authority may subrogate.⁵⁰ To ensure compensation by the state, Parties may set up state compensation schemes as specified in Articles 5 and 6 of the European Convention on the Compensation of Victims of Violent Crimes.⁵¹

⁴⁸ Ibid.

⁴⁹ Article 30, Council of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence, CETS No.210;

⁵⁰ Explanatory Report to the Council of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence (CETS No. 210),

⁵¹ European Convention on the Compensation of Victims of Violent Crimes, ETS No.116, 24/11/1983;

7.3. ECtHR and jurisprudence regarding DV cases under Articles 3, 8 and 14 and its connection to the Istanbul Convention

During the past eight years, the ECtHR has built up a substantial and important court practice on domestic violence in a relatively short period of time. Violations of the right to be free from torture and from inhuman or degrading treatment under Article 3; the right to respect for private and family life under Article 8 and the prohibition of discrimination under Article 14 have all been determined in cases involving domestic violence considered by the ECtHR.

The Court has found a **failure of the state of Slovakia in providing adequate protection against domestic violence** in **E.S. and Others v. Slovakia**.⁵²In this case, the Court concluded that Slovakia had failed to provide the first applicant and her children with the immediate protection required against her husband's violence, in **violation of Article 3** (Prohibition of inhuman or degrading treatment) **and Article 8** (Right to private and family life) of the Convention. It observed that, given the nature and severity of the allegations, the first applicant and the children had required protection immediately, not one or two years later. Thus, she had been without effective protection for herself and the children during the interim.

In A. v. Croatia⁵³ the Court discussed **failure of state officials to implement measures ordered by courts to protect the applicant**. The Court concluded that there had been a violation of Article 8 (The right of respect for private and family life) of the Convention and that the Croatian authorities had failed to implement many of the measures ordered by the courts to protect the applicant or deal with her ex- husband's psychiatric problems, which appeared to be the root of his violent behavior. It was also unclear whether he had undergone any psychiatric treatment.

In the landmark case of **Opuz v. Turkey**⁵⁴, the Court **found that the state failed to set up and implement an adequate system for punishing domestic violence and protecting the victim**. The Court concluded that there had been a **violation of Article 2** (The right to life) of the Convention concerning the murder of the applicant's mother and a **violation of Article 3** (Prohibition of inhuman or degrading treatment) of the Convention concerning the State's failure to protect the applicant. It found that Turkey had failed to set up and implement a system for punishing domestic violence and protecting victims. The authorities had not even used the protective measures available and had discontinued proceedings in view of violence as a "family matter", ignoring the reason for withdrawing complaints. There should have been a

⁵² Case of E.S. and Others v. Slovakia - 8227/04;

⁵³ Case of A. v. CROATIA (Application no. 55164/08);

⁵⁴Case of OPUZ v. TURKEY (Application no. 33401/02);

legal framework allowing initialization of criminal proceedings irrespective of whether the reports had been withdrawn. The Court also held – for the first time in a domestic violence case – that there had been a **violation of Article 14** (prohibition of discrimination) of the Convention, **in conjunction with Articles 2 and 3**: it observed that domestic violence affected mainly women, while the general and discriminatory judicial passivity in Turkey created a climate that was conducive to it. The violence suffered by the applicant and her mother could have therefore be regarded as having been gender-based and discriminatory against women.

The lack of proper investigation and prosecution of perpetrators and adequate punishment was likewise discussed by the Court in the case of *Eremia and Others v. the Republic of Moldova*.⁵⁵ The first applicant and her two daughters complained about the Moldovan authorities' failure to protect them from the violent and abusive behavior of their husband and father, a police officer. The Court concluded that there had been a **violation of Article 3** (Prohibition of inhuman and degrading treatment) of the Convention in respect of the first applicant and that, despite their knowledge about the abuse, the authorities had failed to take effective measures against her husband and to protect her from further domestic violence. The Court further concluded that there had been a **violation of Article 8** (the right of respect for private and family life) of the Convention in respect of the daughters, considering that, despite the detrimental psychological effects of them witnessing their father's violence against their mother in the family home, little or no action had been taken to prevent the recurrence of such behavior. Lastly, the Court concluded that there had been a **violation of Article 14** (Prohibition of discrimination) of the Convention **read in conjunction with Article 3** in respect of the first applicant, finding that the authorities' actions had not been a simple failure or delay in dealing with violence against her, but had amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman. In this respect, the Court observed that the findings of the United Nations Special Reporter on violence against women, its causes and consequences only went to support the impression that the authorities did not fully appreciate the seriousness and extent of the problem of domestic violence and its discriminatory effect on women in the Republic of Moldova.

It is important to stress that **the broad principles contained in the Istanbul Convention have already been implemented by the European Court of Human Rights** in the recent judgment delivered in the case of *Bălșan v Romania*.⁵⁶ In this case, the applicant suffered repeated domestic abuse at the hands of her partner and sought help from the Romanian police several times. The police mainly ignored her pleas and did not provide her with adequate protection, finding that she had provoked the abuse and her injuries were not serious enough to invoke criminal law. The Court found that this was evidence of discrimination against women in

⁵⁵Case of EREMIA AND OTHERS v. THE REPUBLIC OF MOLDOVA, (*Application no. 3564/11.*);

⁵⁶Case of BĂLȘAN v. ROMANIA (*Application no. 49645/09*);

Romania and, referring to the Istanbul Convention, found that the authorities had violated Article 14 of the European Convention of Human Rights, thus laying the foundation for the Court to continue to refer to the Istanbul Convention in other cases, including when considering the extent of the positive obligations owed to victims of domestic and gender-based violence.

The Istanbul Convention envisages the standards of protection and assistance to victims, which should be made available to victims across Council of Europe Member States, and the European Court of Human Rights could be one of the mechanisms through which much of this is achieved.

7.4. International obligations of Montenegro with respect to CEDAW and the Istanbul Convention with respect to penal policy

Montenegro is a party to the CEDAW, the Istanbul Convention (2013) and the ECHR (European Convention on Human Rights), and accordingly has a duty to address domestic violence as a violation of human rights, and ensure that is effectively investigated, prosecuted and that perpetrators are effectively punished. The proportionate punishment and provision of access to justice and compensation of the damages to victims is one of the crucial elements of prevention and protection of victims of domestic violence. However, it was noted by both monitoring bodies the CEDAW Committee on the implementation of CEDAW by Montenegro and the GREVIO committee in their report on Implementation of the Istanbul Convention in Montenegro that: lenient sentences are pronounced to the perpetrators of gender-based violence against women, despite the recent decision by the Judicial Council to implement tougher sentences (CEDAW Committee in Concluding observations on the implementation of CEDAW Convention in Montenegro) that **perpetrators of gender-based violence against women should be prosecuted and adequately punished with sentences that are commensurate with the gravity of their crimes**⁵⁷ (CEDAW Committee in Concluding observations on the implementation of CEDAW Convention in Montenegro), **that there is a trend for** drastic shift towards much more lenient sentences for domestic violence and that it appears that there is a widespread tendency among prosecution services and the judiciary to route cases involving intimate partners (psychological, sexual and physical violence, including lethal violence) towards a milder possible offence, meaning lesser punishments. (GREVIO)⁵⁸

⁵⁷ CEDAW/C/MNE/CO/2

⁵⁸ GREVIO's (Baseline) Evaluation Report On Legislative And Other Measures Giving Effect To The Provisions Of The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Montenegro, 2018;

8. National criminal legislation with respect to Domestic Violence with accent on penal policy

Domestic violence in Montenegro is prosecuted either as a **criminal offence** under the Criminal Code or as a **misdemeanor offence** under the LDVP and the Law on Misdemeanor that regulates the conditions for proscribing misdemeanor sanctions and misdemeanor responsibility and the procedure for implementation of misdemeanor sanctions. The Law on Criminal Procedure is also relevant for this area.

➤ Definition, scope and delimitation

Montenegrin legislation contains two definitions of domestic violence: Article 36 of the Law on Protection against Domestic Violence (LPDV in the following text)⁵⁹ that prescribes a **misdemeanor liability** of a family member, while Article 220 of the Criminal Code⁶⁰ imposes the **criminal liability** of family members.

The LDVP (Article 2)⁶¹ defines domestic violence as any “omission or commission by a family member in violating physical, psychological, sexual or economic integrity, mental health and peace of another family member”, irrespective of where the incident of violence has occurred.⁶² The LDVP includes current or former non-married partners (whether or not they share or have shared a residence), thus defining the acts and the scope of possible victims in line with the definition of domestic violence as set out in Article 3, paragraph b of the Convention.⁶³

It is important to emphasize the fact that in both Laws there are **no uniform criteria that could be used to distinguish between a misdemeanor offence and a criminal offence** of domestic violence. According to Judges, from the wording of the respective legal provisions it appears that the criminal code provision is reserved for more severe cases of domestic violence perpetrated with more severe violence, while the misdemeanor offence is intended to cover

⁵⁹Article 36 of LPDV, published in Official Gazette of Montenegro, No 46/2010; See Article 152 of LPDV - 40/2011-1;

⁶⁰Article 220 of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004,47/2006 and "Sl. list CG", br. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015 , 44/2017 and 49/2018);

⁶¹Article 2, of LPDV, published in Official Gazette of Montenegro, No. 46/2010; See Article 152 of LPDV - 40/2011-1.

⁶²Article 220 of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004,47/2006 and "Sl. list CG", br. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015 , 44/2017 and 49/2018);

⁶³ GREVIO's (Baseline) Evaluation Report On Legislative And Other Measures Giving Effect To The Provisions Of The Council Of Europe Convention On Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Montenegro, 2018;

mainly psychological violence of all forms. The definition contained in these two legal texts does not support such a precise distinction between the two. In practice, the determination of the legal nature of the act is decided during the pre-trial stage: law enforcement officials called to the incident consult the prosecutor on duty regarding the qualification of the act as a misdemeanor or a crime over a telephone conversation. Depending on the severity of the incident, prosecutors in cooperation with police officers will qualify the case as a misdemeanor or a criminal offence at that precise moment.⁶⁴

That being said, curiously, Article 220 of the Criminal Code also applies where the violent behavior in question has violated the “mental integrity” of the victim. But at the same time, as stipulated in the LDVP, the misdemeanor offence may be invoked for any physical violence as well⁶⁵, thus perplexing the qualification of the deed either way.

Article 220 of the Criminal Code distinguishes five forms of domestic violence. The first, elaborated in Article 220, paragraph 1, represents the basic form of the deed. Under Article 220 paragraph 2,3 and 4, three more qualified forms of the criminal offense of domestic violence are described, related to the degree of violence and the gravity of the consequences of the violation of the bodily or mental integrity of a member of family or family community. The Article 220 in paragraph 5 sanctions the violation of the already imposed protection measures of domestic violence determined by the court or other state authority under the law:

1. Anyone who by use of violence or by an impudent or arrogant behavior endangers peace, physical integrity or mental condition of a member of his family or family community shall be sentenced to a fine or imprisonment not exceeding two years.
2. If for the commission of an act referred to in Paragraph 1 of this Article any weapons, dangerous tools or other means suitable for inflicting heavy bodily injuries or for seriously impairing health are used, the perpetrator shall be sentenced to imprisonment of three months to three years.
3. If, due to acts referred to in Paragraphs 1 and 2 of this Article, a heavy bodily injury is inflicted or health is seriously impaired or if such acts have been done to a minor, the perpetrator shall be sentenced to imprisonment of one to five years.
4. If by acts referred to in Paragraphs 1, 2 and 3 of this Article, a death of a member of a family or a family unit has been caused, the perpetrator shall be sentenced to imprisonment of three to twelve years.

⁶⁴ GREVIO's (Baseline) Evaluation Report On Legislative And Other Measures Giving Effect To The Provisions Of The Council Of Europe Convention On Preventing And Combating Violence against Women and Domestic Violence (Istanbul Convention), Montenegro, 2018;

⁶⁵ GREVIO's (Baseline) Evaluation Report On Legislative And Other Measures Giving Effect To The Provisions Of The Council Of Europe Convention On Preventing And Combating Violence against Women and Domestic Violence (Istanbul Convention), Montenegro, 2018;

5. Whoever violates family protection measures ordered by a court or other state authority under the law shall be punished by a fine or imprisonment up to six months.⁶⁶

Definition of the misdemeanor offence of domestic violence in Article 36 of the LPDV seems to cover a more broadly defined range of behaviors with a focus on controlling, coercive and threatening behavior rather than physical violence. Article 36 includes the use of physical force irrespective of whether it actually inflicts a bodily injury, verbal assaults and insults, rude behavior, damaging of property, controlling and coercive behavior such as prohibiting communication with third parties, stalking, and denying means of subsistence:⁶⁷

- 1) Uses physical force, irrespective of whether it inflicts a bodily injury on other family member;
- 2) Threatens to use force or induces danger that may provoke a feeling of personal insecurity or cause physical pain in other family member;
- 3) Assaults verbally, swears, calls names or otherwise insults other family member;
- 4) Denies other family member freedom of communication with third persons;
- 5) Exhausts through labor, deprives of sleep or other rest, threatens to expel from residence or take away children;
- 6) Sexually abuses other family member;
- 7) Stalks and otherwise severely abuses other family member;
- 8) Damages or destroys joint property or property of other family member or makes an attempt to do so;
- 9) Denies means of subsistence to other family member;
- 10) Behaves rudely and so disturbs family peace of a family member that does not share family community with (article 8, para.1).

