Part I
Domestic Violence in Portuguese Criminal Law – An Overview

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1. System's Features and Criminal Act

In Portugal, the criminalisation of acts of domestic violence first appeared with the Criminal Code of 1982, in section 153, under the tittle *Ill-treatment or overload of minors and subordinates or between spouses*:

"1 – The father, mother or guardian of a minor under 16 years of age or anyone who has them in their care or custody or who is responsible for their management or education will be punished with imprisonment from 6 months to 3 years and a fine of up to 100 days when, due to wickedness or selfishness:

a) Inflicting physical ill-treatment on him, treating him cruelly or not providing him with the health care or assistance that the duties arising from his duties impose on him; or

b) Employing him in dangerous, prohibited or inhumane activities, or overloading, physically or intellectually, with excessive or inappropriate work in such a way as to harm <u>his</u> health or intellectual development, or expose him to serious danger.

2 – [...].

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121 The authors, here listed alphabetically by surname, are joint authors of this report.

3 – Anyone who inflicts the treatment described in subparagraph a) of paragraph 1 of this section on their spouse will also be punished."

Under this section, the opening of the criminal procedure was not dependent of a complaint of the plaintiff, which means that, if the news of the commission of the crime somehow got to the knowledge of the Public Prosecutor, the criminal procedure was necessarily opened, regardless of the victim's will. Back then, the law required, in no. 1, when the mistreatment was inflicted on minors, that the ill-treatment behaviour was caused by a specific intent of wickedness or selfishness, so that the offender could be punished. However, Court often wrongfully interpreted this section, demanding that this specific intent of wickedness or selfishness was present also when considering no. 3, when the ill-treatment occurred between spouses. The penalty was imprisonment from six months to three years.

By 1995, with the entry in force of the reform of the Portuguese Criminal Code, this crime suffered some changes, as follow. The crime was now stated in section 152. The reference to a specific intent fell through, the penalty was elevated to a maximum of five years of imprisonment and the punishable ill-treatment could now constitute of physical or psychological abuse. There was also an extent of the possible victims of this crime, since the victim could now be not only a spouse, but also a non-married cohabitant. The criminal procedure considering ill-treatment between spouses and unmarried cohabitants, however, was now dependent of the filing of a complaint by the plaintiff (semi-public nature of the crime), which constituted a major setback in the fight against domestic violence, because, in many cases, the victim is not in full conditions to perceive herself/himself as a victim or encounters psychological or *the facto* difficulties to file a complaint.

By 1998, the Portuguese legislator came to terms with the fact that this requirement, indeed fell short to protect the victims. This led to a change of the law, allowing the Public Prosecutor to start the criminal procedure without the filing of complaint, if the victim's interest

demanded such procedure. We could not yet be satisfied with this solution, because it drove to the Public Prosecutor's hands the power to start the criminal procedure or not, depending on what he might consider as interest of the victim to start the criminal procedure, but, then again, it was a little step forward.

Finally, in 2000, the requirement of the filing of complaint by the plaintiff was dropped all together and, co-respectively, the plaintiff lost his/her ability to drop the charges against the offender, but as counterbalance, since the plaintiff could no longer withdraw the complaint, provisional suspension of the criminal procedure upon request of the victim was introduced. This meant that regardless of the general requirements of section 281 of the Portuguese Penal Procedure Code, considering provisional suspension of the criminal procedure, if the victim request for the provisional suspension was free of any pressure and properly enlightened, it had to be conceded by the Public Prosecutor.

In 2007, with Law no. 59/2007 (04.09.2007), section 152 was divided into three. Section 152 was especially devoted to domestic violence. In 2013, a specific reference was introduced to include victims who are in courtship or dating relationships.

Today, section 152 states that:

"1 – Whoever, whether as a one-off excess or a repeated activity, inflicts physical or psychological abuses, including corporal punishments, deprivation of liberty, and sexual offences, or impedes access or enjoyment of own or common economic and patrimonial resources:

a) To their spouse or ex-spouse;

b) To a person of another or of the same sex with whom the agent maintains or has maintained a relationship similar to a relationship of spouses, even in the absence of cohabitation;

c) To the progenitor of a common descendant in first degree; or

d) To a person particularly defenceless due to age, deficiency, disease, pregnancy, or economic dependency, cohabitating with the agent;

e) To a minor who is either the agent's descendant or the descendant of one of the persons mentioned in subparagraphs a), b), and c), even in the absence of cohabitation;

is punished with imprisonment from one to five years, if a more serious sentence is not applicable by reason of another legal provision.

2 – In the case addressed in the previous paragraph, if the offender

a) commits the act against a minor, in the presence of a minor, in the common domicile, or in the victim's domicile; or

b) disseminates, via the Internet or other means of widespread public dissemination, personal data, namely image or sound, relating to the intimacy of the private life of one of the victims without their consent;

is punished with imprisonment from two to five years.

3 – In case the offences indicated in paragraph 1 result in:

a) Grievous bodily injury of the victim, the offender is sentenced with imprisonment from two to eight years;

b) Death of the victim, the offender is sentenced with imprisonment from three to ten years.

4 – In the cases indicated in the previous paragraphs, accessory sentences such as prohibition of contact with the victim and prohibition to carry and use weapons, namely for a period from six months to five years, may apply, as well as the obligation of attending specific programmes for the prevention of domestic violence.

