



Protection of abducting mothers in return proceedings: intersection between domestic violence and parental child abduction (POAM)

SPANISH NATIONAL REPORT

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This report analyses the intersection between domestic violence and international parental child abduction in Spanish legal system. In particular, it focuses on the operation of the Regulation 606/2013 (Protection Measures) and the Directive 2011/99 (European Protection Order) in the context of return proceedings involving allegations of domestic violence, under the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the Council Regulation 2201/2003 of 27 November 2003 ('Brussels IIa').

Table of contents:

1. Introduction 2. Normative situation: Domestic violence and minor's restitution 3. Quantitative data: statistics 4. Qualitative data: case law 4.1 Juana Rivas v. Francesco Alcuri 4.1.1. Facts 4.1.2 Parties' claims 4.1.3 Court decisions 4.2 Juliana v. Baltasar 4.2.1. Facts 4.2.2 Parties' claims 4.2.3 Court decisions 4.3 Erica v. Arcadio 4.3.1. Facts 4.3.2 Parties' claims 4.3.3 Court decisions 5. Findings 6. Conclusions



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1. Introduction

Though a unique and indissoluble State (art. 2 Spanish Constitution - SC), Spain is administratively structured in seventeen self-governing Communities (*Comunidades Autónomas*) enjoying a wide margin of legislative, administrative and executive power (arts. 147-149 SC)¹. However, the judicial administration system is unique for the whole country (arts. 117 and 149.1.5 SC).

Beyond the final possibility of appealing to the Constitutional Court in cases of alleged breach of fundamental rights (art. 53.2 SC), the Spanish judicial system has three instances. Regarding the subject matter of this report, civil and criminal courts must be considered. Initially, first instance courts (*juzgados de primera instancia*) have jurisdiction civil cases (there is no specialization within the private law jurisdiction despite the fact that some of the First Instance courts are signified as family courts²) whilst criminal courts (*Juzgados de instrucción*) have jurisdiction in criminal cases. In certain areas of the country, joint criminal and civil first instance courts (*Juzgados de primera instancia e instrucción*) have jurisdiction in both areas. In addition, at this first level, Courts for Violence against Women (*Juzgados de violencia contra la mujer*) have jurisdiction in criminal actions on domestic violence affecting women and minors and can also hear minor's related civil issues³. On appeals, Provincial Audiencias (*Audiencias*

¹http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_in_gles_0.pdf English text.

² *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (LOPJ)*, BOE n° 157, 2 July 1985. Consolidated text in <https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666>.

³ Arts. 87 bis and ter LOPJ. Particularly, art. 87 ter. states “2. *Within the sphere of criminal matters, the Courts for Violence against Women, with the procedures... outlined in the Law of Criminal Procedure... shall hear the following matters:... c) Matters relating to parent-child contact. d) Matters relating to the adoption or modification of measures that have bearing on the family; e) Matters exclusively relating to the guardianship and custody of minor offspring or to alimony claimed from one parent by the other on behalf of offspring who are minors. ... 3. ... exclusive and exclusionary competence in the sphere of civil matters where the following requisites are simultaneously met: a) Where we are dealing with a civil procedure for the purposes outlined in point 2 of this article. b) Where any of the parties in the civil procedure are victims of gender-based violence, in the terms outlined in paragraph 1 a) of this article. c) This report was funded by the European Union’s Rights, Equality and Citizenship Programme (2014-2020).*”



Provinciales) and, finally, the Supreme Court provide for the second and third instances respectively (civil and criminal chambers).

The Spanish Courts' work in civil and criminal litigation is implemented by Judges and Justice Attorneys. They are governed, respectively, by the General Council for the Judiciary (*Consejo General del Poder Judicial* - CGPJ), and by the General Secretary for the Administration of Justice (Ministry of Justice).⁴ In order to litigate before Spanish Civil and Criminal Courts, it is generally required to be assisted by a representative *ad litem* and defended by a lawyer.⁵ In both jurisdictions, free legal assistance is granted for those litigants without sufficient economic resources⁶. The intervention of the Public Prosecutor (*Fiscal*) is compelled in criminal cases as well as in those civil cases where the interests of minors are at stake.⁷ Particularly, for domestic violence cases, Public prosecutors are obliged to intervene in any criminal or civil action been heard before the Courts for violence against women.⁸

Beyond a partial reference to the European Protection Order, the *Annual Report on Justice in Spain* prepared by the CGPJ (the last published one corresponds to 2018)⁹, there are no available official quantitative data regarding the application of Regulation 606/2013, Brussels Iia Regulation or the 1980 Hague Convention (see Point 3). The principal qualitative data used in this report has been obtained from the search implemented in different Spanish jurisprudence databases (the publicly funded, CENDOJ, and other private ones; see point 4). Except in exceptional circumstances, none of them includes

Where any of the parties in the civil procedure are accused as the perpetrator, instigator or essential collaborator in relation to acts of gender-based violence. d) Where criminal proceedings for a crime or misdemeanour as a result of an act of violence against a woman have commenced before a Judge for Violence against Women, or a protection order has been adopted in relation to a victim of gender-based violence.