Looking at this provision it is obvious that the legislator intended to cover an array of prohibited behaviors constituting domestic violence within the realm of misdemeanor offending, but, as also pointed out by the GREVIO Report, a provision that includes sexual abuse as a misdemeanor offence created an opportunity for the prosecution to systematically route cases of sexual violence within marriage or intimate relationships to the misdemeanor courts.⁶⁸

⁶⁶Article 220 of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004,47/2006 and "Sl. list CG", br. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015 , 44/2017 and 49/2018);

⁶⁷Article 36, of LPDV, published in Official Gazette of Montenegro, No 46/2010;

⁶⁸ GREVIO's (Baseline) Evaluation Report On Legislative And Other Measures Giving Effect To The Provisions Of The Council Of Europe Convention On Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Montenegro, 2018;

➤ **Urgency of procedure**

The Law on Criminal Procedure establishes the right of the accused to be subjected to a trial in the shortest possible time as the basic principle, along with the duty of courts to conduct the procedure without unnecessary delays with an obligation to prevent all misuse of rights of parties in the procedure. However, the Law does not proscribe special urgency for domestic violence proceedings.⁶⁹

On the other hand, LPDV contains certain deadlines that oblige the Court to act in a more urgent manner regarding protection measures, defining the urgency of proceedings in Article. 6.⁷⁰

In general, a clearly defined principle of urgency is missing both in criminal and misdemeanor procedures.

➤ **Sanctions, Aggravating and mitigating circumstances**

Article 4 of the Criminal Code⁷¹ prescribes the type and the general purpose of criminal sanctions that could be pronounced in criminal proceedings:

(1) Criminal sanctions shall include the following: punishments, warning measures, security measures, and correctional measures.

(2) Criminal sanctions shall be prescribed and imposed for the general purpose of suppressing the acts which violate and threaten the values protected by criminal legislation.

Chapter III of the Criminal Code describes the concrete **purpose of sanctions** in Article 32⁷² as to:

1) **prevent a perpetrator from commission of criminal offences** and influence him not to commit criminal offences in the future;

2) **influence others not to commit criminal offences;**

⁶⁹ The Law On Criminal Procedure ("Sl. list CG", br. 57/2009, 49/2010, 47/2014 – decision of the Constitutional Court, 2/2015 - decision of the Constitutional Court, 35/2015, 58/2015, 28/2018 – decision of the Constitutional Court);

⁷⁰LPDV, published in Official Gazette of Montenegro, No 46/2010;

⁷¹Article 4 of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004,47/2006 i "Sl. list CG", br. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015 , 44/2017 i 49/2018);

⁷² Article 32 of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004,47/2006 i "Sl. list CG", br. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015 , 44/2017 i 49/2018);

3) express social condemnation of the criminal offence and emphasize that everyone has a duty to abide by law;

4) strengthen morality and promote social responsibility.

The legislator set the purpose of sanctions in clear manner, inter alia, stressing the preventive function of sanctions in relation to criminal acts through the deterring mechanism.

Sanctions in criminal proceedings against perpetrators of domestic violence are prescribed in Article 220. The Article envisages sanctions in the form of fines and prison sentences, ranging from three months to two years.⁷³

Misdemeanor sanctions are prescribed by Law on misdemeanors in Article 4.⁷⁴ Misdemeanor sanctions are: penalties, warning measures, protective measures and corrective measures (Article 5).⁷⁵ The general purpose of prescribing, imposing and applying misdemeanor sanctions is to influence citizens to respect the legal system, to express public disapproval towards an offender for committing a misdemeanor and to influence him and all other persons to refrain from committing misdemeanors in the future (Article 6).⁷⁶

The sanctions LPDV provides regarding misdemeanor responsibility are fines amounting from 150 to 1000 euro or imprisonment sentence from 10 days to no more than 60 days depending on the qualified form of the violation (Article 36).⁷⁷

Article 39 of the LPDV sanctions civil servants for failing to report violence. Sanctions envisaged for this misdemeanor offence are fines ranging from 100 to 500 euro.⁷⁸

Aggravating and mitigating circumstances are provided in Articles 42-51⁷⁹ of the Criminal Code of Montenegro. Article 42 states that:⁸⁰

⁷³ Article 220 of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004, 47/2006 and "Sl. list CG", br. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015, 44/2017 and 49/2018);

⁷⁴ Law on Misdemeanors, (Official Gazette of Montenegro, No. 1/2011, 6/2011, 39/2011, Ar. 18. is not included in the consolidated text, 32/2014 (Ar. 56. is not included in the consolidated text, 43/2017 – Decision of the Constitutional Court of Montenegro, 51/2017);

⁷⁵ Law on Misdemeanors, (Official Gazette of Montenegro, No. 1/2011, 6/2011, 39/2011, Ar. 18. is not included in the consolidated text, 32/2014 (Ar. 56. is not included in the consolidated text, 43/2017 – Decision of the Constitutional Court of Montenegro, 51/2017);

⁷⁶ Law on Misdemeanors, (Official Gazette of Montenegro, No. 1/2011, 6/2011, 39/2011, Ar. 18. is not included in the consolidated text, 32/2014 (Ar. 56. is not included in the consolidated text, 43/2017 – Decision of the Constitutional Court of Montenegro, 51/2017);

⁷⁷ Article 36 of LPDV, published in Official Gazette of Montenegro, No 46/2010;

⁷⁸ Article 39, of LPDV, published in Official Gazette of Montenegro, No 46/2010;

(1) The court shall fix the punishment for the perpetrator of a criminal offence within the statutory limits for that particular offence taking into account the purpose of punishment and giving due consideration to any circumstances which result in lighter or more severe punishment (mitigating and aggravating circumstances) as well as the following, in particular: degree of culpability, motives for the commission of offence, degree of peril or injury to the protected good, circumstances under which the offence was committed, perpetrator's history, his personal situation, his behavior after the commission of criminal offence, particularly his attitude towards the victim of the criminal offence as well as any other circumstances concerning the perpetrator's personality.

(2) In fixing a fine the court shall give particular consideration to the perpetrator's financial situation.

(3) The circumstance which is an element of the criminal offence may not be additionally taken into consideration as either an aggravating or mitigating circumstance, except where it exceeds the measure required for establishing the criminal offence or a certain form of criminal offence, or where there are two or more such circumstances of which only one is sufficient for the establishment of a more serious or minor form of the criminal offence.

However, the requirement of Article 46 (a)⁸¹ of the Istanbul Convention to introduce aggravated sentences for offences committed against a former or current spouse or partner, family members and persons cohabiting with the victim is not sufficiently covered by the Criminal Code. First of all, the definition of family or family community provided in Article 142, paragraph 31 of the Criminal Code of Montenegro⁸² does not cover intimate partners who have never shared a household - unless they have or are expecting a child together. As a result, aggravating circumstances or criminal acts for which a harsher penalty is prescribed if committed against a family member does not apply to such unions. Second, the murder of a family member, including intimate partners, sanctioned in Article 144 of the Criminal Code⁸³

⁷⁹ Articles 42-51 of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004,47/2006 and the Official Gazette of Montenegro No. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015 , 44/2017 i 49/2018);

⁸⁰ Article 42 of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004,47/2006 i "Sl. list CG", br. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015 , 44/2017 i 49/2018);

⁸¹ Article 46 of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004,47/2006 and "Sl. list CG", br. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015 , 44/2017 and 49/2018);

⁸² Article 142 of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004 , 47/2006 and Official Gazette of Montenegro, No. 40/2008, 25/2010, 32/2011, 64/2011 - 40/2013, 56/2013, 14/2015, 42/2015, 58/2015 - 44/2017 and 49/2018).

⁸³ Article 144 of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004 , 47/2006 and Official Gazette of Montenegro, No. 40/2008, 25/2010, 32/2011, 64/2011 , 40/2013, 56/2013 , 14/2015, 42/2015, 58/2015 , 44/2017 and 49/2018).

will only qualify as an aggravated homicide if the family member has previously been abused. As pointed out by the GREVIO, such restrictive conditions limit the scope of application in a way that is incompatible with the Istanbul Convention.⁸⁴

The LPDV also envisages aggravating circumstances for domestic violence offences committed in the presence of or against a child (Article 36, paragraphs 2 and 3),⁸⁵ thus complying with Article 46 (d). The aggravating circumstances provided in the LDVP are:⁸⁶

“A fine of minimum 250 euro or a prison term of minimum twenty days shall be imposed for the offence on an adult family member who commits violence from paragraph 1 of this act **in the presence of a minor child.**

A fine of minimum 500 euro or a prison term of minimum thirty days shall be imposed for the offence on a family member who commits violence from paragraph 1 of this act and victim is a minor child.

A fine of minimum 1000 euro or a prison term of minimum sixty days shall be imposed for the offence on a family member who fails to report (hides) family member with special needs (article 8, para.3).”

➤ **Security measures pronounced with the sanction by the Courts**

Articles 66 to 78 of the Criminal Code⁸⁷ prescribe the types, conditions and the manner of the imposition of security measures. The court may render one or more security measures to the perpetrator of the criminal offense when there are conditions for their pronouncement.

According to Article 67, the following security measures can be imposed on persons who have committed a criminal offence together with the sanction:⁸⁸

- “ 1) mandatory psychiatric treatment and custody in a medical institution;
- 2) mandatory psychiatric treatment at liberty; mandatory medical treatment of a drug addict;
- 3) mandatory medical treatment of an alcoholic;
- 4) mandatory medical treatment of a drug-addicted person;

⁸⁴GREVIO

⁸⁵Article 36 of LPDV, published in Official Gazette of Montenegro, No 46/2010;

⁸⁶Article 36 of LPDV, published in Official Gazette of Montenegro, No 46/2010;

⁸⁷ Articles 66-78 of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004, 47/2006 and Official Gazette of Montenegro, No. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015, 44/2017 i 49/2018).

⁸⁸ Article 67 of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004, 47/2006 and Official Gazette of Montenegro, No. 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015, 44/2017 i 49/2018).

- 5) prohibition from practicing a profession, activity or duty;
- 6) prohibition of driving a motor vehicle;
- 7) confiscation of objects;
- 8) expulsion of a foreigner from the country;
- 9) publishing of a judgment;
- 10) restraining order;
- 11) removal from the place of residence .”

The changes and amendments of the Criminal Code of Montenegro⁸⁹ introduced two protective measures: The Restraining Order - prohibition of approaching a victim or another person or group or a specific place where there is a risk of a perpetrator committing the same or equivalent criminal offense again (Article 77a) and the Measure of removal from residence or other residential space (Article 77b). These measures are determined by the court and they cannot be in force shorter than one year or longer than five years, counting from the day the decision becomes final, not including the time spent in prison during the duration of this measure (Paragraph 2). One year after the commencement of the implementation of the measure, the court may, suspend it on the proposal of the convicted person, if it determines that a threat of domestic or family violence ceased to exist (Paragraph 3).⁹⁰

According to Article 19 of the LPDV, protective measures are imposed to prevent and suppress violence, eliminate the consequences of perpetuated violence and take effective measures to educate the perpetrator of violence and eliminate the circumstances that favor or encourage committing new offences. In Misdemeanor proceedings, a protection measure can be pronounced with the punishment or as a separate sentence⁹¹ 1) before and 2) during the proceeding and no later than 48 hours from the date of receipt of the application.⁹² An order of protection granted before and during the proceeding may last as long as the reasons for which it was granted are present, limited by the end of proceeding. Before the proceeding ends, a misdemeanor body may replace the order of protection granted before and during the proceeding with another measure of protection (Article 31).⁹³

⁸⁹Articles 77 a i 77b of the Criminal Code of Montenegro (Official Gazette of Montenegro, No. 70/2003, 13/2004, 47/2006 and Official Gazette of Montenegro, No. 40/2008, 25/2010, 32/2011, 64/2011 , 40/2013, 56/2013 , 14/2015, 42/2015, 58/2015 ,44/2017 i 49/2018).

⁹⁰ Ibid.

⁹¹ Article 26 of LPDV, published in Official Gazette of Montenegro, No 46/2010;

⁹²Article 29, of LPDV, published in Official Gazette of Montenegro, No 46/2010;

⁹³Article 31, of LPDV, published in Official Gazette of Montenegro, No 46/2010;

Measures of protection predicted by this Law:⁹⁴

1. Order of removal from place of residence or other premises ('removal from residence');
2. Restraining order;
3. Prohibition of harassment and stalking;
4. Mandatory addiction treatment;
5. Mandatory psycho-social therapy.