5 – The accessory sentence of prohibition to contact with the victim may include distance from the victim's residence or place of work, and its compliance may be monitored through remote technical means.

6 – Whoever is convicted for a crime provided for in this section may, considering the concrete seriousness of the act and its connection with the function performed by the agent, be deprived from the exercise of parental responsibilities, guardianship, or decisions as guardians of persons with physical and/or psychological disabilities, for a period from one to ten years."

From this extensive and, may we say, rather complex section, we may conclude that, in the present, to apply the legal type of domestic

violence it is not necessary that the acts of aggression are repeated. This is a major conquest in the battle against domestic violence, because, through the years, again and again, Courts dismissed cases of domestic violence by considering that only one aggression, not serious enough, had taken place.[122] Currently, the law also clearly states that sexual offences, deprivation of freedom and economic violence fall into this section.

The introduction of different accessory penalties deserves a few good words. In our legal system, the application of accessory penalties is not automatic. It is the judge who, taking into consideration all the facts, decides if certain accessory penalty should be applied. Theoretically, we find the prohibition of possession and use of weapons, the mandatory frequency of domestic violence programmes for abusers or the prohibition of contacts with the victim. When concerning offences against children, the Court may also condemn the offender to the inhibition of exercise of his or her parental responsibilities for a certain period of time. This last possibility was only available, for a large number of years, when the offender committed sexual abuses against children, but fortunately, today this accessory penalty may be used for violent parents as well.

Accessory penalties play a significant role in domestic violence cases, since we are in face of offences perpetrated within the family or the household and a prison sentence will not be the magic wand which makes aggressivity and relational problems disappear. These people are

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122 For an example, see FERREIRA, Elisabete, (2017), "Crítica ao pseudo pressuposto da intensidade no tipo legal de violência doméstica (Comentário ao Acórdão do Tribunal da Relação de Lisboa de 15 de janeiro de 2013, proferido no âmbito do processo n.º 1354/10.6TDLSB.L1-5)", Revista *Julgar Online*, maio de 2017, available at: http://julgar.pt/wp-content/uploads/2017/05/20170531-ARTIGO-JULGAR-Crítica-ao-pressuposto-da-intensidade-no-tipo-legal-de-violência-doméstica-Maria-Elisabete-Ferreira.pdf

likely to cross paths in the future, especially when considering abusive parents, who will not lose their quality of parents. That is why accessory penalties may be the key to stop recidivism.[123]

Although criminal law is a subject highly determined by cultural and social factors concerning the territory where it is enforced, it is also true that in present times, no State lives alone. Every State has cultural, economic, and political relations which result in all sorts of influences. Portugal is a Member-State of the European Union and part of several Treaties and Conventions. On different levels, they all played and still play some role in the configuration of Portuguese legal frame, including in regard to domestic violence.

The Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, 1950) and its Protocols, the European Social Charter (ETS No. 35, 1961, revised in 1996, ETS No. 163), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) and its Optional Protocol (1999) as well as General Recommendation No. 19 of the CEDAW Committee on violence against women, the United Nations Convention on the Rights of the Child (1989) and its Optional Protocols (2000) all have its influence in the definition of the legal frame against domestic violence, acting like inspiration and grounds to the this legal frame.

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123 About this subject, see FERREIRA, Elisabete, (2018), "As penas aplicáveis aos pais no âmbito do crime de violência doméstica e a tutela do superior interesse da criança". Revista *Julgar Online*, março de 2018, available at: http://julgar.pt/as-penas-aplicaveis-aos-pais-no-ambito-do-crime-de-violencia-domestica-e-a-tutela-do-superior-interesse-da-crianca/

In fact, in Portugal, the explicit prohibition of corporal punishment of children in section 152 of the Portuguese Criminal Code, introduced in 2007, is due to a Complaint of the World Organisation Against Torture against Portugal (Complaint no. 34/2006), admitted by the European Committee of Social Rights (2011/def/PRT/17/1/EN), alleging the violation of section 17 of the European Social Charter on the grounds that the Portuguese State did not explicitly prohibit such punishments. In 2006, the Portuguese Supreme Court in an ill-treatment case, ruled that some corporal punishments were considered admissible. This fact led to the file of the complaint by the WOAT and to the subsequent amendment to the Portuguese Criminal Code.

Also to consider are the recommendations of the Committee of Ministers to Member States of the Council of Europe: Recommendation Rec(2002)5 on the protection of women against violence, Recommendation CM/Rec(2007)17 on gender equality standards and mechanisms, and other relevant recommendations.

Portugal is signatory of the European Convention on Human Rights, and the European Court of Human Rights possesses a growing body of case law which sets important standards in the field of violence against women. And last, but not least, Portugal is also signatory of the Council of Europe Convention on preventing and combating violence against women and domestic violence – the Istanbul Convention.

It is interesting to mention that the Istanbul Convention did not have a determinant impact on the legislation concerning domestic violence in Portugal because by the time the Convention entered in force, the Portuguese legislation was already quite developed and ahead in the protection of the victims of domestic violence and in the persecution of the offenders. The problems faced in Portugal have more to do with the interpretation of the law, its enforcement and effectiveness in the real life, rather than with legal issues.