⁴ Arts. 330 *et eq.*, 440 *et eq.* LOPJ, note 2.

⁵ Arts. 542 and 543 LOPJ. In criminal cases, when the offender has no means to afford his defense, the State provides him with an *ex officio* lawyer (*abogado de oficio*).

⁶ Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita (LAJG), *BOE* n° 11, 1/12/1996.

⁷ Art. 749 Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (LEC), *BOE* n° 7, 08/01/2000; <https://www.boe.es/eli/es/l/2000/01/07/1/con> (for cases where minors are involved). As to criminal cases, Criminal Procedure Law (Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal, *BOE* n° 260, de 17/09/1882; *BOE-A-1882-6036*).

⁸ Art.18.1 Ley 50/1981, de 30 de diciembre, reguladora del Estatuto Orgánico del Ministerio Fiscal, *BOE* n° 11, 13/1/1982; <https://www.boe.es/eli/es/l/1981/12/30/50/con>.

⁹ The annual reports can be found in <http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estudios-e-Infomes/Panoramica-de-la-Justicia/>

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decisions adopted by any of the first instances' courts. Therefore, the analysis (Point 5) relies on the limited available data, which refers, essentially, to courts of appeals' decisions.

2. Normative situation: domestic violence and restitution of minors

Spanish Criminal Code¹⁰ provides for the prosecution of domestic violence (including women and children)¹¹ and minor's kidnapping¹². For the purposes of this study, focused in the restitution of minors under 1980 Hague Convention¹³ and Brussels IIa Regulation¹⁴, minor's kidnapping is of scarce relevance since, under Spanish legal system, minor's restitution is classified as a separate civil action. Therefore, despite their possible interactions, domestic violence (criminal action) and minor's restitution (civil action), fall, at least in principle, under different jurisdictions and receive different legal treatment, including protection measures. The reason for this split lies on the nature of the rights protected in each of these actions: the physical and moral integrity of the individuals (particularly women) on the one hand and, on the other, custody rights.

On this subject matter, Spanish legal system counts with several normative sources with different origin, nature and scope. To begin with, international Conventions such as the

¹⁰ Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, BOE nº 281, 24/11/1995, <https://www.boe.es/eli/es/lo/1995/11/23/10/con>

¹¹ Art. 173.2 Criminal Code (Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal, BOE nº 260, de 17/09/1882; BOE-A-1882-6036); *The one who habitually exercises physical or psychological violence on who is or has been his spouse or on a person who is or has been linked to him by an analogous relationship of affectivity even without coexistence, or on the descendants ..., or on minors ... who live with him or who are subject to the power, guardianship, conservatorship, foster care or de facto guardian of the spouse or cohabiting partner ..., will be punished with the prison sentence from six months to three years, deprivation of the right to possession and bearing of arms from three to five years and, where appropriate, ... to the interest of the minor ... special disqualification for the exercise of parental rights, guardianship, conservatorship, custody or foster care for a period of one to five years, without prejudice to the penalties they could correspond to the crimes in which the acts of physical or psychological violence had been carried out.*

¹² Art. 225 bis Criminal Code: *1. The parent who, without justified cause for this, abduct his youngest child shall be punished with a prison sentence of two to four years and special disqualification for exercise of parental rights for a period of four to ten years. 2. For the purposes of this article, abduction is considered: 1º. The transfer of a minor from his place of residence without the consent of the parent with whom he usually lives or of the persons or institutions to which his guardianship or custody was entrusted. 2º. The retention of a minor seriously breaching a judicial or administrative resolution....*

¹³ 1980 Hague Convention on the Civil Aspects of International Child Abduction

¹⁴ Council Regulation 2201/2003 of 27 November 2003 ('Brussels IIa').



Children rights one¹⁵ and European Fundamental rights Charter¹⁶ are basic general normative references in this realm.

Regarding domestic violence, Spain is a party - together with the EU- to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).¹⁷ On custody, visitation and other rights, article 31.1 of the Convention states that “Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account”.