A request for a protective measure may be filed to the Misdemeanor Court by a victim or their representative, a center for social welfare or other social or child welfare institution, police or the prosecutor. The Misdemeanor court can also determine the protective measure ex officio.⁹⁵ Article 42 of the Law on Misdemeanors prescribes more protective measures that the Misdemeanor court may pronounce, "that by their application, the state or conditions that may have the effect of causing the perpetrator to commit offences in the future will be removed."⁹⁶

Orders of protection, in accordance with its authority, are to be imposed by administrative authorities in the administrative procedure and misdemeanor body in misdemeanor proceedings.

➤ **Compensation of damage to victims**

Regarding compensation of damage to victims, the Code of Criminal Procedure⁹⁷ grants victims– damaged parties the right to seek compensation in lieu with the criminal proceedings against the perpetrator, under condition that such action does not prolong the procedure too much. In such a case or if the evidence is insufficient for a conviction, the compensation may be claimed separately through litigation.

However, it should be noted that Montenegro adopted a Law on Compensation for Damages to Victims of Violent Crimes⁹⁸ in 2015. that envisages compensation for physical and psychological damage as well as for loss of earnings to be provided by the state. Unfortunately, as pointed

⁹⁴ Ibid.

⁹⁵ Article 27 of LPDV, published in Official Gazette of Montenegro, No 46/2010;

⁹⁶ Law on Misdemeanors, (Official Gazette of Montenegro, No. 1/2011, 6/2011, 39/2011, Ar. 18. is not included in the consolidated text, 32/2014 (Ar. 56. is not included in the consolidated text, 43/2017 – Decision of the Constitutional Court of Montenegro, 51/2017);

⁹⁷ Code on Criminal Procedure ("*Official Gazette of Montenegro*", No. 57/2009, 49/2010, 47/2014 – decision of the Constitutional Court, 2/2015 - decision of the Constitutional Court,, 35/2015, 58/2015,28/2018 - decision of the Constitutional Court,).

⁹⁸ Law On Compensation of Damages to the Victims of Violent Crime (Official Gazette of Montenegro, No. 35/2015);

out by GREVIO Report on Montenegro, this law is not yet in force and will only be in force with the full Montenegrin EU membership.⁹⁹

GREVIO notes in its report that the general opinion of the women's support services is that very few women victims of domestic violence have received adequate compensation from the perpetrator and strongly encourage the Montenegrin state authorities to introduce the State compensation of damages as provided by the Law on compensation for damage to victims of violence, regardless of its accession to the European Union.¹⁰⁰

In conclusion, it could be said that both the Criminal Code and the LDVP treat domestic violence as an offence, a criminal or misdemeanor one. However, both laws fail to provide exact rules of distinguishing whether the offence in question falls under criminal or misdemeanor proceedings. Furthermore, the offences provided in both legal documents overlap to a certain degree, making it possible to qualify sexual offences against a person during acts of domestic violence as a minor deed punished with lower/misdemeanor sentence. Aggravating circumstances are well described in the LPDV with exception of the Criminal Code that fails to meet all the standards set by the Istanbul Convention. Both laws offer a number of protective measures that can be issued together with the punishment.

Finally, in the absence of special state run compensation scheme for victims of domestic violence - due to the delayed implementation of the Law on Compensation for Damages to Victims of Violence - victims depend on the Courts' guilty verdict against perpetrators that will enable them to seek compensation either in criminal proceedings or through additional civil law procedure/litigation.

⁹⁹ GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Montenegro, 2018.

¹⁰⁰ First GREVIO Evaluation Report for Montenegro, paragraphs 160-162

9. Findings of the court practice analysis

Judicial practice of Criminal and Misdemeanor Courts in Montenegro in DV cases

Quantitative research in criminal cases was conducted on 126 enforceable judgments in 2017. Qualitative research was conducted on 108 judgments of the Basic Courts in Montenegro in criminal cases which were available to researchers.

Qualitative research in misdemeanor cases was conducted at random to a selected sample of 327 final misdemeanor decisions¹⁰¹, and quantitatively to 1370 final misdemeanor decisions.

9.1. Criminal or misdemeanor offence/qualification

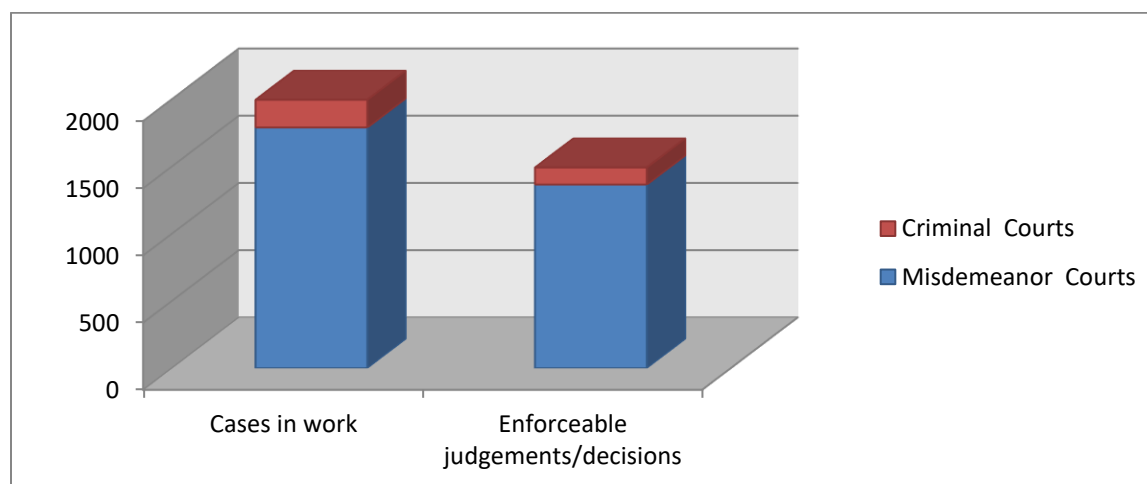
As stated in section eight of this report, in absence of clear defined delimitation principles of what constitutes a criminal offence and what constitutes a misdemeanor offence in DV cases, it is very likely for cases that could be prosecuted as criminal offences to be processed by misdemeanor courts as misdemeanor offences. Hence GREVIO has forwarded this concern stating that there are no uniform criteria that are being applied consistently to distinguish between a misdemeanor offence and a criminal offence of domestic violence.

➤ Number of cases in criminal and misdemeanor courts in 2017

In 2017 the criminal courts of Montenegro processed 206 cases of domestic violence, whereas 126 cases were completed in 2017 with enforceable judgment. Misdemeanor courts worked on 1790 cases of domestic violence in 2017 and 1366 cases were finished with enforceable decisions in 2017. The numbers show that in 2017 there were 90.7% more completed cases in misdemeanor than in the criminal courts. and On the whole, in 2017, the misdemeanor courts had 88.5% more cases than criminal courts, indicating that only every tenth case of domestic violence is qualified as a criminal act.

¹⁰¹ Art. 36 and 37 of the LPDV/ 30 % of finished cases.

Figure 1 Cases in work and enforceable judgments in criminal and misdemeanor courts-2017



➤ **Qualification of the offence**

GREVIO Report on Montenegro has pointed out that even serious cases of physical violence are commonly prosecuted as misdemeanor offences and that, in turn, cases of psychological violence have led to convictions under the Criminal Code.¹⁰² The problem of qualification has been identified in the cooperation between the prosecution and the police where charging decisions of prosecution can occur without direct access to police records and without further investigation of facts of specific cases. The decision of qualification of the offence may be even completed through a telephone conversation and that can easily lead to unjustified decisions.¹⁰³

During the analyses of misdemeanor decisions, it was noted that in 27 cases the deed could have been qualified as criminal offence under Article 220 from the Criminal Code, because it contained elements of grave violence resulting in bodily harm. One of those examples is the case that was tried under Article 36 paragraph 1.1 for two offences committed against victims: "under the influence of alcohol, (the defendant) insulted his father in a grave manner,

¹⁰² GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Montenegro, 2018.

¹⁰³ GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Montenegro, 2018.

(use of expletives) and then threw bags of frozen meet on him hitting him in the head and body,” also “under the influence of alcohol (the defendant) gravely insulted his aunt (expletives) and used physical force against her by dragging her from the bed by her hand and hitting her with his open hand in the head while pulling her hair.” The medical records submitted confirm the existence of bodily harm to both victims.

Another such example that was prosecuted as a misdemeanor rather than a criminal offence even though it contained elements of the criminal deed, as described in Article 220 of the Criminal Code of Montenegro, is a crime of extended duration (prolonged crime) conducted by a recidivist with the use of grave violence, causing bodily harm: “the perpetrator verbally attacked and insulted his wife and then attacked her physically – strangling her with his shirt and hitting her multiple times with fists in the head, causing bodily harm.”

However, it is important to point out that, in the course of the analysis, an isolated case was identified that demonstrated good practice: the public prosecutor re-qualified the offence as a criminal offence from the original qualification as misdemeanor offence by the police:

“The initiated misdemeanor proceedings have been stopped because the State prosecution office has informed the Misdemeanor Court that they have formed a case against the defendant for criminal offence under Article 220, paragraph 2 of the Criminal Code for the same act for which a misdemeanor proceedings were initiated, due to the prosecutor’s estimation based on the gathered evidence referring to the existence of justified suspicion that a criminal deed prosecuted ex officio has been committed.”

The analyses noted that, under the current investigative and judicial practice, there are cases of domestic violence qualified as misdemeanor offence that actually contain the elements of a criminal deed as described under the Article 220 of the Criminal Code of Montenegro. This practice is inconsistent with international standards, especially with the case law of the ECtHR, which declares that state organs have a duty to properly investigate cases of domestic violence and therefore properly prosecute them.¹⁰⁴

¹⁰⁴ Case of BĂLȘAN v. ROMANIA (*Application no. 49645/09*).

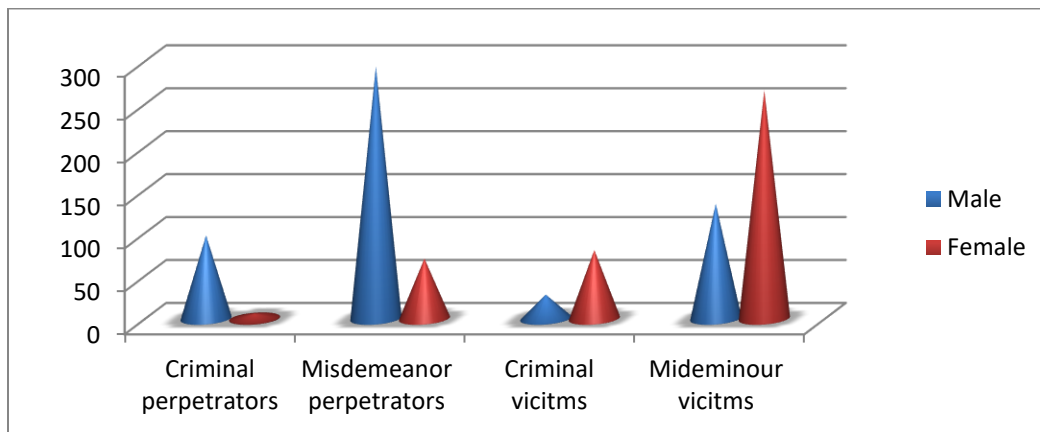
9.2. Profile and relationship of defendants and victims/damaged persons

➤ Gender of defendants and victims/damaged persons

In 2017, the majority of defendants were male and majority of victims/damaged persons were female. Hence, 80.77 % of the defendants in misdemeanor and 92.38% in criminal proceedings in 2017 were male, and 74.04% of the victims in criminal proceedings and 66.17 % of the victims in misdemeanor proceedings were female, confirming the prevalence of gender-based violence.

Further, sample analysis shows that men most often suffer violence from male family members - fathers, sons, brothers.

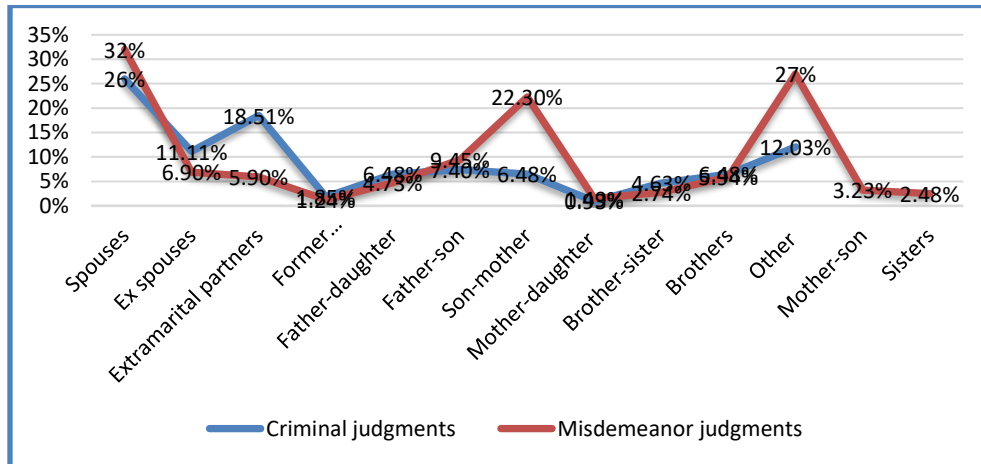
Figure 2 Gender of defendants and victims/damaged persons



➤ Relationship between the defendant and the victim

In the most number of analyzed decisions of both criminal and misdemeanor cases of domestic violence, the perpetrator and the victim were in an intimate partner relationship: spouses (24% in criminal and 28% in misdemeanor cases), ex spouses (11.11% of criminal and 7% in misdemeanor proceedings), extra-marital partners (18.51% in criminal and 6% in misdemeanor proceedings) and ex-extra-marital partners (1.8 % in criminal and 1.25 % in misdemeanor proceedings).