In Portugal, Domestic Violence is a serious social problem, and that recognition proceeds, among others, from the inclusion of domestic violence as one of the priorities in the Portuguese Law of Criminal

Politics.[124] This means that prevention, prosecution, and punishment of domestic violence are considered a priority, among other serious offences. The Criminal Procedure in such cases is considered urgent, which ideally will bring along a speedier process and condemnation, if that should be the case.

As to how we recognise it as a social problem, there are several NGO's that work in the field of domestic violence and draw their own statistics, such as APAV (Portuguese Association for Victim Support) and the conclusions are always striking, because domestic violence appears every year as the number one reason to give cause to a support process.[125]At State level, every year, a report is elaborated on National Security (Annual Report on Internal Security – RASI), which addresses a wide range of aspects concerning criminality, and this report includes a specific chapter dedicated to the statistics of domestic violence. According to the latest numbers of RASI, in a country with about 10 million people, in 2022, 30 488 complaints were registered, corresponding to a 15% raise comparing to 2021. In 86% of the cases, there was violence against a spouse or similar.[126]

As part of the Portuguese Government, the Commission for Citizenship and Gender Equality (CIG) was created. CIG's powers not only relate do gender equality but also to the combat against domestic violence. CIG created a domestic violence portal, making available all the information for victims and the public in general,[127] a domestic violence

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124 See Law no. 51/2023, 28th August 2023.

125 See https://apav.pt/apav_v3/images/pdf/Estatisticas-APAV_Relatorio-anual-2022.pdf

126 Statistics available at: https://www.portugal.gov.pt/pt/gc23/comunicacao/documento?i=relatorio-anual-de-seguranca-interna-2022-

127 https://www.cig.gov.pt/area-portal-da-violencia/portal-violencia-domestica/enquadramento/

phone line,[128] and periodic media campaigns raising awareness about the gravity of domestic violence.

Unlike Norway, Portugal has developed a particular law dedicated to the prevention and deterrence of domestic violence – Law no. 112/2009, which establishes several important measures to support the victim during the pendency of the criminal procedure. There is also a law (no. 107/2009) that allows victims of domestic violence, who lost their income due to the perpetration of these aggressions, to ask the State for an advance payment of the damage compensation owed by the defendant for his/her actions. Over the years, the Government has also conceived several National Action Plans addressing the issue of domestic violence.

To better understand the criminal regulation of domestic violence in Portugal, we have to bear in mind the general principles that guide the Portuguese legal system in general. Our criminal law system is based on the principle of legality. Criminal law shall be given by the Parliament or by the Government, if in use of an authorisation to legislate; the law shall be precise, strict and prior to the offence. Incriminatory analogy is forbidden.

That said, the Portuguese legal system is built under the principle of human dignity. This brings consequences to the criminal law system: penalties of imprisonment go up to a maximum of 25 years. There is no life in prison penalty. The penalties' goal is prevention. The penalty is established depending on the needs of prevention for the perpetrator. Our criminal law system believes in resocialisation of the offender. That is why when part of the penalty is served, the offender is placed on parole. Courts' convictions are usually mild, and imprisonment is often suspended if the defendant complies with certain conditions proposed

[128] This phone line is free and available 7 days a week, 24 hours a day. It works via SMS on 3060 or call on 800 202 148.

by the Court. Our legal system is not based on the legal precedent but on the enforcement of codes and other legislation. Court's Rulings are only binding in the case they ruled.

Also based in the human dignity principle, our criminal legislator has increasingly dedicated more attention to the victims of crime. This led to the introduction in the Penal Procedure Code of section 67-A, acknowledging the victim as a subject of the Penal Procedure, granting him/her some (limited) rights.

After this general overview, let us summarise a few basic ideas about the crime of domestic violence under the Portuguese law:

1. Punishable behaviours

According to section 152, no. 1 of the Portuguese Criminal Code, domestic violence is to, repeatedly or not, a) inflict *physical* or b) *psychological abuse*, c) including *corporal punishments*, d) *deprivations of liberty*, e) *sexual offences* or f) prevent *access or fruition of their own or common economic and patrimonial resources*.

2. Potential victims

According to section 152, no. 1 of the Portuguese Criminal Code, victims of domestic violence can be:

a) The spouse or former spouse; b) a person of another or of the same sex with whom the offender maintains or has maintained a dating relationship or a relationship like that of the spouses, even without cohabitation; c) the parent of a common descendant in the 1st degree; d) a person who is particularly vulnerable, in particular because of age, disability, illness, pregnancy or economic dependence, who cohabits with the offender; e) a minor who is the offender's descendant or that of one of the persons referred to in subparagraphs a), b) and c), even if the perpetrator and the minor do not cohabit.

The behaviours punishable in the range of the crime of domestic violence may fit in other criminal types, such as offences to the physical integrity, threats, coercion, sexual abuse, rape, among others. The main difference is the type of relationships that must exist between the offender and the victim so that a crime can be classified as domestic violence – if the offender/victim does not fall in the list presented above, we will not be able to apply the crime of domestic violence but only one of the other crimes, which has implications on the kind of protective measures victims may benefit from and the kind of initiative that is necessary to start the penal procedure.

Aside of this requirement, from a substantial point of view, the behaviours in question must be considered in violation of, and causing harm to, the psychological and/or physical health of the victim. Most of the literature considers that the fundamental value protected by the crime of domestic violence is precisely the physical and psychological heath of the victim. Other authors make reference to the human dignity of the victim. The question of which juridical asset is behind the crime of domestic violence, ground for its criminalisation, is controversial.