The national internal norms directly or indirectly covering the protection of minors in domestic violence situations comprise:

- Law 27/2003 on the protection motion for domestic violence victims¹⁸;
- Organic law 1/2004 on the integral protection measures against gender violence¹⁹, which includes protection measures for gender violence victims;
- Organic law 3/2007 on the effective equality between women and men²⁰;
- Organic law 8/2015 modifying the infancy and adolescence protection system²¹
- Law 4/2015 on the victims statute²², transposing Directive 2012/29²³;
- Civil Code²⁴ (and the parallel Autonomous Communities norms where applicable), including the regulation on minors custody and protection;
- Organic Law 10/1995, on the Criminal Code²⁵; and
- Criminal Procedure Law²⁶, whose articles 544 *bis* and *ter*. regulates the protection measures for domestic violence victims.

¹⁵ Convention on the Rights of the Child adopted by the General Assembly of the United Nations on November 20, 1989; *BOE* nº 313, 31.12.1990.

¹⁶ 2000/C 364/01, *OJ*, C 364/3, 18.12.2000.

¹⁷ Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011, *BOE* nº de 6/6/2014.

¹⁸ Ley 27/2003, de 31 de julio, reguladora de la orden de protección de las víctimas de la violencia doméstica, *BOE* nº. 183, 01/08/2003.

¹⁹ Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género (LOPIVG), *BOE* nº. 313, 29/12/2004

²⁰ Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres (LOI), *BOE* nº 71, 23/03/2007.

²¹ Ley Orgánica 8/2015, de 22 de julio, de modificación del sistema de protección a la infancia y a la adolescencia (LOPIA), *BOE* nº175, 23/07/2015.

²² Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito, *BOE* nº 101, 28/4/2015

²³ Directive 2012/29 of the European Parliament and the Council, of 25 October 2012, of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, *OJ L* 315, 14.11.2012.

²⁴ Real Decreto de 24 de julio de 1889, Código Civil, *Gaceta de Madrid* nº 206, 25/7/1889, [https://www.boe.es/eli/es/rd/1889/07/24/\(1\)/con](https://www.boe.es/eli/es/rd/1889/07/24/(1)/con)

²⁵ Note 10.

²⁶ Note 11.



It is important to note that protection measures available under these legal instruments for victims of domestic violence can have criminal, civil and even administrative character. It seems also interesting to note that some of the protection measures related to the contact between accused parents and minors have a certain degree of overlapping content in the civil and criminal sphere. As it has been said, the interests protected in each legal areas are, in this realm, different.

In addition, Directive 2011/99, on the European Protection Order (EPO), imposed member States the mutual recognition principle in order to extend the territorial scope of criminal protection orders (art. 5 Directive)²⁷ issued in a member State to another member State where the victim moves temporally or with the intent to establish a new residence. The Directive was incorporated to the Spanish legal system through the Law 23/2014²⁸. This law articulates the procedures to issue Spanish European protection orders as well as for the enforcement in Spain of those EPO issued in other member States.

On its part, Regulation 606/2013 on mutual recognition of protection measures in civil matters²⁹ aims to ensure the effectiveness of any civil measures taken in a member State for the physical or psychological protection of a victim of violence (domestic or gender based), including those affecting minors with respect to parents. Spanish legislator has not implemented rules to ease its application by national courts. This instrument guarantees that the civil (UE autonomous concept) protection measures (under the definition of art. 3.1)³⁰ issued in a member State are recognized in all other Member States without need for any special procedure.

²⁷ A national criminal measure entailing the “*following prohibitions or restrictions: (a) a prohibition from entering certain localities, places or defined areas where the protected person resides or visits; (b) a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax or any other means; or (c) a prohibition or regulation on approaching the protected person closer than a prescribed distance*”.

²⁸ Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea, *BOE* nº 282, 21/11/2014; <https://www.boe.es/eli/es/l/2014/11/20/23>, modified by Ley 3/2018, de 11 de junio, para regular la Orden Europea de Investigación, *BOE* nº. 142, 12/06/2018, <https://www.boe.es/eli/es/l/2018/06/11/3>.

²⁹ Regulation 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, *OJ L* 181, 29.6.2013.

³⁰ “*protection measure*’ means any decision, ..., ordered by the issuing authority of the Member State of origin in accordance with its national law and imposing one or more of the following obligations on the person causing the risk with a view to protecting another person, when the latter person’s physical or

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As to minor's trans-border restitutions, Spain is compelled to apply the already mentioned Brussels IIa bis Regulation together with the 1980 Hague Convention. Both of them are complemented with the Spanish Civil Procedure Law³¹.