Figure 3 Relationship between the defendant and the victim in criminal and misdemeanor cases

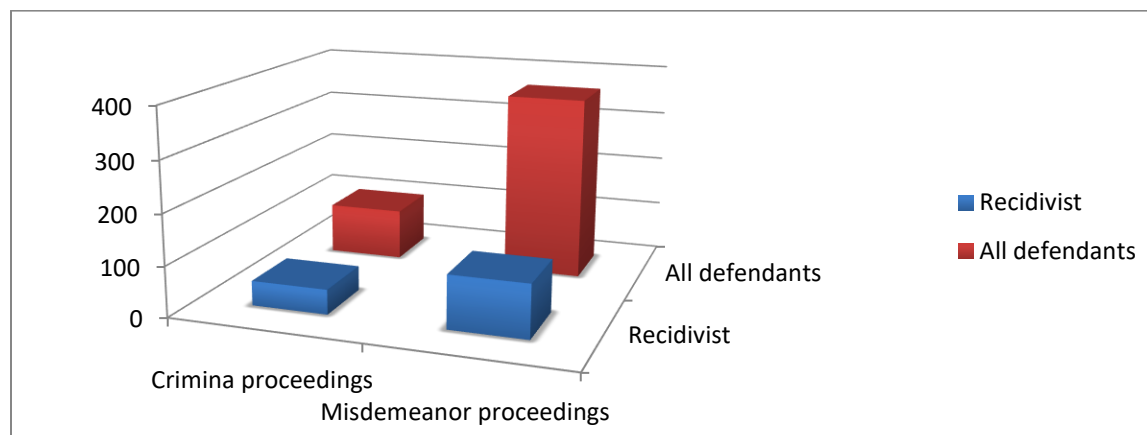


These findings, coupled with the previous findings on the gender of victims, confirm that domestic violence, in most cases, is gender-based violence against women, connected with the traditional distribution of gender roles in the family, which influences the dynamics of present or former partner relations, revealing the still unequal distribution of power between men and women inside the family.

Recidivism of defendants

In criminal proceedings there were 49 recidivists out of 105 defendants, which make up 46 % of all defendants. This data shows a high percentage of recidivism in criminal cases, meaning that almost every second defendant is a recidivist. Among those that had prior convictions, 7 were recidivists (prior convictions for other criminal deeds), 20 of the defendants were multiple recidivists, there were 7 special recidivist (prior conviction under Article 220 of the Criminal Code of Montenegro) and 5 multiple special recidivists, while 3 of them were multiple or ordinary and special recidivists. (In two cases, it was not specified whether there was recidivism).

Figure 4 Recidivism rate in criminal and misdemeanor proceedings



In misdemeanor proceedings, out of 364 defendants, 102 of them were recidivist, which makes 28% of all defendants. Among the recidivists there were 24 regular recidivists (prior conviction for other misdemeanor offences), 17 special recidivists (found guilty for the same offence), 9 multiple regular recidivists, 8 multiple special recidivist and in 46 cases type of recidivism was not reported.

Thus, it was noted that the rate of recidivism, especially special recidivism in both misdemeanor and criminal proceedings but particularly in criminal proceedings, is very high, *i.e.* every second defendant is a recidivist in criminal cases and every third defendant is a recidivist in misdemeanor cases.

These data indicate that violence rarely ends with a single incident, that the repetition and continuity are the basic characteristics of family and partner violence and that the previous penalties did not have a deterring effect on recidivist perpetrators of violence - the facts that judges should consider when deciding on the nature and purpose of the sentence.

9.3. Children witnesses and victims (damaged persons) of violence and failure to address violations of mental integrity of children in judgments

The analysis has revealed that children appear as witnesses or victims of domestic violence in 33 criminal cases of family violence. Out of these, in 24 cases (22.85%) of family violence, children were referred to as witnesses of violence. However, by analyzing the verdicts and the statements of the parties in the proceedings, it was discovered that the children were also direct victims of violence in 7 cases out of the above-mentioned 24, but neither the prosecution nor the courts recognized them as injured parties in the proceedings. As a result, this fact was

not acknowledged in the judgment statement nor did it affect the aggravating circumstances and the amount of the sentence. In addition to these 7, 9 more cases were registered, amounting to total of 16 or 15.2% of cases that involved children as direct victims of family violence. The total number of children exposed to violence was at least 42. This number is not final, given that the exact number of children is not specified even in the cases where the court registered that the children were present. The conclusion on the number of children was based on the statements of the parties the proceedings. Data on children was not included in 21 or 20% of cases.

The following examples illustrate the above allegations – in these cases, children were not recognized as witnesses or as victims / defendants in criminal proceedings, although the data clearly showed that the mental integrity of children was violated and the risk of physical injury existed:

Ex 1: The defendant was tried for making death threats to his former extra-marital partner as well as for attempting to hit her. During the first attempt he was stopped by his minor son and during the second attempt by his minor son and daughter. Among the other threats, the defendant also threatened to throw the children and mother out of the house. The children were not invited to testify in the proceedings.

Ex 2: The accused forced the seven year old son to call his father (the child's grandfather) and tell him that the accused intends to take the boy and his grandfather to a "mad house." The child got distressed and was crying when he told this to his grandfather. In order to protect the child, the grandfather called his daughter in law and asked her to bring the child out of the house and that he will come and take the grandson to his house. The mother followed his advice. The child was in the grandfather's car on the co-driving seat when the defendant opened the door and kicked his father in the stomach and in the head with a fist several times. The child ran away from the car and his mother hid him in the house. According to the mother, the three year old daughter who was in the yard witnessed the whole incident."

Example 3: The injured party "sat on the bed in the bedroom and then her husband got up from the bed and kicked her with a leg, more precisely with his foot in the head. Blood started running from her nose and then the children entered the room and began screaming and crying. After that, they all sat in the living room. Then the husband took the kitchen knife and said, "I will stab you if you leave me." Despite the fact that the children were present at the scene of violence, the court ruled the fact that the defendant is a father of two children as a mitigating circumstance.

Example 4: The damaged party was holding her friends' baby in the arms at the moment when the defendant - her husband hit her so forcefully that she fell on the floor. The baby's mother

took the child into her arms while the father of the child was separating the defendant from the victim. This circumstance has not been taken into account neither in the qualification of the offense nor as an aggravating circumstance when measuring the sentence.

Example 5: The mother / injured party entered the room and found her husband - the accused lying beside their three-month-old baby on the bed, holding the phone in one hand and his penis in the other. She took the child and commented that it was an appropriate thing to do when lying next to the baby, after which he physically assaulted her while she held the baby in her arms. Later, while breastfeeding her baby in his father's car, who was supposed to drive her to her parents, the defendant hit her several times and pointed a cocked gun in her direction.

Example 6: At the time of the attack the injured party held their one-year-old son in her arms and fell with him on the floor.

The sample analysis of misdemeanor cases reveals a similar tendency of misdemeanor courts. Namely, the children were witnesses or victims of domestic violence in as many as 76 or 23.2% of the total number of analyzed decisions of misdemeanor courts, which included 94 offenses. Out of this, in 13 or 4% of the cases, the court recognized the children as witnesses of violence i. e. the procedure was conducted in conjunction with Article 36 paragraph 2 of the Criminal Procedure Law, which prescribes tougher penalties for violence committed in the presence of a child¹⁰⁵.

Furthermore, children were recognized as direct victims of violence in 8 or 2.4% of cases (8 offences). The courts acted in accordance with Article 36, paragraph 3 of the LPDV¹⁰⁶, while in 4 or 1.2% of the cases (7 offences) the children were both witnesses and direct victims of violence. In these cases, the court acted in accordance with Article 36, paragraph 2 and paragraph 3 of the LPDV, which provides stricter penalties.

In 14 or 4.3% cases (14 offenses), children were victims of neglect and the proceedings were conducted against the children's parents, in accordance with Article 37, Paragraph 1 of the LPDV¹⁰⁷.

¹⁰⁵ Article 36, paragraph 2 of LPDV: "Fine of minimum five-fold minimum salary in Montenegro or a prison term of minimum twenty days shall be imposed for the offence on an adult family member who commits violence from paragraph 1 of this act in the presence of a minor child";

¹⁰⁶ Article 36, paragraph 2 of LPDV: "A fine of minimum ten-fold minimum salary in Montenegro or a prison term of minimum thirty days shall be imposed for the offence on a family member who commits violence from para. 1 of this act and victim is a minor child".

¹⁰⁷ Article 37 of LPDV "A fine of minimum five-fold minimum salary in Montenegro or a prison term of minimum ten days shall be imposed on abuser who does not take sufficient action to provide the following: 1) food, personal hygiene, clothing, medical care or ensure regular school attendance or his failure to prevent the child from being in harmful company, as well as from vagrancy, beggary or theft or otherwise severely neglects his duties concerning child development and education (Article 8, paragraph 2, subparagraph 1); 2) food, personal hygiene, clothing or

However, the reason for concern is the result of an analysis that shows that in 37 or 11.3% of cases involving 51 offenses, children witnessed or were directly exposed to violence, and the courts did not recognize them neither as witnesses of violence nor as the damaged ones in the proceedings. Consequently, they acted in accordance with the Article 36 Paragraph 1 of the Law on Criminal Procedure, which provides for a significantly shorter sentence compared to paragraphs 2 and 3 of the same Article that covers offenses committed in the presence of a child or against a child.

The following is an example of a misdemeanor case related to child exposure to violence:

Example 1: Although it is clear from the factual description of the misdemeanor offence that the three minor children of the defendant were also injured as the defendant shot from firearms in the ceiling while the children were in the house, and the factual description of the deed even stated that this caused a sense of personal uncertainty of children, the offence was not qualified as the more serious form of the deed under Article 36 paragraph 3 of the LPDV but under the basic deed of Article 36 paragraph 1. The Court only recognized that the offence was committed in the presence of children, regarding it as an aggravating circumstance.

Having in mind the above examples and the data presented, it could be assumed that prosecution and courts often fail to recognize the position of children in domestic violence cases, resulting with lesser qualification of deeds, or with denying children's status of a victim, which on other hand impacts the outcome of procedures, especially with respect to sentencing of defendants. This kind of court practice is incompatible with the Istanbul Convention, the ICRC, and the case law of the ECtHR that found that children who witness violence are also victims and institutions have to take adequate measures to protect them.¹⁰⁸

The fact that no child safety measures¹⁰⁹ have been imposed in any of the criminal cases is particularly concerning. The Misdemeanor Court has imposed protective measures in one case only and these measures included the Order of removal from the place of residence and the Restraining Order that referred both to the damaged party – the perpetrator's wife and their underage child. Lack of protective measures and the lack of recognition of children as witnesses / victims of violence in practice most often means that a violent family member, if he or she does not serve a prison sentence, and sometimes even in that situation, misuses contact with

medical care to other family member who he has a duty to take care of, where this family member needs special care for reason of his illness, disability, old age or other personal characteristics, which prevent him from taking care of himself (Article 8, paragraph 2, subparagraph 2)."

¹⁰⁸ ***Eremia and Others v. the Republic of Moldova***: "There had been a violation of Article 8 (the right of respect for private and family life) of the Convention in respect of the daughters, considering that, despite the detrimental psychological effects of them witnessing their father's violence against their mother in the family home, the children were not protected."

¹⁰⁹ Measures prescribed in articles 77a and 77b of the Criminal Code of Montenegro;

children thus exposing them to a greater risk of violence. Apart from the fact that this kind of criminal policy does not protect children and non-violent parents from further violence, it creates an erroneous image, i.e. reduces the actual extent of family violence and data on the number of children exposed to trauma that inevitably develops not only through direct exposure to violence but also through witnessing violence directed against a close family member, most often a mother, who is, in most cases, a non-violent parent and primary caregiver. Similar observations have been made by GREVIO, which in its report on Montenegro states that "the degree of recognition of the harmful consequences of children witnessing family violence is very small among social workers and members of the judiciary in Montenegro", and that acts of violence directed from one parent against the other have a serious impact on children.