Authors and Courts are not in the same page and face some difficulties as to agreeing on what characteristics should the behaviour possess to fit in the crime of domestic violence, especially discussing whether repetition or severity of the perpetrated behaviour constitutes a requirement. Courts have the tendency to only consider as domestic violence a repeated or serious offence, interpretation which, as seen above, does not proceed from the letter of section 152 of the Portuguese Penal Code. This interpretation is, from our point of view, inappropriate and reduces greatly the chances of considering many acts of aggression as domestic violence, *stricto sensu*. In fact, it is fair to say that, in Portugal, the main problem concerning domestic violence is not in the lack of adequate regulation, but instead in the misinterpretation of those regulations by judges and public prosecutors.

As seen above, sexual abuse may fit in the crime of domestic violence and that poses the question of how to conciliate sexual abuse that

has taken place within, for instance, an intimate partner relationship with cohabitation and a crime of rape that has taken place under the same circumstances. Concerning this issue, again, there is no consensus in the literature and the Courts rulings on whether in such cases we may encounter one crime of domestic violence and one crime of rape, or, instead, if the defendant should only be punished for having committed the rape, or only for the crime of domestic violence. The understanding on this subject as luckily evolved positively through recent year. Traditionally, if we faced a rape within the range of a domestic abusive relationship, Courts overlooked the domestic violence crime, and the defendant was only punished for the most severe crime committed – the rape. In fact, the crime of rape has a harsher penalty than the crime of domestic violence. According to section 152, no. 1, if a conduct considered to be domestic violence may also fit in another legal type, which is a more severely punished offence, then, the offender will be punished for this last crime, and not for the crime of domestic violence.

Literature on this matter was more accurate, and sustained that, depending on the specific circumstances of the case, an offender could be convicted for domestic violence and for rape against the same victim, when it was possible to distinguish in the general conduct autonomous typical behaviours of the two separate crimes, punishable as such by the Court. Today, we find more and more Court rulings stating that since the crime of domestic violence and the crime of rape protect two different juridical assets – the first, the physical and psychological integrity of the victim, and the second, sexual freedom – when cases as mentioned above occur, we find two different kinds of unlawfulness and we may autonomise the two actions, fitting them into two legal types: the repeated abuses such as diminishing attitudes towards the victim, threats, coercion, name calling, slapping, punching and so on, on the one hand, and the rape, on the other, because the rape stands out as a punishable behaviour on its own.

Another question concerning the crime of domestic violence is how to qualify the witnessing of abuses between adults, usually the parents,

by children. Let us imagine that the father physically and psychologically abuses the mother in front of the children, but the father is, otherwise, the perfect father, treating the children lovingly and carefully. Is there only one crime of domestic violence, against the mother, although aggravated because the offences were witnessed by the children? Or are there two crimes, one against the mother, and another against the child who witnessed the mother's abuse perpetrated by the father? Is this last case a situation of indirect victimisation, or is the child witness a direct victim of the crime of the domestic violence, suffering a psychological ill-treatment?

The Preamble of the Istanbul Convention recognises "that children are victims of domestic violence, including as witnesses of violence in the family". If one understands that exposing children to violence committed towards another parent configures psychological abuse, it is possible to consider that exposure as an autonomous crime of domestic violence against the child. Reinforcing this view, section 67-A, no. 1, subparagraph a), iii) of the Penal Procedure Code and section 2, subparagraph a) of Law no. 112/2009 (which establishes a specific regime for the prevention of domestic violence and protection of its victims), both when defining the concept of victim, specifically include in the definition "a child or young person up to the age of 18 who has suffered harm caused by an action or omission in connection with the commission of a crime, including those who have suffered abuse related to exposure to contexts of domestic violence". Moreover, Portuguese superior courts have already convicted offenders in these terms. As long as we may attest that the child who was exposed to violence between the parents suffered psychological damages, we may clearly state that this child was a direct victim of domestic violence.

Concerning the subjective element necessary to fulfil the crime of domestic violence, in Portugal, the general rule is that crimes are only punishable if there is an intent, which can assume three grades: we talk

about direct *dolus*, necessary *dolus*, and eventual *dolus*.[129] Negligence is only punishable when explicitly stated by the law. That said, negligence is not punishable when considering the crime of domestic violence, so, the presence of intent, in one of the three forms previously mentioned, is mandatory. No additional requirements considering intent are necessary, unlike when the crime of ill-treatment was originally conceived and enforced, in 1982. Back then, the law demanded wickedness or selfishness of the offender in the case of infliction of ill-treatment on children.

Attempt is punishable when committing the crime of domestic violence, because this crime's main penalty ranges from one to five years imprisonment and section 23, no. 1, of the Portuguese Penal Code, regarding attempt, states that "[u]nless otherwise legally stated, the attempt is only punishable if the penalty of the respective consummated crime is of more than 3 years in prison". Despite the legal possibility, it is not usual to open a criminal procedure based on a mere attempt, especially because the crime of domestic violence has the tendency to endure in time, it is usually composed of several acts of violence, so, consummation is easily achievable.

One last mention to co-participation: all forms of co-participation are possible.[130] The offender may use an accomplice, for instance, to help him/her carry out the crime.