1.1 Domestic violence and protection of minors.

Regarding the regulation of domestic violence, the point of departure is necessarily the concept of victim. In accordance with Istanbul Convention (art. 3)³², any person that has experienced domestic or gender violence, be it directly or indirectly, is understood to be a victim under the Spanish victim's statute (art. 2)³³. Whilst the Statute is applicable regardless the nationality of the victim, his age (adults or minors), or whether he legally resides in the country, in principle, it does only cover crimes committed in Spain or that can be prosecuted before Spanish courts, (art. 1)³⁴. In this realm, article 23 of the Organic Law of the Judiciary establishes Spanish courts' criminal jurisdiction.³⁵ Regarding crimes

psychological integrity may be at risk: (a) a prohibition or regulation on entering the place where the protected person resides, works, or regularly visits or stays; (b) a prohibition or regulation of contact, in any form, with the protected person, including by telephone, electronic or ordinary mail, fax or any other means; (c) a prohibition or regulation on approaching the protected person closer than a prescribed distance.

³¹ Chapter IV bis (arts. 778 quarter, quinquies and sexies) and Final Provision n° 22, 3rd rule, LEC, note 7.

³² Victim is any natural person subject to "violence against women" (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 harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life) or to "domestic violence" (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 Direct victims are any natural person that has suffered personal or patrimonial damage, particularly physical, psychological or emotional harm, resulting of a crime. Indirect victims are those in cases of death or disappearance of a person (initially; spouse, victims' and cohabitating victim's partners' children, partners and children in analog situations; if these are non-existent, the rest of the family members).

³⁴ Although article 17 of the Victim's Statute establishes that "victims residing in Spain may submit complaints to criminal authorities corresponding to criminal acts that had been committed in the territory of other countries of the European Union", under Spanish law, any jurisdiction rule or modification of the existing jurisdiction rules has to be adopted through an Organic Law, which is not the case in Law 4/2015.

³⁵ In particular, 2nd paragraph establishes that Crimes committed outside Spanish territory also fall under Spanish jurisdiction providing that those held criminally responsible are Spanish or are foreigners who have acquired Spanish nationality subsequent to the perpetration of the act, and where the following requisites are met:

a) The act must be punishable in the place where it was perpetrated, save where, by virtue of an international Treaty or the legislative act of an international Organisation of which Spain is a member, this requisite does not prove necessary, notwithstanding the stipulations of the following paragraphs.

b) The affected party or the State Prosecutor must file a lawsuit before the Spanish courts.

c) The offender must not have been acquitted, pardoned or convicted abroad or, in the latter case, must not have served the sentence. If only part of the sentence has been served, this shall be borne in mind in order to decrease the corresponding sentence by the appropriate amount.



covered by the Istanbul Convention, article 23.4.1 LOPJ establishes jurisdiction (1) when the indicted person is Spanish citizen or (2) a foreigner that habitually resides in Spain; and (3) when the victim possessed Spanish nationality or a habitual place of residence in Spain at the time of the acts if the accused person is levelled in Spain. In the event that the Spanish courts have no jurisdiction, they will immediately forward the claim to the competent authorities of the State where the events took place and notify the claimant (art. 17 Victims' Statute).

In the context of these domestic violence criminal procedures courts may adopt a number of protective measures particularly directed to address the needs of minors, be it on a precautionary basis during the procedure (precautionary inductions) or as final resolutions.³⁶ Beyond those already provided by the Criminal Code, LO 1/2004 also establishes victim's safety and protective measures³⁷, including the so-called protection order (art. 62)³⁸. As to the protection orders, it may seem obvious to acknowledge that its request to the Court by the claimant/victim is initially demanded as precautionary measure and is usually accompanied with the request of other protection measures. Specifically, Criminal Code article 173.2³⁹ detail the measures to be adopted as a final condemn and, article 105.1b refers to those penalties associated to imprisonment of the condemned.⁴⁰ On its part, LO 1/2004 article 65 refers to the measures of suspension of parental rights or custody of minors whilst article 66 focus in remoteness and communication or visits' limitations.⁴¹ LO 1/2004 measures are compatible with "any of

³⁶ Victim's protection is guaranteed beyond the end of the process through "security measures".

³⁷ In particular, those regulated in article 544 bis LECrim.

³⁸ Regulated in art. 544 ter LECrim. for domestic violence victims.