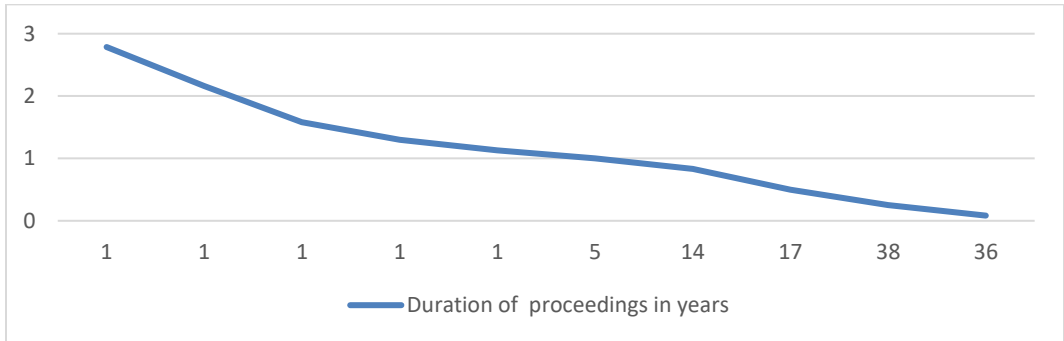
9.4. Duration of the criminal and misdemeanor proceedings

In order to calculate the duration of court proceedings, the researchers measured the time period from the date of indictment to the date of public announcement of judgments and decisions.

In criminal cases these dates were shown in 100 enforceable judgments, from the 104 that were analyzed. The analyses showed that the cases lasted up to one month in 26 cases, until three months in 38 cases, between three and six months in 17 cases and between six and 14 months in 14 cases. In five cases proceedings lasted over a year with the shortest one from this category lasted one year and the longest two years and nine months.

On average the proceedings in criminal cases lasted 5 months and 20 days.

Figure 5 Duration of criminal proceedings in years - 2017



In misdemeanor cases, the longest case lasted one year, and the shortest one lasted only one day in 11.3% of cases, which was identified as a good practice.

Average duration of proceedings in misdemeanor cases was three months and 15 days, which is reasonably swift and efficient as also pointed out by the GREVIO Report on Montenegro.

Criminal proceedings tend to last longer than the misdemeanor proceedings, thus, in 2017 the duration of criminal domestic violence cases was 40 % longer than the duration of domestic violence misdemeanor cases.

9.5. The type and level of criminal and penal sanctions analyses

9.5.1. Type of judicial decisions

In criminal cases, out of 126 judgments (total number of finished cases in 2017) there were 121 guilty verdicts, four acquittals and one dismissed case.

In misdemeanor proceedings, out of 327 decisions (30% representative sample) there were 209 guilty decisions, 139 acquittals, three dismissals and 12 decisions on discontinuation of the process.

Figure 6 types of judicial decisions in criminal proceedings 2017

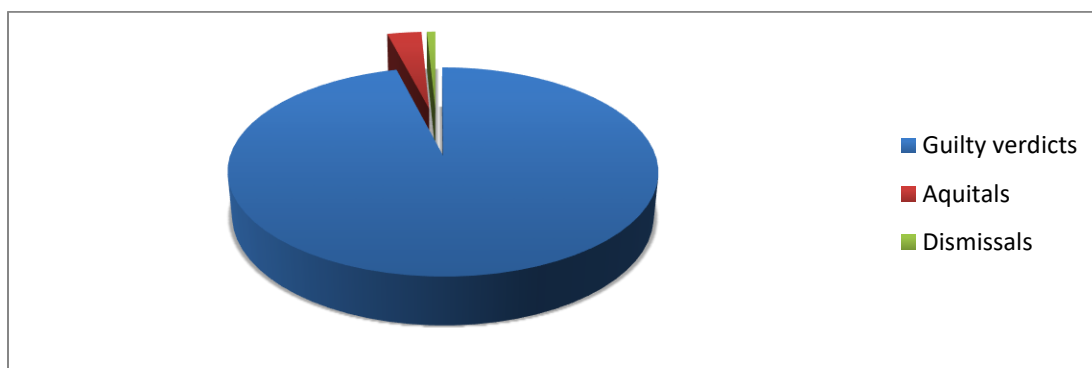
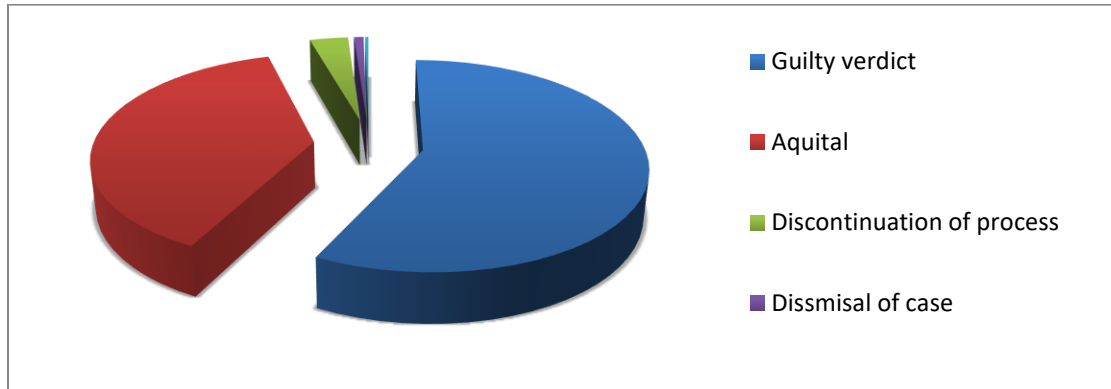


Figure 7 types of judicial decisions in misdemeanor proceedings 2017



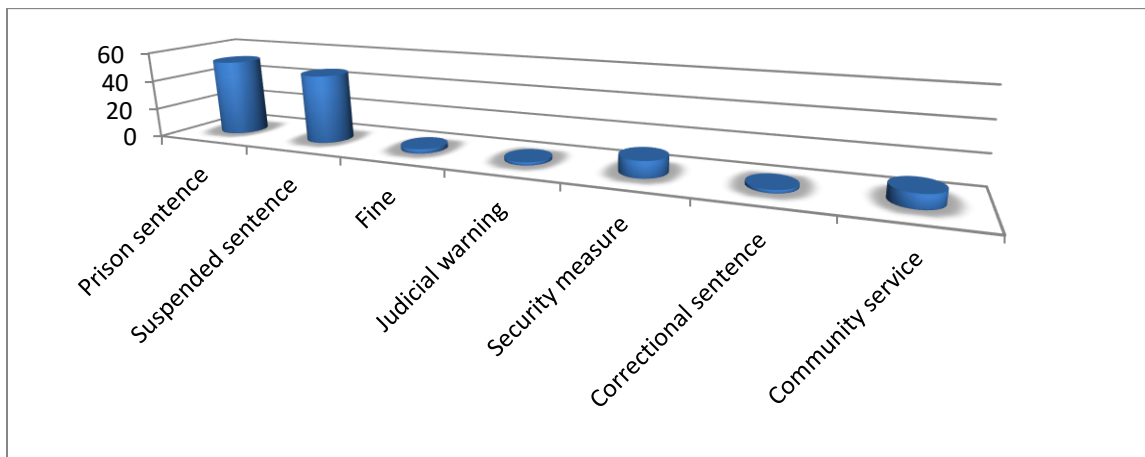
From the received data it can be concluded that 96% of decisions in criminal proceedings are guilty verdicts as opposed to misdemeanor proceedings where only 57% were condemning decisions.

9.5.2. Type of imposed sanctions in criminal proceedings

The sentencing decisions of the 121 criminal judgments were examined and analyzed to survey the frequency and characteristics of sanctions imposed for domestic violence. Thus, it was found that the following types of criminal sanctions were imposed on defendants: punishments, warning measures, security measures and correctional measures.

Out of the imposed punishments - 3 were fines, 52 were prison term, and 9 were community service. When it comes to the imposed warning measures, 47 were suspended sentences and 2 were judicial warnings. Finally, 11 security measures and 2 correctional measures were imposed .

Figure 8 Type of criminal sanctions imposed on defendants in criminal cases



From the received numbers it can be seen that 37.3% of the sanctions were suspended sentences, 41 % were prison sentences, 7.1 % were community service, 1.5% were judicial warnings, 8.7% security measures and 1,5% correctional measures, showing that prison sentences and suspended sentences make up the majority of the sentences imposed on perpetrators of domestic violence in criminal cases. Based on the results, it can be concluded that that judges often use suspended sentence, as every third imposed sanction in domestic violence criminal cases is a suspended sentence.

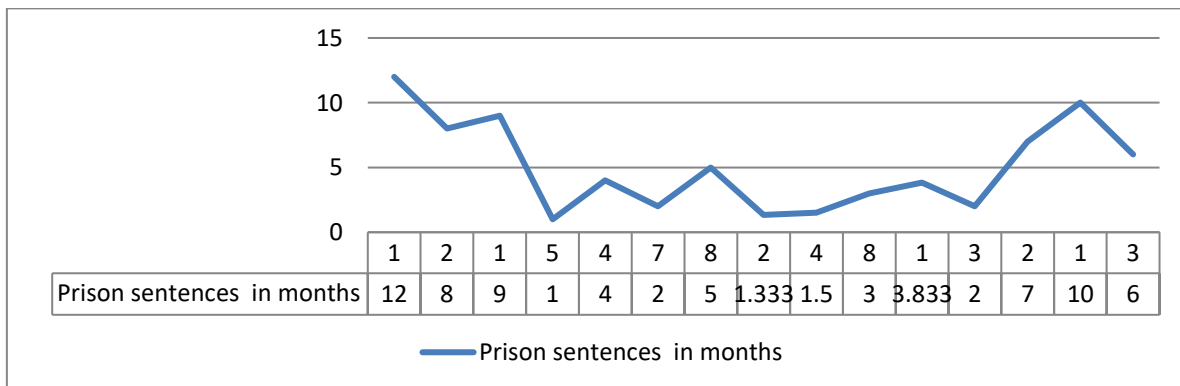
- **Fines** - 3 monetary fines pronounced to perpetrators, were of 600, 800 and 2000 euro each.

The analyses of court judgments revealed the use of fines in cases where the defendant is a special recidivist, as well as in cases where there was use of grave (gross) violence which puts the proportionality of the committed crime and the given sanction in question.

In the following case the perpetrator was given only a fine despite the fact that he is a special recidivist for the "use of grave violence that violated the physical integrity of his family member *i.e.* his extramarital wife in a way that he hit her head with fists several times, after that, he grabbed her hands and threw her on the bed, then sat down on her and hit her with fists in the chest area on the left and right side, which caused injuries to her body in the form of an early split in the area of the nose with a diameter of about 3 x 1 cm, hematoma of upper eyelid and split upper lip, about 1 x 1 cm in diameter...."

- **Prison sentences and judicial warnings** - Within this category, the majority of the prison sentences were of short duration: 87% per-cent of prison sentences were of one to six months in length, while 13 % were of six to twelve months duration. The shortest imposed sentence was 30 days in five cases and the longest was of one year in only one case. The average sentence imposed was three months and 23 days. There were only two court warnings.

Figure 9 Prison sentences in months –criminal proceedings



From the judgment analyses it was obvious that courts generally fail to provide an explanation for imposing more onerous sanctions in cases where prison sentences were applied. However, it seems that the court considered the offences to be more serious or took into account the presence of aggravating factors. An examination of the cases shows that many involved death threats, long-term and continuous violence or other aggravating circumstances.

Less than half of the prison sentences were imposed for charges of aggravated offences. However, the statistics also show that most of those who are convicted of aggravated offences do not actually receive a prison sentence, but rather a suspended sentence. These statistics also demonstrate that the courts are consistently applying sentences at or below minimum statutory levels which do not commensurate to the offences committed and are further mitigated by illogical mitigating circumstances.

In the following example, the victim stated that the defendant hit her during her pregnancy, and that she had to escape from the house several times, but eventually came back. Her statement was accepted by the court as “true and believable that the defendant in the prosecuted event hit her with a belt over her whole body, than took her to the hallway and continued to hit her with her high heel shoe in the head.” Even though the victim was pregnant, and the defendant committed severe violence against her, the Court pronounced only the five months prison sentence to the perpetrator, stating the fact that he is a family man and father of children as a mitigating circumstance, despite the fact that the violence occurred in presence of the children, which is defined as an aggravating circumstance both by national legislation and Istanbul convention. Additionally, children were not recognized as victims.

The next example also points out to low penalty policy: The defendant was punished with 10 months of imprisonment (below the legally proscribed maximum of one year) which is not proportionate to the gravity of the crime, having in mind the brutality of the violent act. The witness stated that the violence would have ended with the death of the injured person, if he did not happened to pass by the place of violence and asked for help. The witness also stated that four people were barely able to separate the perpetrator from the victim; that the perpetrator used grave violence and caused severe bodily harm to the victim. In addition, the perpetrator is a multiple special recidivist, previously sentenced to 7 years in prison for one of the acts of domestic violence he committed.

Another example of a mild penal policy and improper use of court warning is found in the case where the perpetrator was prosecuted for the criminal offense from Article 220, paragraph 1, which was of extended duration (a prolonged crime), of two consecutive days “the defendant was physically violent to his wife, caused bodily harm, threatened and insulted her, and several months before he threw her suitcases down a cliff and was eventually pushing her to/ as well.” The court believed her testimony, which is corroborated by medical records. However, the

judge only imposed a court warning to the defendant "... the court considers that only a warning will have an affect enough on the defendant to refrain from this and similar criminal offenses."