2. Punishment and other reactions to domestic violence

In Portugal, the crime of domestic violence dates to the 2007 amendment to the criminal code. Before, there was the crime of mistreatment, which, in 2007, was divided into three separate sections: section 152

129 See sections 13 and 14 of the Portuguese Penal Code.

130 See sections 26 and following of the Portuguese Penal Code.

(domestic violence), 152-A (mistreatment of minors and subordinates), and section 152-B (violation of safety rules).

Today, section 152 of the Portuguese criminal code states the following regarding penalties:

"1 – Any person who, repeatedly or not, inflicts physical or psychological maltreatment, including corporal punishment, deprivation of freedom, and sexual offences: [...]

shall be punished with a penalty of one to five years of imprisonment, if a higher penalty is not applicable by another Criminal Code disposition.

[...]

4 – In the cases foreseen in the previous numbers, measures such as accessory penalties of prohibition of contact with the victim, prohibition of use of weapons for a period of six months to five years, and obligation of frequency of specific programmes on domestic violence prevention may be applied to the defendant.

5 – The accessory penalty of prohibition of contact with the victim shall include the withdrawal from their residence or place of work and its reinforcement shall be supervised through the use of remote-control technology.

6 – Any person sentenced for a crime foreseen in this section may, regarding the particular severity of the act itself and its connection with the agent's exercise of function, be inhibited of parental rights [...] for a period of one to ten years."

As seen before, the crime of domestic violence encompasses a range of behaviours, varying in severity. It is punishable by a prison sentence of one to five years unless a more severe penalty is stipulated elsewhere in the Penal Code, the act of inflicting physical or psychological harm, including corporal punishment, deprivation of liberty, sexual offences, or preventing access to or enjoyment of one's own or shared economic and property resources. However, there will be a slight increase in the minimum prison sentence, from one to two years, if the criminal act is committed against a minor, in the presence of a minor, in the shared

residence or in the victim's residence; or if the perpetrator publicly discloses, for instance, via the Internet, personal data, including intimate videos or photos of the victim, without his/her consent.

The most severe penalty for the crime of domestic violence, ranging from three to ten years, is applicable when the physical or psychological abuse results in the death of the victim. Additionally, a penalty of two to eight years of imprisonment is prescribed for situations where the consequence of the physical or psychological abuse is not death, but a serious bodily harm. The Penal Code defines serious bodily harm as depriving the victim of a vital organ or limb, causing severe and permanent disfigurement; significantly impairing their ability to work, intellectual capacities, reproductive or sexual enjoyment, or the ability to use their body, senses, or language; inducing a particularly painful or permanent disease, or a severe or incurable psychological anomaly; or endangering their life.

In conjunction with the prison sentence, it is possible to impose additional penalties such as: a) prohibition of contact with the victim, which includes staying away from his/her residence or workplace; b) prohibition of owning and carrying weapons; c) mandatory attendance of specific domestic violence prevention programmes; and/or d) restriction on the exercise of parental responsibilities, guardianship, or measures related to an accompanied adult.

There is an interesting problem regarding the restriction on the exercise of parental responsibilities, as follows:

Considering the application of the accessory penalty of inhibition of the exercise of parental responsibilities, how to align the criminal law regimen with the civil law regimen, whereas to the withdrawal of the inhibition once the cause that determined the inhibition in the first place has ceased to exist. If we qualify the inhibition of the exercise of parental responsibilities[131] as a true accessory penalty, in that case, if, hypotheti-

131 Established in paragraph 6 of section 152 of the Portuguese Penal Code.

cally, the parent sentenced to an inhibition of the exercise of parental responsibilities for a period of three years rehabilitates himself or herself to parenthood, the early withdrawal of the inhibition will never be possible, not before we reach the three years deadline, even if it is proven to be in the child's best interest that the contacts with the parent are re-established and that this parent resumes the exercise of the parental responsibilities.

In comparison, section 1916 of the Portuguese civil code establishes that the inhibition of the exercise of parental responsibilities will be withdrawn when the causes that have determined the inhibition have ceased. The withdrawal may be requested by de Public Prosecutor at any time and by the parents after completed one year over the final decision in the procedure in which the inhibition was decreed.

Let us imagine the case of a drug addict parent who inflicted severe mistreatment on an eighteen-month-old child. A thorough consideration of all circumstances of the case demands the enforcement of an effective prison sentence for the period of two years, combined with the accessory penalty of inhibition of the exercise of parental responsibilities during four years. In the meantime, the convicted parent successfully finishes a drug abuse rehabilitation programme which fully enables the parent as a respectful citizen and fit parent. Furthermore, this child does not keep any memory of the past aggressions and the experts' reports consider that the child reunion to the parent will be favourable to his/her development. From a strict criminal law point of view, nothing can be done, except to wait for the course of time, because the accessory penalty has to be fully served. Differently, if the facts in which the decision of inhibiting the exercise of parental responsibilities had given cause to a civil process, we could resort to section 1916 of the Portuguese civil code and the withdrawal of the inhibition would be possible. It is obvious that the same facts may give room to different treatments under the criminal law and under the civil law. So, how do we solve this divergence?