³⁹ ... *Six months to three years of imprisonment, ...and, attending to the best interests of the child or disabled person needed of special protection,, special disqualification for the exercise of parental responsibility, guardianship, from one to five years, regardless of the penalty imposed for the crimes derived from the physic or psychic violence.*

⁴⁰ (...) *1. For a period not exceeding five years: a) Probation; b) Family custody. The person subject to this measure will be subject to the care and supervision of the designated family member and who accepts custody, who will exercise it in relation to the Surveillance Judge and without prejudice to the custodian's school or work activities. 2. For a period of up to ten years: a) Probation, when this Code expressly establishes it; b) The deprivation of the right of possession and bearing of arms; c) The deprivation of the right to drive motorized vehicles and mopeds (...).*

⁴¹ In both cases, judges may suspend the exercise of any parental rights, custody, guardianship, conservatory or de facto custody rights as well as communications, stays or visits of the accused of gender violence. If the Judge does not suspend any of those, he must decide on the form in which those rights will be exercised and adopt the necessary measures to guarantee the safety, integrity and recovery of minors (and women), and will periodically monitor their evolution.



the precautionary and assurance measures that may be adopted in civil and criminal proceedings".

As it is well known, the European Protection Order (EPO) is not an autonomous protection measure on itself. On the contrary, it entails the extension of the territorial scope of a national protective measure whose previous existence is necessary (arts 2.5 and 5 Directive 2011/99; art. 133.a Ley 23/2014). Both things, the protection measure at issue and the accordance of its European executive character through the issuance of the order, can be requested to the court simultaneously. Therefore, in principle, for the issuance of the EPO, the Spanish competent authority must have accorded one of the protection and safety measures for victims of gender and domestic violence provided for in the Criminal Code and/or in LO 1/2004, be it with provisional or definitive character. However, Directive 2011/99 requires the measure be criminal in nature (art. 2 Directive 2011/99; arts. 130 and 133.a Law 23/2014) and comply with certain requirements (art. 5 Directive 2011/99 and art. 133 Law 23/2004). In practice, this implies that only three types of protection measures can be certified as EPOs:

- (1) the prohibition of entering or approaching certain localities, places or defined areas in which the protected person resides or frequents;
- (2) the prohibition or regulation of any type of contact with the protected person, including telephone contacts, by email or post, by fax or by any other means; and
- (3) the prohibition or regulation of the approach to the protected person at a distance less than that indicated in the measure.

The competent authorities to issue and receive an EPO in Spain are the Criminal Courts (in general) or Courts for Violence against Women (mixed, criminal and civil courts) of the place where the victim resides or intends to do so (art. 131.2 Law 23/2014). This approach leads to confusion (which of those criminal courts is the competent one?) in gender violence cases (as to the EPO Directive) but also in those cases where Regulation 606/2013 is to be applied to enforce protective civil measures adopted in another member State.

When it comes to the application of Regulation 606/2013, it is previously necessary to determine whether the enforcement of the foreign protection measure corresponds to the civil or to the criminal jurisdiction. Practice shows that litigants have appealed courts

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decisions on the basis of the inhibition of the Courts of Violence against Women in favor of instruction (criminal) or first instance-family courts (as appropriate) and vice versa. A Barcelona Provincial Court Order resolving the appeal against the judgement of a Court of Violence against Woman can illustrate the case. The Court of Violence against Woman had established its lack of competence to hear a claim for the recognition and enforcement in Spain of protection measures issued in the United Kingdom (on a woman and her child). The Provincial Audience established the competence of the Court of Violence against Woman to recognize and adopt the restraint measures accorded in the United Kingdom, as well as the analogous or complementary measures. Likewise, the Provincial Audience recommends Barcelona Judges Board to adopt clear rules on the distribution of cases among courts to gain effectiveness and to avoid the delays experienced in this case.⁴²

As to the civil nature protection measures, automatic recognition is established in Regulation 606/2013 regardless the nature of the Member State's authority ordering the measure.

1.2 Minor's restitution (civil)

In EU related cases, according to Brussels IIa Regulation (art. 11), Spanish courts have jurisdiction in restitution proceedings when the minor was a Spanish resident before the retention or kidnapping and he is illegally held or moved to Spanish territory. Spanish Courts always refer to the 1980 Hague Convention in those aspects not covered by the Regulation. Civil procedural Law establishes the procedure and the measures that can be adopted.⁴³

Any civil (autonomous concept) protection measure surrounding the restitution proceeding that is not covered by Brussels IIa Regulation may fall within the scope of Regulation 606/2013. When that is the case, decisions adopted by courts of EU member States would be enforceable in Spain under Regulation 606/2013. Since there are no specific internal rules complementing the domestic application of Regulation 606/13,

⁴² SAP Barcelona 01/03/2018 Roj: AAP B 435/2018 - ECLI: ES:APB:2018:435A.

⁴³ See note 31. Particularly, art. 778 *quinquies*.