As a matter of concern, from the analysis of verdicts, no full explanation can be drawn as to why some of the serious offences of domestic violence receive rather lenient punishments as in the above mentioned cases. It was noted that sentencing of domestic violence cases in criminal proceedings is unbalanced comparing to the intensity and the consequences of violence and therefore inadequate. It is possible that cases of similar intensity of violence and similar injuries to the victims are very differently viewed by various judges in different cases resulting in pronouncement of totally different sanctions for similar crimes.

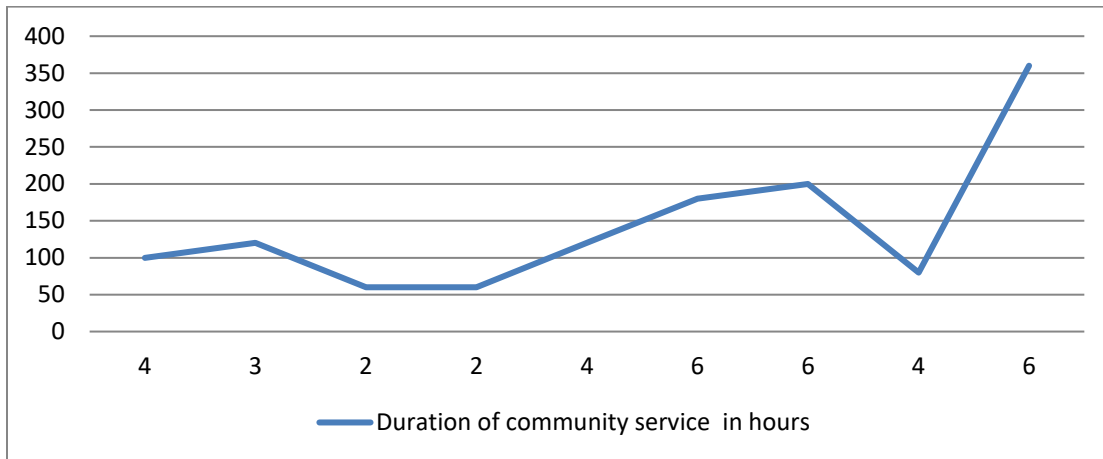
It was further noted that wholly unfounded sentences were imposed which were contrary to the very nature of the punishment, such as imprisonment carried out in residential premises, in accordance with Article 36a of the Criminal Code of Montenegro. Thus, in one criminal case in which the defendant was convicted of 2 offenses - Domestic or family violence from Art. 220 par. 2 in connection with para. 1 of the Criminal Code of Montenegro and the criminal offense of illicit possession of weapons and explosive substances referred to in Art. 403 par. 2 of the Criminal Code of Montenegro, the court imposed a single sentence of 5 months imprisonment to be served by the accused to serve him in the premises where he lives. A security measure was also pronounced to confiscate weapons and ammunition from the accused, as objects of commission of a criminal offense.

In this case, the defendant in his family home "by violent violence violated the mental integrity of his family member - wife" by "slapping 5,6 times with an open fist in the face and striking twice with his fist, pulling his hair, then grabbed a knife, a device similar to the one badly injuring her body and damaging her health, and told her that he would disarm her in the home with unauthorized weapons and ammunition, as follows: automatic rifle brand "CZ" model ..., 7.62x39 mm caliber, factory number. .. - Category A weapons, the prohibition of which is prohibited by citizens and the possession of a pistol, brand "CZ" model ..., caliber 7,65mm, factory number ..., Category "B" without a license for acquisition, holding and carrying weapons and 95 pieces of ammunition, of which 37 pieces of 7.62x39 mm caliber for automatic and semi-automatic rifle and 58 pieces of ammunition for 7.65 mm caliber pistol, contrary to Article 5 paragraphs 1 and 2, Article 23 and Article 29 Of the Weapons Act. "

Such treatment of victims could also qualify as inhuman and degrading treatment or even torture.

- **Community service**- there was 9 such punishments pronounced by courts in 2017. The average duration of community service was 168 hours.

Figure 10 Duration of community service in hours –criminal proceedings



During the analyses of the judgments, it was observed that there are a number of cases where special recidivists of domestic violence are imposed with a sanction of community service.

An example of that is the following case, where the defendant, a special recidivist, was given a sanction of community service. The court reasoned: "Among the mitigating circumstances are the family circumstances of the defendant, since he is a father of two children, his poor financial situation, as well as the fact that the injured person did not join the criminal prosecution. The court considered an aggravating circumstance the fact that he was convicted once for the same criminal offense, being a special recidivist. Bearing in mind the quality of the mitigating circumstances and despite the earlier conviction, taking into account the accused's personality and bearing in mind that the accused agreed to serve a sanction of community service, pursuant to Article 41 of the Criminal Code, the court pronounced sanction of community service of 100 (hundred) hours, which was to be carried out within a period of four months." Interestingly enough, the court did not elaborate which part of the defendants personality was to serve as a mitigating circumstance and how the mitigating circumstances were of a higher importance than the aggravating circumstances?

- **Suspended sentences** - The most notable finding regarding sentencing for domestic violence is the high number of suspended imprisonment sentences, which accounted for 37.4 % of the total number of sanctions pronounced. It is also notable that most of the imprisonment sentences that were suspended were rather low. Data shows that in the majority of cases where the court had determined the imprisonment sentence the duration was between 45 days and 12 months. The probation period ranged from one to two years. Average suspended sentence pronounced in criminal cases in 2017 was 30 days of imprisonment with one year probation.

Results of the analyses showed that cases which were concluded with a suspended sentence embraced the full spectrum of domestic violence offences. The analyzed cases included frequent accounts of beatings, slapping, physical assault causing injuries or the use of weapons such as knives or firearms. Verbal abuse was frequently reported, including death threats. Recidivists and special recidivists were among those who received suspended sentences.

In the following case, the accused “kicked her with his legs in the head and body area after which she lost consciousness”. However, he received a one month suspended sentence with one year probation. In another case the defendant, by the use of grave violence, caused grave bodily harm to a member of his family, his minor extramarital partner that stated that there were prior incidents of violence. He was on trial for two criminal deeds: for criminal deed of extramarital union with a minor Ar. 216 CC for which he received a prison sanction of two months and for the criminal deed of family violence (Art 220 paragraph 3.1.) “He hit the victim multiple times with hands in her head and body saying that she must not wake him up, so when the victim went to the police to report him, he went after her and continued to hit her with his hands and then threw her on the ground causing her head injury...” He was sentenced with the 3 months of imprisonment. Finally the sentences were suspended and the defendant was sentenced with one year of probation.

- **Security measures** – analyses showed that the courts pronounced small number of security measures, only 8.7% out of all sanctions. The most frequently pronounced security measures were: mandatory treatment of substance abuse and seizure of fire arms in three cases, followed by mandatory outpatient psychiatric treatment, mandatory psychiatric inpatient treatment in two cases and mandatory treatment of alcoholism and abuse of substances in one case.
- **Correctional measures** – Two correctional measures were pronounced as sanctions to juvenile perpetrators in domestic violence cases: spending time in educational institution in the first and strengthened observation by guardianship authority in the second case.

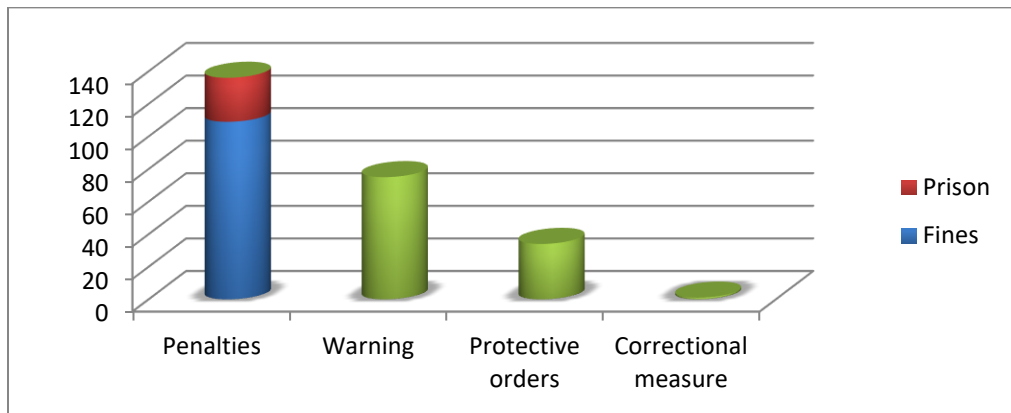
9.5.3. Type of imposed sanctions in misdemeanor proceedings

The sentencing decisions of the 327 misdemeanor decisions were examined and analyzed to survey the frequency and characteristics of sanctions imposed for domestic violence. Types of sanctions that were given to defendants that were found guilty were: penalties, warning measures, protective measures and correctional measures. The penalties imposed were fines and prison sentences. During the analyzed time period (year of 2017) there were 136 penalties,

75 warning measures, 34 protective orders and one correctional measure. Among penalties there were 109 fines and 27 prison sentences. The majority of sanctions pronounced were penalties - 65% among which as many as 81 % were fines and only 19.58% prison sentences, 35 % of them were warning measures, 16% - protective measures and 0.48% correctional measures.

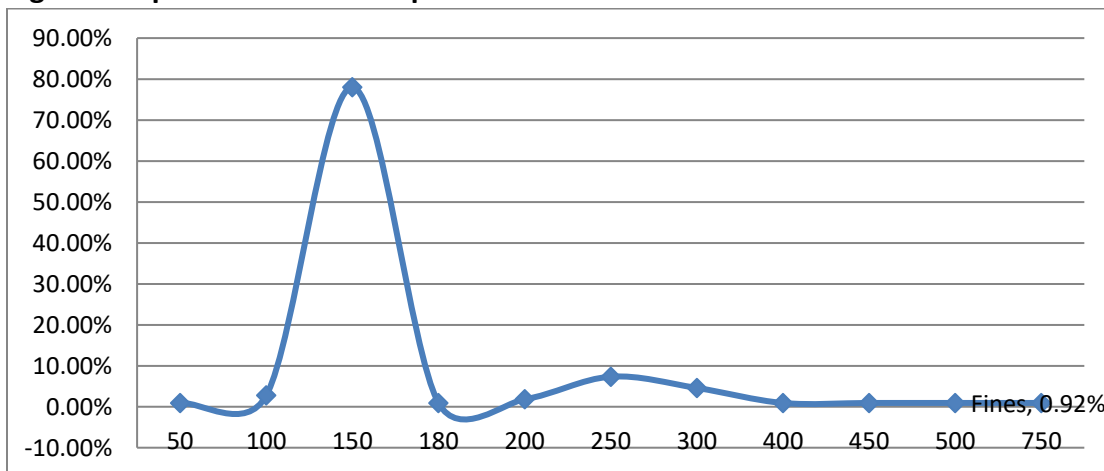
Prison sentences amount to only 8.2% among all sanctions in misdemeanor cases. It is evident that the most often pronounced sanctions in misdemeanor cases are fees which amount to 33% of all misdemeanor sanctions, followed by protective measures - 16 % and suspended sentences pronounced in 14% of cases.

Figure 11 Type of imposed misdemeanor sanctions



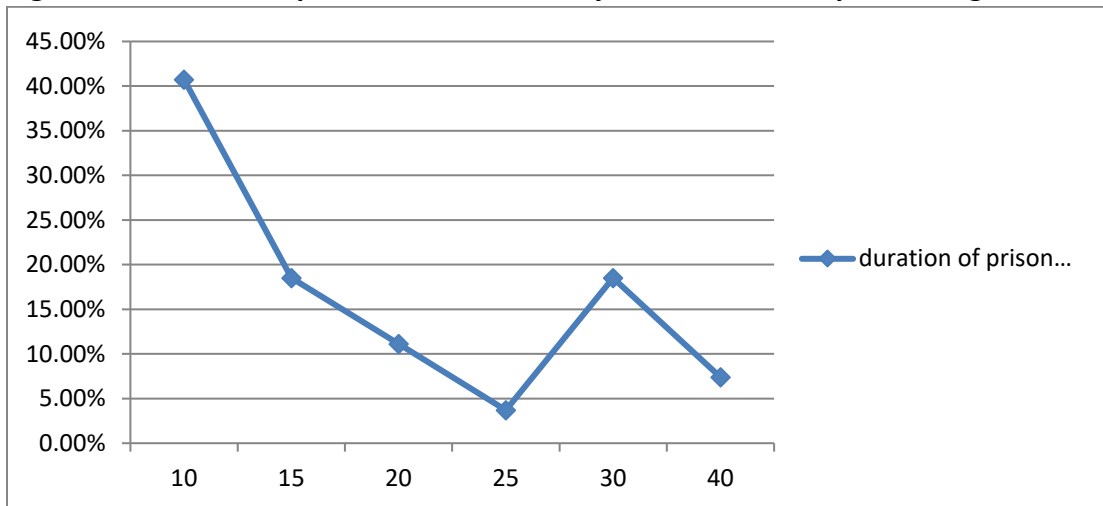
- **Fines and prison sentences** - the lowest fine given in the analyzed sample of judgments was 50 euro and the highest fine noted was 750 euro. Average fine given in 2017 was 176.88 euro which is on the lower end of the legally proscribed fines.