Before we answer this question, we should accentuate that this problem is more theoretical than practical, because courts are supposed

to proceed with the necessary care in the assessment of the case and be extremely careful in the determination of the exact accessory penalty adequate to the seriousness of the infraction, the demands of prevention and, especially in this case, to the child's best interest. Nevertheless, it is possible that, in some cases, very dark scenarios turn out to overcome the difficulties and give room to happy endings. Life has unexpected twists and turns that catch the most diligent judge off guard. In those cases, if we are in the presence of an accessory penalty, we are bound by the law and must respect it. We will be forced to keep the parent away from the child until the end of the period established in the sentence, depriving both parent and child from mutual and healthy interaction, depriving the child of the benefits that the parent may add to his or her well-being, health, education, and development. As mentioned before, the Portuguese legal system lays its foundations in the fundamental principle of the correctability of every felon, so, it is imperative to take that in consideration especially when dealing with parents.

On the other side, opposite to the problem we have been discussing, we may also argue if, once we reach the time frame set in the sentence which inhibited the parent of the exercise of parental responsibilities, this parent is already fit for parenting – in other words, if nothing else from the mentioned above was done, was the mere course of time enough to capacitate the parent to parenthood, allowing him or her to favourably contribute to the child's project of life? It is obvious that the course of time, itself, is not enough to properly protect the child's best interest. But it this case, the problem is easily solvable. If we realise this parent is not fit to resume the exercise of his or her parental responsibilities, we can address the civil or family courts, depending on the case, and by request of the Public Prosecutor we may start a judicial proceeding to inhibit this exercise on the grounds of this parent's inability to exert the parental responsibilities.

Going back to the example set above, and trying to find a solution to the problem, one way would be not to qualify the inhibition pursuantto the paragraph 6 of section 152 of the Portuguese Penal Code as a

true accessory penalty. Instead, we could qualify it as a security measure, and, doing so, we could apply the regime of the security measures, which allows the withdrawal of the measure once the level of dangerousness of the offender has ceased or decreased to levels where this offender poses no threat to society.[132] When the Portuguese legislator established the accessory penalty of inhibition of the exercise of parental responsibilities connected to the commission of the crime of domestic violence, it is undoubtable that here was an underlying concern with the protection of the child from the parent's interaction, whose patterns of behaviour may endanger the life and well-being of the child. We can clearly claim that this inhibition aims to deter the parent from endangering the child, in a sense close to the one we mentioned about the security measures. Although this would be an easy way out, possible, because the text of the law, in section 152 of the Portuguese Penal Code, does not specifically qualify the inhibition of the exercise of parental responsibilities as an accessory penalty, from a dogmatic point of view, we are inclined to acknowledge that this was not the legislator's intention. The comparison of the content of paragraph 6 of section 152 with the content of section 69-C leaves us no choice but to qualify the inhibition established in paragraph 6 of section 152 as an accessory penalty. In addition, systematically, this section 69-C is inserted in the chapter concerning accessory penalties.

In consequence of all that has been written above, we may find ourselves in face of the unconstitutionality of paragraph 6 of section 152 of the Portuguese Penal Code, interpreted in the sense that, when the

132 In Portugal, the security measures are applied to non-responsible offenders who commit acts qualified by the criminal law as crimes, but they act with no fault. Security measures are applied as a mean to protect society from this non-responsible agent and the scope is the neutralisation of the dangerousness of this offender. When that dangerousness disappears, the security measure is withdrawn. In some cases, security measures can be applied to responsible offenders who show signs of dangerousness beyond the concept of fault.

facts which founded the decision of inhibition of the exercise of parental responsibilities have ceased, the withdrawal of this inhibition is not possible until we meet the end of the period established in the sentence. This unconstitutionality is due to the violation of paragraphs 5 and 6 of section 36 of the Portuguese Constitution, which recognises the parents' fundamental right to education and upbringing of their own children and the principle of inseparability of children from their parents. Indeed, this separation should only take place if the parents fail to fulfil their obligations towards their children, when ordered by a court of law. This separation should be terminated when the underlying cause ceases to exist. Our conclusion is predictable and strong: the accessory penalty of inhibition of the exercise of parental responsibilities as it is drawn today by the Portuguese Penal Code does not entirely protect the child's best interest and needs an urgent change. We propose, *de lege ferenda* a simple solution, which leaves untouched the dogmatic issue of the juridical qualification or juridical nature of the inhibition (whether it is a true accessory penalty or a security measure) but secures the full protection of the child's best interest in the safe, positive, interaction with the parent. The Portuguese Penal Code does not establish for those convicted for the crime of domestic violence with an accessory penalty of inhibition of the exercise of parental responsibilities a similar solution such as the one set for the non-custodial security measures[133]: section 103 of the Portuguese Penal Code determines that those who were sentenced to a security measure which inhibited the offender of developing a certain kind of activity may, after the course of a predetermined minimum period of time, require the withdrawal of the security measure, as long as the reasons which gave cause to its application have ceased. Keeping this reasonable solution in mind, we propose that the same possibility should be given to the inhibited parent. Therefore, we defend that paragraph 6 of

133 Measures which do not involve the confinement or deprivation of freedom.

section 152 should be amended, adding to the current formulation the following: "It is applicable, *mutatis mutandis*, the procedure laid down in section 103."

The prerequisites for the suspension of a prison sentence are that the specific prison sentence imposed does not exceed five years, and there is the belief that the punitive objectives will be met with the mere condemnation of the act and the threat of actual imprisonment. Factors that are significant in deciding on the suspension of the prison sentence include the personality of the offenders, their life conditions, their behaviour before and after the crime, and the circumstances of the crime itself.