Spanish case law has established that the determination of the competent court for the enforcement of the foreign measure depends on the internal characterization of the measure as civil or criminal; resorting to the corresponding civil or criminal court of the place where the affected party has his residence. For the rest, the nature that better suits the purpose of protection must prevail.⁴⁴

In any case, under Spanish case law, if the violence protection measure adopted is only addressed to the kidnapping or retaining parent and does not expressly include the minors that have been moved to our territory, it will not be a basis for the rejection of the restitution claim.⁴⁵

2. Quantitative data: Statistics

The most significant available official statistical data on Spanish Courts' activity is to be found in the annual Panoramic of the Justice. However, it does not specifically address the use of Regulation 606/2013. Data on the EPO can be found but without any reference to the particular cases or the circumstances surrounding them. Therefore, it is not possible to determine whether those cases were related to domestic violence.

For a general overview and without any possibility of distinguishing between international and purely internal cases, it is interesting to refer to the most recent data on the activity of the Courts on Violence against woman.⁴⁶ It states that these courts resolved 14.308 criminal procedures and that, from the 24.514 civil cases entered in these tribunals, 21.635 were resolved. A total of 39.176 protection orders and measures under 544 *bis* and *ter* of the Criminal Code were introduced (implying a 1,8% increase from 2017). Some were turned down (392), the majority (27.093; that is a 69,2%) were adopted and, finally, 11.691 were denied.

Number of cases on the basis of victim and accused characteristics

Victim

Accused

⁴⁴ AAP Barcelona de 01/03/2018 Roj: AAP B 435/2018 - ECLI: ES:APB:2018:435A.

⁴⁵ SAP Valencia 23/02/2017 Roj: SAP V 718/2017 - ECLI: ES:APV:2017:718.

⁴⁶ CGPJ, *Panorámica de la Justicia durante 2018*, 2019, p. 47.

<file:///C:/Users/Carmen%20Otero/Downloads/Panor%C3%A1mica%20de%20la%20Justicia%202018.pdf>

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Number of protection orders and measures of 544 bis and ter	Adult Spanish woman	Minor Spanish woman	Foreign adult woman	Foreign minor woman	Spanish man	Foreign man
39.176	26.263	679	12.006	228	26.560	12.616

Number of cases on the basis of their presentation				
Victim's instance	Other persons' instance	Prosecutor instance	Ex officio	Administration's instance
93,9%	0,4%	4,3%	1,3%	0,0%

As to EPO⁴⁷, the data reveal that in 2018 only 5 were issued by Spanish courts and none was received from other member States. Nevertheless, it is not established whether this scarce use of the order took place in domestic violence cases or in any other criminal context.

Regarding the procedures related to the wrongful removal or retention of children, 112 cases entered Spanish civil courts and 108 were resolved. In the previous year (2017), 134 cases entered these courts and 117 were resolved.⁴⁸ It is not possible to determine how many of these cases were of intra-EU character.

3. Qualitative data: Child abduction cases involving domestic violence

This section presents the most relevant available child abduction and restitution international case law involving domestic violence.⁴⁹ As a note, it is interesting to point that, in purely internal cases involving domestic violence, is not strange to find decisions in which Courts refer to Brussels IIa Regulation in order to reinforce the best interest of the child as a regulatory principle in this area.⁵⁰

⁴⁷ *Ibid.* p. 53.

⁴⁸ *Ibid.* p. 22.

⁴⁹ For example, in the case of Valencia Provincial Audience 3/6/2019 (AAP V 2283/2019 - ECLI: ES:APV:2019:2283A), the mother retained the Bulgarian resident children in Spain after holidays and, beyond claiming provisional measures on them, demanded her partner for domestic violence. This demand was dismissed and the lack of Spanish jurisdiction established as to the children's parental responsibility according to art. 8 Regulation 2201/2003.

⁵⁰ As recent illustrations, see, for example, Barcelona Provincial Audience 16/9/2019 (SAP B 11317/2019 - ECLI: ES:APB:2019:11317)31/7/2019 (SAP B 10402/2019 - ECLI: ES:APB:2019:10402), and This report was funded by the European Union's Rights, Equality and Citizenship Programme (2014-2020).



3.1 Juana Rivas v. Francesco Arcuri

The Juana Rivas affair is one the most renowned case in recent years. The fact that almost every media has followed the story of this family has made public factual data that are not usually available. The case has been going on over several years both in Spanish and Italian jurisdiction. In Spain, criminal and civil proceedings have taken place.