Figure 12 Spectrum of fines imposed in misdemeanor



- The lowest prison sentence noted in the representative sample of judgments used was 10 days, and the longest was 40 days. On average, in 2017, prison sentences for misdemeanor offences of domestic violence lasted 15.5 days, showing a very low average score, prompting the observation that majority of imposed prison sentences in misdemeanor cases are very low, closer to the legal minimum proscribed by the LPDV.

Figure 13 Duration of prison sentences in days - misdemeanor proceedings



From the analyses of court decisions in misdemeanor cases, it is obvious that courts have imposed prison sentences in a low number of cases and fines in high number of cases. Alike criminal judgments, use of lenient punishments, sentencing well below the maximum proscribed penalties, lack of uniformity of legal ratio applied when sentencing was observed in misdemeanor judgments as well. Also, cases were noted where special recidivists did not receive harsher penalties but were treated as first time offenders. In the following case, the perpetrator - a special recidivist threatened his wife with which he no longer lives in a marital union by calling her on the phone and making the following threats to her: "I will make your life a living hell, you will not be able to leave the house, you will curse me when you see what I will do to you...I will go to your workplace tomorrow and disgrace you in front of your colleagues..." Court found him in violation of Art. 36 paragraph 1.2 and imposed a fine of 150 euro, a minimal fine proscribed for this deed, not taking in account that he is a special recidivist.

Furthermore, cases where special recidivist receive minimal prison sentence were also registered, such as in the example that follows. Namely, the perpetrator, a special recidivist threatened his wife by saying: " I will kill you, beat you, leave the house (expletive)!" The court found him in violation of Article 36 paragraph 1.2 of the LPDV and even though it was recognized that he is a special recidivist and prone to violence, it was nevertheless considered that a minimal legally proscribed prison sentence would be adequate and would fulfill the purpose of misdemeanor sanction, stating: "During the elaboration and deciding about the type

and duration of punishment, and having in mind that for this deed a minimum of 10 day prison sentence is proscribed by the law, or monetary fine of at least 150 euro, as well as that in previous years he was also punished for the same offense..... and that the perpetrator has tendency towards violent behavior, the court imposes a sanction of 10 days in prison , with conviction that the purpose of misdemeanor sanction is realized and that the defended will in future refrain from similar offences.”

Additionally, cases where only monetary fines were imposed on defendants by Courts for offences of extended duration (prolonged crime) and by recidivist with use of grave violence, have also been registered, such as in the case of the perpetrator verbally attacking and insulting his wife, and then attacking her physically by strangulation with the use of his shirt, and hitting her multiple times with fists in the head. The Court found him in violation of Article 36 paragraph 1.1 of the LPDV in prolonged duration and pronounced a fine of 150 euro.

- **Warnings** consist of suspended sentence and judicial warning, among which there were 44 suspended sentences and 31judicial warnings pronounced.

The analyses of the judgments also identified imposing of judicial warnings to cases where grave violence was used by defendant. In one of the identified cases, the defended grabbed his wife by the hair and hit her with fists on her back, kicked her multiple times in her legs. Medical report found bodily injuries in a form of edema and hematomas. The court stated:”In this particular case, the court believes that the misdemeanor sanction of judicial warning will have a deterring effect...”

- Protection measures –out of 136 punishments in 2017, 120 were pronounced without a protection measure, whereas in 16 cases protection measures were pronounced with the punishment; out of the 75 warning measures, 17 were given together with protection measures. Only 19 % of sanctions were pronounced with protection measure.

Therefore, in cases finished in 2017 there were 83 protection measures. The imposed protection measures were: removal of objects - 1.2%, prohibition of profession or duty - 2.41%, prohibition to drive a motor vehicle - 0%, mandatory treatment of addiction and alcoholism - 8.43%, mandatory treatment of substance abuse - 1.2%, mandatory inpatient psychiatric treatment - 2.41%, mandatory outpatient psychiatric treatment - 3.61%, publishing a judgment - 0% and removal of foreigner from Montenegro - 0%.

Protection measures that were given based on the LPDV were: removal from apartment or other living space - 25.3 %, prohibition of stalking - 43, 37% and mandatory treatment of addiction - 2.24%.

Overall, the majority of domestic violence cases in criminal and misdemeanor proceedings that were analyzed in this report show: mild penal policy and under-charging, inconsistency in sanctioning, un-substantiated and groundless legal reasoning regarding imposing of sanctions, lack of proportionality between the pronounced sanction and the committed crime and failure to connect the involvement of children in domestic violence processes with the intensity of sanctioning. Also, the perceived under-charging indicates a lack of understanding of the nature and forms of domestic violence by judicial professionals. It demonstrates a lack of awareness to gender, sexual violence and child welfare issues. The current modus of sanctioning does not seem to adequately serve the purpose of punishment to provide protection and gratification to victims and to deter perpetrators from re-offending. Furthermore, it is contrary to the international standards and the case law of the ECtHR that clearly established that appropriate punishment of perpetrators is a duty of the relevant institutions.¹¹⁰

The high recidivism rate perceived among defendants - every second in criminal cases and every third in misdemeanor cases - is a good indication of ineffectiveness of imposed sanctions, or, in other words, the more lenient the punishments are, the higher the rate of recidivism is.

9.6. Aggravating and Mitigating circumstances

9.6.1. Aggravating and mitigating circumstances in criminal proceedings

The 121 criminal judgments were analyzed in order to see whether they involved aggravating or mitigating circumstances and those who were found to involve them were analyzed in detail, regarding how these circumstances are considered when pronouncing the sentence.

Criminal legislation requires courts to measure the punishment within the limits provided by law for that particular offence, bearing in mind the purpose of punishment and taking into account mitigating and aggravating circumstances, which include “degree of culpability, motives for the commission of offence, degree of peril or injury to the protected good, circumstances under which the offence was committed, perpetrator’s history, his personal

¹¹⁰ Case of EREMIA AND OTHERS v. THE REPUBLIC OF MOLDOVA, (*Application no. 3564/11.*);

situation, his behavior after the commission of criminal offence, particularly his attitude towards the victim of the criminal offence as well as any other circumstances concerning the perpetrator's personality."¹¹¹

Mitigating circumstances were identified and used as grounds for reduction or imposition of a lower sentence in 92 cases. A wide variety of such factors were taken into consideration. The following mitigating circumstances were found in the analyzed judgments (some judgments enumerate more than one mitigating circumstance thus percentages are above 100 %).

Fact implying that the victim did not joint criminal prosecution – 48 (52, 17%);

Family status of the defendant 57 or 62% (father of children- 46 or 50%; married father of children – 8 or 8, 69%; married – 3 or 3, 26%;

No prior convictions – 43 (46, 73%)

Personal circumstances of defendant (damaged health condition, mature age, unemployed or young age - 39 (42, 39%)

Relation to the deed committed – remorse or apology given – 28 (30, 34%)

Poor financial status - 28 (30, 34%)

Other – 10 (10, 86%)

No mitigating circumstances – 3 (3, 26%)

Degree of culpability – 1 (1%)

Frequent reference was made to lack of prior convictions on the part of the accused - 46.73% of cases. Admission of guilt, expressing remorse for the crime or a combination of both was amongst the circumstances most frequently accepted by the courts as mitigating circumstances in 30.34% of cases; Another very frequently cited mitigating circumstance was the accused's status as a "father" or "family man" or "father of children" in 62% of cases. Given the near ubiquity of cases in which an accused is married or has children, the courts groundlessly imply that marital status or paternity itself in some way evokes greater "respectability" within society or provides a form of character reference, also observed by GREVIO Report: "judges appear to be guided by stereotypical gender roles and respect for the family as a fundamental unit of society." This is especially grave practice in cases where the legally protected subject "family / wife /children" is violated by the offence committed. It would be only logical to use this fact as an aggravating circumstance in such cases, rather than a mitigating one, in accordance with the provisions of Istanbul Convention.

¹¹¹ Criminal Code of Montenegro;

During the analyses of judgments in 16 criminal cases it was noted that that the children were present during the violent incidents and the court did not consider this fact to be an aggravating circumstance in accordance with the standards set by Article 46 of the Istanbul Convention. Instead, the court considered the fact that the defendant is a father of children as a mitigating circumstance. Example of this is a case where: “She sat on the bed in the bedroom when her husband hit her with his foot in the head, that caused her to bleed from the nose, at which moment the children entered the room and started crying and screaming. After that they all went to living room where the father took a knife and threatened that he will stab his wife if she leaves him.”

In another case under Article 220 paragraph 3, the court found as the fact that the defendant is a father of five children to be a mitigating circumstance, when he was on trial for violence against his son whom he attacked with a knife and caused injuries to his body. Interestingly, the legislator envisaged prison sanction for such crime from one to five years, but the court imposed suspended sentence of one year of imprisonment with five years probation period.

However, it must be stressed that the analyses found an isolated example of a good judicial practice, when the court concluded:

“Court had in view that the defendant is a father of two children but this fact cannot be used as a mitigating circumstance in this criminal deed, exactly for the reason that this criminal deed is against family and marriage, so it would be wrong to use this circumstance as a mitigating one because it is contrary to the just criminal Policy.”

Thus the Court’s rationale is correct and stands as an example of proper use of mitigating circumstances, in line with international standards.

In other cases, the courts identified mitigating circumstances in accordance with the “wishes of victims,” who: did not wish the accused to serve a custodial sentence, “withdrew from the prosecution, ”did not take part in proceedings” or stated that they had reconciled with the accused. These should not be valid considerations; the Court’s duty is to determine if there is guilt on part of the defendant and to impose adequate sanction based on the law and circumstances of the case. The wishes of the victim are not prescribed as mitigating circumstance neither by the law nor by international standards. GREVIO Report on Montenegro has also identified “alarming tendencies to assess the credibility of victims on the basis of harmful methods such as “confrontations” between victims and perpetrators which do not instill trust in the system” and could deter victims from testifying or **changing statements**. Further inquiry should be made to ascertain whether the victims were questioned about these matters in private or they were required to publicly make statements to the court in the presence of the accused. Finally, it should be determined whether the mere circumstances of

lack of economic empowerment of women in society/traditional norms or PTSD contribute to these incidents.

In two cases, the Court found that a mitigating circumstance is the defendant's alcohol abuse and rationalized that it probably influenced him to commit the deed. However, this shows the judges' lack of understanding regarding the root causes of violence against women - unequal relations between men and women. GREVIO report points out that there is a low level of awareness of gender inequalities in the family setting and that the violence is not observed as an unequal relationship between men and women and often is connected to alcoholism, psychological disturbances of perpetrator and economic status.¹¹²

Another frequently-cited mitigating circumstance is the financial status of the accused; the courts refer to poor economic status, unemployment and poverty in 30 % of cases. However, even though the stated circumstances reflect the economic reality for many families in Montenegro and it is often a valid consideration when deciding whether to impose a fine, they should not be the base for minimizing the perpetrators' culpability and distorting the balance between the deed committed and punishment pronounced. This manner of court reasoning sets dangerous example and sends a message to society that there is an excuse that legitimizes domestic violence or absolves the responsibility of offenders.

Aggravating circumstances were less used in delivering judgments and imposing sanctions on perpetrators by the Courts. Namely, in 52 % there were no aggravating circumstances found. The most cited aggravating circumstance noted was prior convictions of the defendant - in 43 % of cases, and in two other cases the court stated the tendency towards aggressive behavior as an aggravating circumstance, invoking Art. 46 of the Istanbul Convention which is also identified as good practice.

And finally, it is important to note that presence of children was not considered an aggravating circumstance in a single case, which is contrary to the Istanbul Convention.¹¹³

9.6.2. Aggravating and mitigating circumstances in misdemeanor proceedings

Analyses of the 327 court decisions from misdemeanor courts showed that in 217 cases - 66% - the courts used mitigating circumstances. The same observations that were substantiated in

¹¹² GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Montenegro, 2018;

¹¹³ See section 7.2 aggravating circumstances under the Istanbul Convention and the above example of court judgment pg.45;

the previous section on analyses of mitigating and aggravating circumstances in criminal proceedings apply in misdemeanor proceedings regarding the use of mitigating circumstances. Namely, the misdemeanor courts cite the same mitigating circumstances as the criminal courts. The use of certain mitigating circumstances in most cases is unwarranted and in conflict with international standards.

The most cited mitigating circumstance by the misdemeanor courts was the previous life of the defendant- no prior convictions in 37.32% of cases. However, the analyses of judgments showed that courts did not investigate this matter thoroughly and did consider mitigating circumstances even in cases where there were prior convictions. An example could be seen from the case where no prior convictions of the defendant were considered a mitigating circumstance, but dispositive of the decision stated that he is a recidivist. No further explanations were found in the judgment.

The second most cited mitigating circumstance was the defendant's attitude towards the deed in 29.9% of cases, followed by poor financial situation in 26.7% of cases and personal circumstances of the defendant in 24.88% of cases.