Given that the crime of domestic violence, even in its most severe forms, is punishable with prison sentences that, at their minimum, are less than five years – it is noteworthy that the harshest penalty prescribed for domestic violence ranges from three to ten years –, it is theoretically always possible for the offender not to be sentenced to actual imprisonment. It suffices for the judge to impose a prison sentence of five years or less and, concurrently, believe that the punitive objectives are not compromised by suspending the prison sentence.

In the case of domestic violence, the suspension of the prison sentence is also contingent upon the fulfilment of duties, adherence to conduct rules, or the imposition of a probationary regime.

According to data provided by APAV, an association for the protection of victims' rights, approximately 90% of convictions for domestic violence result in a suspended sentence.

In Portugal, we have a specific law on the subject of domestic violence, prescribing a certain number of protective measures while pending a criminal procedure. For instance, if you have a look at section 31 of Law no. 112/2009, you will find that "after the constitution of a defendant for the crime of domestic violence, the judge considers, within a maximum period of 48 hours, the application of one or several coercive measures provided for in the Code of Criminal Procedure, namely: a) Prohibition of acquiring, using, or immediately delivering weapons or other objects

and utensils capable of facilitating the continuation of criminal activity; b) Subjection, with prior consent, to the frequency of programmes for defendants in crimes in the context of domestic violence; c) Prohibition of staying or going near the residence where the crime was committed, where the victim lives, or which is the family home, imposing on the defendant the obligation to abandon it; d) Prohibition of contacting with the victim, with certain people, or frequenting certain places or certain means, as well as of contacting, approaching, or visiting pets of the victim or family; e) Restriction of parental responsibilities, of guardianship, of the exercise of measures relating to an accompanied adult, of the administration of assets, or of the issuance of credit instruments. These coercive measures are cumulative with any other coercive measure provided for in the Code of Criminal Procedure.

Also, according to this law, when there is a serious threat of retaliation, situations of revictimisation, or strong indications that the privacy of the victim, their family, or of other individuals in a similar situation might be compromised, specific protective measures for victims of domestic violence are implemented, which include: preventing contact between the victim and the defendant when their joint presence is required, e.g., in court proceedings; allowing testimony to be given in a more confidential manner; providing psychosocial support and protection through tele-assistance; concealing the victim's address in notifications from relevant authorities that are addressed to the suspect or defendant.

In addition to these specific protective measures, Portuguese legal order has a witness protection law in criminal proceedings that can also be applied in cases of domestic violence. See Law no. 93/99, of 14th July. This law provides for the possibility of: concealing the image and/or distorting the voice during testimony; hiding the identity of the witness when there is an applicable prison sentence of eight years or more; testifying via teleconference; providing an alternate address in the case files different from the usual residence; relocating to a new residence; transport in a designated vehicle; designated and possibly monitored areas in

courts or police facilities; police protection; if the protected individual is an inmate, he/she can be placed in a separate area in the prison; issuing identification documents different from the originals; altering the facial features or appearance of the beneficiary; creating conditions for securing means of livelihood; granting a subsistence allowance for a limited period.

Portuguese law provides for programmes both for individuals convicted of crimes within the context of domestic violence and for defendants accused of crimes in the context of domestic violence. On average, the recidivism rate decreases by 7% after attending a programme for those convicted of crimes related to domestic violence. After two years, 91% of the convicted individuals do not reoffend, but after five years this percentage drops to 78%.

3. Procedural and preventive issues

Under the Portuguese law, domestic violence is a public offence.

As such, the "Public Prosecutor's Office has the legitimacy to promote criminal proceedings" since a public offence does not require the offender to file a complaint. And, having this legitimacy, the Public Prosecutor's Office is also obliged to open an enquiry and investigate the crime once it has been reported.

Consequently, any individual can report the offence, thus initiating criminal proceedings. However, they are not obliged to do so. Police forces, on the other hand, are obliged to report any crime they become aware of. Other civil servants (which, for the purposes of criminal law, is a very broad concept) are obliged to report all crimes of which they become aware in the course of their duties and because of them.

In other words, there is a general obligation for public bodies to report crimes of domestic violence, but not for private individuals, although they can do so. And this reporting is sufficient to initiate criminal proceedings with the aim of pursuing criminal prosecution.

All these reports occur, by their nature, after the fact (after the crime) and have no preventative effect in relation to it. This is without prejudice to the preventive effects recognised in the application of criminal sanctions, which necessarily require the completion and finalisation of the respective criminal proceedings.

In short, each complaint only serves the purpose of prosecuting the crime that has already been committed, although from a more systemic viewpoint it can have a real effect on preventing the future commission of domestic violence offences, via the preventive effects of punishment.

As for the victim of the crime, he or she can indeed file a complaint about the offence, but since domestic violence is a public offence, it is not necessary for the victim to do so: any report of the crime is equally viable for the purposes of initiating criminal proceedings. In Portugal, even anonymous reporting is admissible (although with some legal precautions).

Thus, the proactive intervention of the victim is not necessary to initiate criminal proceedings.

As in any other criminal offence, the defendant in criminal proceedings for domestic violence may be subject to the appropriate measure(s) of coercion. In the crime of domestic violence, even the most serious measure of coercion can be applied: preventive detention while pending the criminal procedure. This is because the crime of domestic violence is classified as "violent crime", which corresponds to "conduct that is intentionally directed against […] physical integrity, [...] and is punishable by a maximum prison sentence of five years or more".