3.1.1. Facts:

In 2005, Mr. Arcuri (Italian), was sued in Spain for beating his wife, Ms. Rivas (Spanish). The Criminal Court of Granada condemned him for family injuries (article 153. 2, 3 and 4 of the Criminal Code) to three months in prison and provided for a one year's time restraint order with regard Ms Rivas. While separated, Ms. Rivas went to Asia with a new partner, leaving their only child to the care of his father for some months. In 2013, Ms. Rivas and Mr. Arcuri resumed the relationship. In June of that year they decided to move together to San Prieto (Italy) and in January 2014 the couple's second child was born.

In May 18, 2016, once the school year was over, Ms. Rivas and her children travelled to Granada for holidays with Mr. Arcuri's consent. Ms. Rivas did not return with the minors to Italy on the scheduled date arguing that she was ill. On July 12th, 2016 Ms. Rivas filed a complaint of gender-based violence against Mr. Arcuri before Granada's Violence against women Courts, for events that had allegedly lasted from 2013 to 2016 while they were residing in Italy.

In August 2016, Ms. Rivas expressly informed Mr. Arcuri of her refusal to return to Italy with the children. She unilaterally decided to educate children in Spain from September. At that time, Granada's court had not admitted the complaint due to lack of jurisdiction, because alleged criminal acts had not been carried out in Spain.

Meanwhile, Mr. Arcuri's, on its part, he promoted and obtained before the Italian Courts the provisional custody of the two minors. At the same time, he sued for restitution before

24/07/2019 (SAP B 10406/2019 - ECLI: ES:APB:2019:10406, mentioning arts. 12.1. b and 3.b, 15.1; 5 and 23 of Regulation 2201/2003, together with art. 39 SC.

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the Italian Ministry of Justice, invoking the 1980 Hague Convention. As a consequence, on December 14, 2016, the Court of First Instance of Granada issued a ruling agreeing to the immediate return of the minors to Italy as their habitual State of residence. The sentence was appealed by Mrs. Rivas and, on April 21, 2017, the Provincial Court of Granada dismissed the appeal and maintained the same resolution adopted by the Court of First Instance.

Mrs. Rivas' did not comply with the sentence that forced her to return the children. Hence, Mr. Arcuri requested its forced execution. On July 11, 2017, the Court of First Instance of Granada issued an order of forced execution, requiring the mother to comply immediately, giving her a period of three days to hand over the children. Since Ms. Rivas failed to comply with the aforementioned injunction, the same court issued a resolution on July 24, 2017, ordering the immediate minors delivery on July 26 at 4:30 p.m. at the family meeting point in Granada. For this purpose, Mr. Arcuri moved to the meeting point, accompanied by the consular authority of Italy and a Spanish police force, but Mrs. Rivas did not appear nor give an explanation about her absence. Her refusal to comply with the July 24, 2017 injunction was supported with a petition for annulment of the enforcement actions carried out by the Court of First Instance, but, on August 9, 2017 the Provincial Audience of Granada dismissed the annulment incident and reminded Mrs. Rivas of her obligation to immediately return the children.

Meanwhile, Mr. Arcuri requested, through civil proceeding, urgent measures for the protection of minors requesting -among others- particular measures in order to avoid departure of minors from Spain, together with the deprivation of parental rights of the mother and they be established exclusively for the father.

At last, Mr. Arcuri got the minors returned to Italy where, the courts had granted him their custody establishing a right for restricted visits to the mother, Ms. Rivas.

From the criminal point of view, Ms. Rivas was condemned, as author of two offenses of child abduction, to a penalty of two years and six months of imprisonment for each, with accessory deprivation of the right to stand for election, deprivation of the exercise of



parental responsibility for six years with respect to her children and to indemnify Mr. Arcuri for the damages suffered.

2.1.2 Parties' claims (before Spanish jurisdiction):

There were three criminal procedures and a number of civil procedures.

A) As to the criminal procedures:

A.1 Two criminal proceedings dealt with domestic violence accusations. In both cases Ms. Rivas (mother) was the plaintiff and Mr. Arcuri the accused. The first one in 2005 (event occurred in Spain): with the result of conviction for Mr. Arcuri. The last one in July 2016 (events occurred in Italy which lasted from 2013 to 2016) was not admitted due to lack of jurisdiction.

A.2 The third one dealt with minors' kidnapping. Mr Arcuri accused Ms. Rivas; that was convicted.

B) As to the civil proceedings:

B.1 Initially, there was a minor's restitution proceeding. On its first phase: Claimant Mr Arcuri; Defendant: Ms. Rivas. Second phase: Appeal: Ms. Rivas (mother). Final injunction: return of minors.