Regarding the fact that the defendant is a father of a child - 8.76% of cases / married and a father of a child - 8.29% of cases / married - 1.48% of cases as a mitigating circumstance is particularly alarming. An example of application of such mitigating circumstances can be seen from the case where the court has regarded the fact that the defendant is a family man and a father of four children as a mitigating circumstance. On the contrary, the defended committed offence against his child and was found guilty for that offence: "he threw an ax at his son, and prior to that, hit him with an open hand several times".

Furthermore, as it is the case with criminal judgments, the courts have used mitigating circumstances when the victim refused to testify in 5.07% of cases, the fact the victim did not join the procedure against the defendant in 2.3% of cases, the attitude towards the victim in 1.8% of cases or took into consideration the victims' wishes for lenient punishment, as in the following example where the court states: " In line with all previously said, and accepting the testimony of the victim as valid, the defended is pronounced guilty for the deed of Article 36, paragraph 1.1 and having in mind the circumstances of the case as well as the victim's statement that she is not afraid of the defendant and that after the incident she had no problems with him, that the defendant had a good attitude towards the victim, and that he is the sole wage earner in the family..." a warning is imposed on the defendant. It should be stressed that this practice is not in line with international standards, (elaborated in section 9.6.1).

Aggravating circumstances were identified in only 126 i.e. 38.5 % of judgments analyzed. The most cited ones were recidivism and special recidivism in 5% of cases, offence committed in presence of children in 4% of cases, degree of culpability in 5.56% of cases and other aggravating circumstances in 30 % of cases.

Overall, criminal and misdemeanor courts use mitigating circumstances more than aggravating circumstances when sentencing defendants in domestic violence cases. In more instances, the courts applied mitigating circumstances that could not be possibly regarded as mitigating in the respective cases and did not consider international standards as guidance. It is difficult, if not impossible, to determine how mitigating circumstances truly impacted the eventual sentence. In most cases, courts do not provide logical connection of how such factors lead to deciding that a suspended sentence is fairer than a prison sentence, or how a warning will serve the purpose of sanctioning and have a more deterring effect on the perpetrator than a prison sentence.

9.7. Setting up a compensation claim during the procedure in criminal and misdemeanor proceedings

Analyses of 105 criminal judgments found that the victim initiated a compensation claim only in 10 cases i.e. 9.4% of cases. In all of these cases, the court instructed the victims to realize their rights through litigation.

Out of 209 convicting misdemeanor decisions, the victim set up a compensation claim in only one case, but it was not clear whether the court directed the victim to litigation.

It was noted that even though the responsibility of judges and prosecutors also extends to ensuring that victims file their claim in due course of time, so that it can be processed during criminal proceedings, courts always refer victims to process their claims through civil proceedings instead.

These findings raise several concerns: First, victims are in all probability not informed of their rights properly; second - criminal courts do not use the legally proscribed possibility of joined procedures (criminal and compensation claim) and third - directing victims to try to claim their compensation in civil litigations which are lengthy and financially demanding are discouraging the victims of domestic violence from accessing their human rights.

9.8. Invoking international law in court judgments and decisions

In court judgments on domestic violence in 2017, the Courts invoked international standards only on one occasion, referring to Article 46 of the Istanbul Convention.

During the analyses of the misdemeanor decisions it was noted that the Courts invoked international standards (Article 1 of the Istanbul Convention) in three cases, all conducted by the same, female judge from Misdemeanor Court in Podgorica.

These isolated cases is an exception of the common practice of judges which in most cases do not invoke international legal standards when adjudicating in domestic violence cases.

10. Conclusions

There are well established international legal standards that define and prohibit all forms of violence against women and children, especially violence in the family and establish state obligations to protect victims of domestic violence.

Montenegro has ratified all international human rights documents related to violence against women in general and child maltreatment in particular. In line with these international documents, Montenegro has taken important legislative steps to ensure investigation and prosecution of cases of domestic violence. However, monitoring bodies on implementation of international treaties such as GREVIO, in their reports on Montenegro express concerns about the judicial practice regarding domestic violence cases.

Therefore, CoE has commissioned a team of consultants to provide analytical presentation of court proceedings for criminal and misdemeanor deeds of domestic violence, with a special focus on the penal policy of Montenegro courts in year 2017.

The analysis of the court practice has delivered the following conclusions:

Legislation

Both the Criminal Code and the LDVP treat domestic violence as an offence, a criminal or misdemeanor one. However, both laws fall short to provide explicit rules of distinguishing whether the offence in question falls under criminal or misdemeanor proceedings. Furthermore, the offences provided in both legal documents overlap to a certain degree, thus making possible that sexual offences against a person during the domestic violence incident are qualified as a lesser deed and thus punished with lower - misdemeanor punishment. Aggravating circumstances are well described in the LDVP with exception of the Criminal Code that falls short to meet all the requirements set by the Istanbul Convention. Both laws offer a number of protective measures that can be issued together with the punishment.

Number of cases

In 2017, the misdemeanor courts had 88.5% more cases than the criminal courts, implying that only every 10th case of domestic violence is qualified as a criminal case.

Nature of the crime

The analyses confirmed the prevalence of the gender-based nature of the crime of domestic violence - with majority of victims being females and that is linked to present or former

spousal/extramarital dynamics, suggesting influence of power dynamics between men and women.

Qualification of the offence

The analyses noted that, under the current investigative and judicial practice, domestic violence offences are often qualified as misdemeanor when in fact bear the elements of a criminal deed, as described under the Article 220 of the criminal code of Montenegro. This practice is inconsistent with international standards, especially with the case law of the ECtHR, that established a duty of responsible institutions to properly investigate cases of domestic violence and therefore properly prosecute them. Also, the analyses showed that qualification of deeds of domestic violence was problematic even within the paragraph of the respective Article, thus resulting in wrong qualification of the deed as the basic form rather than the aggravated form (this is especially true in misdemeanor cases involving children).

The position of children in domestic violence

Prosecution and courts often fail to recognize the position of children in domestic violence cases, resulting with lesser qualification of offences, or denying children the status of a victim, or not regarding the presence of children during violence as an aggravating circumstance, which on other hand impacts the outcome of procedures, especially with respect to sentencing of defendants. This is incompatible with the Istanbul Convention, the ICRC, and the case law of the ECtHR that found that children exposed to violence are also victims and institutions have to take measures to address their position and protect them.

Sanctioning-criminal policy

The majority of the domestic violence cases analyzed, both in criminal and misdemeanor proceedings, reveal: mild penal policy and under-charging, inconsistency in sanctioning, unsubstantiated and unfounded legal reasoning regarding imposing of sanctions, lack of proportionality between sanction pronounced and crime committed.

Also, the perceived under-charging indicates judicial professionals' lack of understanding of the nature and forms of domestic violence. It demonstrates a lack of sensibility for gender (having in mind the gendered nature of the crime in question) and child welfare issues, which is in collision with Istanbul Convention, CEDAW and case law of the ECtHR, especially regarding Article 14 (non-discrimination). The current modus of sanctioning does not seem to adequately serve the purpose of punishment to provide protection and satisfaction to victims and to deter perpetrators from re-offending. Furthermore, it is contrary with international standards and the case law of the ECtHR that clearly established that appropriate punishment of perpetrators is a duty of the authorized institutions - Article 3 and 8. Nevertheless, the lack of information

regarding the courts' reasoning in sentencing gives rise to serious concerns regarding inconsistency and unpredictability: imposition of sentences often appears a little bit more than arbitrary. In particular, the applied sanctions bear little relation to the sliding scale of penalties available for a range of aggravated offences. Overall, the courts appear to fail to ensure that sentences are commensurate with the gravity of the crime committed.

Recidivism

Furthermore, it could be said that the high recidivism rate noticed among defendants - every second in criminal cases and every third in misdemeanor cases - is a good indicator of ineffectiveness of imposed sanctions, or, in other words, the more lenient the punishments are, the higher the recidivism rate is.

Mitigating and aggravating circumstances

Overall, criminal and misdemeanor courts use mitigating circumstances more than aggravating circumstances when sentencing defendants in domestic violence cases. In more instances courts use mitigating circumstances that could not be possibly cited as mitigating in the respective cases and did not consider international standards for guidance. These circumstances include the defendant being father of children, married father, his poor financial status, the fact the victim did not join prosecution etc. Overall, it is difficult, if not impossible, to determine how mitigating circumstances truly impacted the eventual sentence. In most cases, courts do not provide logical explanation of how such factors lead them to decide that a suspended sentence is fairer than a prison sentence, or how a warning will serve the purpose of sanctioning and have a more deterring effect on the perpetrator than a prison sentence.

Compensation scheme for victims of domestic violence

In the absence of special state run compensation scheme for victims of domestic violence, due to the suspended implementation of the Law on Compensation for Damages to Victims of Violent Crimes, victims depend on the Courts' guilty verdict against perpetrators to seek compensation either in criminal proceedings as an adjuvant procedure or through additional civil law procedure/litigation. It was noted that even though the responsibility of judges and prosecutors also extends to ensuring that victims file their claim in time so that it can be processed during criminal proceedings, courts always refer victims to process their claims through civil proceedings instead, resulting in zero cases of victims who were awarded compensation during criminal proceedings. Only 9.48% of victims in criminal proceedings were directed to civil litigation upon a claim of compensation and only one victim in misdemeanor proceedings. These findings showed that: victims are not informed of their rights properly; that criminal courts do not use the legally proscribed possibility of adjuvant procedures (criminal and compensation claim) and that directing victims to try to claim their compensation in civil

litigations, which are lengthy and require financial means, are discouraging for victims of domestic violence.

Invoking international legal standards by Courts

Finally, it was noted that a court invoked the Istanbul Convention in only one criminal case, leading to conclusion that judges do not invoke international legal standards or case law of ECtHR when adjudicating in domestic violence cases. This could be understood as their lack of knowledge about international standards and the case law of the ECtHR on domestic violence.

11.Recommendations

R1:

WHAT: Create instructions for qualification of offences of domestic violence either as criminal or misdemeanor for judges/prosecutors;

WHO: The Supreme State Prosecutor

HOW: The Instruction needs to have elaborate directions of steps that should be taken and facts that should be taken into account in qualification of offences of domestic violence.

R2:

WHAT: Create a rulebook that standardizes the process of imposing sanctions and use of aggravating and mitigating circumstances in cases of DV;

WHO: Supreme Court of Montenegro

HOW: The rulebook needs to contain clear indicators, circumstances, and conditions that will guide judges in imposing sanctions of domestic violence.

R3:

WHAT: Consider creating and implementing continuous trainings of judges on children and domestic violence, international human rights standards and case law on the ECtHR, and gender sensitive adjudication;

WHO: Supreme Court of Montenegro / international organizations / Training Center in Judiciary and State Prosecutor's Office / specialized NGOs

HOW: Include the development and implementation of continues training on the above mentioned subjects in the new Judicial Strategy of 2019-.

R4:

WHAT: Include the misdemeanor proceedings data into the new Judicial Information System, and create and implement specific indicators for criminal and misdemeanor proceedings for monitoring domestic violence cases, especially the position of children;

WHO: Judicial Council of Montenegro /international organizations

HOW: Develop DV indicators that will contain statistical baselines for data collection and calculation on specific selected areas of DV adjudication.

Table 2: Research Matrix

| Key Research Questions | Desk review | Numeric data collection based on indicators | Case study |
|--|-------------|---|------------|
| What are the national criminal and misdemeanor legal aspects and how they relate to international legal standards? | X | | |
| What is the national judicial practice regarding sanctioning of DV in criminal and misdemeanor proceedings and what are the identified problems? | X | | |
| What is the national judicial practice regarding the sanctioning of DV in criminal and misdemeanor proceedings and what are the identified problems? | | X | X |
| What needs to be done in order to improve the national legislation and practice in DV cases in line with international standards? | X | X | X |

Table 3: Research indicators

| Quantitative indicators | What is measured |
|-------------------------|---|
| Indicator 1 | # Offences brought under misdemeanor court # Number of offences brought under the criminal courts % of criminal prosecutions out of all prosecuted cases % of criminal convictions out of all prosecuted cases |
| Indicator 2 | Persons convicted of criminal acts, by type of sanctions imposed Persons convicted of misdemeanor acts by type of sanction |
| Indicator 3 | Civil servants convicted of the act of misconduct or not reporting /taking action in cases of domestic violence and type of sanctions imposed |
| Indicator 4 | # /% Criminal sanctions given by type against the number of all judgments #/% misdemeanor sanctions given by type against the number of all judgments |
| Indicator 5 | Length of duration of the criminal and misdemeanor proceedings; The longest/shortest/average |
| Indicator 6 | # and type of used mitigating circumstances # and type of aggravating circumstances in criminal and misdemeanor proceedings |
| Indicator 7 | Type and number/% of security measures given with criminal sanction Type and number/ % of protection orders issued with misdemeanor sanction |
| Indicator 8 | # and % of recidivists in a year in criminal and misdemeanor cases from 2016 to 2017. |
| Indicator 9 | # Number and % of successfully realized compensation during criminal proceedings |
| Indicator 10 | # of criminal cases in which institute of delayed prosecution was used & % of all prosecuted cases |
| Indicator 11 | Relation between the victim and the perpetrator |