In addition, in Portugal there is a specific legal regime applicable to the prevention of domestic violence and the protection and assistance of its victims, the Law no. 112/2009 (16th September), which applies (also) to criminal proceedings.

Thus, in criminal proceedings for domestic violence, and as a specific mechanism for protecting the victim, the urgent production of evidence is ordered, allowing the Public Prosecutor's Office to decide on

the promotion of the appropriate coercive measure(s) within 72 hours of the report of the offence.

What is more, in the case of an arrest in *flagrante delicto*, the defendant is, as a rule, detained until he is brought before a judge. The possibilities for detention outside of *flagrante delicto* are also extended comparing to other crimes (for example, because "it is essential for the protection of the victim"), and in relation to the entities authorised to order such detention (detentions ordered by the police authority, if it is not "possible, given the situation of urgency and danger of delay, to wait for the intervention of the judicial authority").

There are also specific urgent coercive measures for the crime of domestic violence, the application of which is to be considered by the judge within a maximum of 48 hours of the defendant being charged, including, for example, handing over weapons, leaving the family home or restricting the exercise of parental responsibilities.

Section 134 CPC states that:

"1 – The following may refuse to testify as witnesses:

a) Descendants, ascendants, siblings, relatives up to the 2nd degree, adopters, adoptees and the defendant's spouse;

b) Anyone who has been the defendant's spouse or who, being of the other or same sex, lives with him or her or has lived with him or her under conditions like those of spouses, in relation to events that occurred during the marriage or cohabitation;

c) [...]

2 – Under penalty of nullity, the body competent to receive the statement shall warn the persons referred to in the previous paragraph of their right to refuse to give evidence."

So, as in criminal proceedings for other offences, in a proceeding for domestic violence the victim and other close relatives of the defendant can refuse to testify as witnesses, whether or not they are victims of the crime. They can of course be listed as witnesses, and can make

statements as such, subject to the duty of truth that binds all witnesses. But they have the right to refuse to give evidence without having to justify their refusal. Furthermore, they must be informed of their right to refuse, otherwise what they declare as witnesses will not be valid as evidence.

In Portugal, provisional suspension of proceedings exists as an alternative to submitting the case to trial. It applies to offences punishable by a prison sentence of no more than five years, which includes domestic violence, as provided for in section 152 no. 1 CC. However, in cases of domestic violence, this procedure is specifically referred to in the law, which states in section 281 no. 8 CPC:

"In proceedings for a crime of domestic violence not aggravated by the result, the Public Prosecutor's Office, upon the free and informed request from the victim, shall order the provisional suspension of the proceedings, with the agreement of a judge [juiz de instrução] and the defendant, provided that the assumptions of subparagraphs b) and c) of no. 1 are met."In other words, not only has the regime been adapted to criminal proceedings for domestic violence offences, but there has also been a formal softening in the application of the institute, by requiring the verification of fewer conditions than the usual ones for its application [only subparagraphs b) and c) of section 281 no. 1 CPC, and no longer subparagraphs a), d), e) or f), as it is clear from a mere reading of the law].

The application of this suspension depends on the victim's free and informed request, the absence of a previous conviction of the defendant for committing an offence of the same nature, and the absence of a previous application of this provisional suspension for an offence of the same nature to the defendant. But unlike other offences, there are no other requirements here, for example, the absence of a high level of guilt.

During the suspension, the defendant must comply with certain injunctions and rules of behaviour appropriate to the situation in order to have the criminal case dropped at the end of the suspension. In the event of non-compliance, the criminal proceedings proceed to trial. In

the event of compliance, the criminal act remains to be investigated and thus punished. For all intents and purposes, the defendant has not committed an offence.

The specific legal regime indicated above as applicable to the prevention of domestic violence and the protection and assistance of its victims, contained in Law no. 112/2009 (16th September), provides for a series of supports for the benefit of victims, namely of a legal, psychosocial, psychological, psychiatric, financial, social, and residential nature. However, it is not certain that the victims have effective access to many of these supports. Examples of supports that have actually been implemented include exemption from user charges when accessing the national health service and from court fees in the judicial system (when the victim wants to actively intervene in the criminal proceedings). Furthermore, the Public Prosecutor's Office informs victims about their right to claim compensation and how to enforce it, and about the existence of public, associative or private institutions that carry out victim support activities.

In pending criminal proceedings for domestic violence, it is not compulsory for the victim to be represented by a lawyer. Victims do not have access to a lawyer simply because they are victims. Although they are guaranteed access to the judicial system, victims will only have access to a lawyer if they want legal advice or effective intervention in the proceedings. To do so, they must appoint a lawyer or request their official appointment.

Specific training activities on domestic violence have been of particular interest to the police and forensic professions, not only in terms of legislative updates, but also in terms of best practices for dealing with a victim. For example, the proper way to address a victim, the need for reserved spaces so that they can speak comfortably, how to detect signs of fear, etc., all of this requires specific attention, and therefore training efforts.

Judges and prosecutors receive continuous training throughout their careers, also on issues of domestic violence. The Portuguese police

have invested heavily in training in this area. The Portuguese Bar Association has also provided its members with training in this subject.

There is a clear realisation that this is a specific crime that requires a series of cross-cutting areas of action/intervention skills, which makes it obvious that there is a need for continuous training for the different professionals involved in prosecuting this crime.