B.2 Afterwards, the forced execution of the return injunction of minors was claimed by Mr Arcuri against Ms. Rivas.

Petition for annulment of the enforcement actions before the higher judicial court (Provincial Court of Granada): Claimant: Ms. Rivas. Final injunction: confirms the previous injunction: obligation to immediately return the children.

B.3 Meanwhile, urgent/precautionary protection measures of minor's procedure were requested by Mr Arcuri against Ms. Rivas. In particular: 1) The withdrawal of the passport of minors, as well as the prohibition of the exit of minors from the Schengen territory without authorization of the father or without judicial authorization. 2) That Mrs. Rivas declare if she has a weapons permit and, if so, order her deposit it in court along with the weapons she may have in her home. 3) That it is agreed to expressly order the Judicial Police or the State Security Forces and Corps to locate the minors and proceed to their

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immediate delivery to the father in their custody, without further formalities. 4) Request that the mother, Ms. Juana Rivas Gómez, with international dissemination, be arrested in order to enter prison. 5) Deprivation of the parental rights of the mother with respect to her minor children for her exercise exclusively by the father.

It is interesting to note that this last petition of Mr. Arcuri has great relevance from the jurisdiction perspective under Brussels IIa Regulation. Leaving aside that it was rejected for procedural reasons (it had not been claimed on time and, in addition, it showed no evidence of new facts that could justify the claim at this point), it is important to note that this particular request could have implied Mr. Arcuri's implied acceptance of Spanish jurisdiction on the issue (prorogation of jurisdiction).

Final injunction: Only the measures related to the withdrawal of the passport and the prohibition of the exit of minors from the Schengen territory without authorization of the father or without judicial authorization were accorded. The rest of the requests were rejected since they overreach the specific procedure and the civil jurisdictional order.

2.1.3 Court decisions:

The courts decisions in the criminal and civil orders were as follows.

A) Criminal jurisdiction

A.1 DOMESTIC VIOLENCE

Regarding the criminal acts committed in 2005 within Spanish jurisdiction, Mr. Arcuri was convicted of a crime of family injuries with a penalty of three months in prison and a restraining order with respect to Ms. Rivas of just over one year.⁵¹

In relation to the second complaint of gender violence filed by Mrs. Rivas in Spain against Mr. Arcuri, for alleged acts committed from 2013 to 2016 in Italy, the case was dismissed due to lack of international criminal jurisdiction of the Spanish courts. The Provincial

⁵¹ Criminal Court 2 of Granada Judgment n° 242/2009, 26/5/2009.



Audience also dismissed Mrs. Rivas' appeal on February 27, 2018 under the same reasoning.⁵²

A.2 MINORS KINDAPPING

Mr. Arcuri denounced Mrs. Rivas before the Spanish courts for a crime of international abduction of their children, given the repeated breach of the return order by mother. Ms. Rivas was convicted (in the first instance and ratified in appeal) as the author of two offenses of child abduction. The penalty imposed was two years and six months imprisonment for each, with the accessory deprivation of the exercise of parental responsibility of her children in six years. In addition, she was condemned to pay Mr. Arcuri compensation for damages.⁵³

B) Civil jurisdiction:

B.1. RESTITUTION PROCEEDING:

By decision of December 14th 2016, the first instance court agreed the immediate return of minors to the State of their habitual residence prior to the abduction (Italy). It is based on Brussels II a with reference to the 1980 Hague Convention. A providence of July 24th 2017 accorded to request the assistance of the Provincial Brigade of Judicial Police UFAM Granada for the return of minors. The execution of the return injunction had to be forced through a specific procedure initiated by Mr. Arcuri.

Ms. Rivas appeal to the first instance court judgment according the return of the children (restitution procedure) was rejected by judgment of April 21st, 2017 of the Provincial Court of Granada on the basis of article 11 of Brussels IIa Regulation (in relation to exception provided article 13 b) of 1980 Hague Convention).⁵⁴ The ruling also clarifies that a criminal preliminary issue is not possible within a restitution proceeding since these international norms regulate this procedure regardless substantive issues other than the restitution rejection causes (art. 13 Hague Convention). Nevertheless, such a situation

⁵² Provincial Court of Granada, section 2, Order (judicial Decree) n° 135/2018, 2.2.2018, Roj: AAP GR 177/2018 - ECLI: ES:APGR:2018:177A.

⁵³ Provincial Court of Granada, section 1, Judgment n° 98/2019, 7.3.2019. Roj: SAP GR 25/2019 - ECLI: ES:APGR:2019:25.

⁵⁴ Provincial Court of Granada Judgment, 5th section, 21/4/2017 (Appel n° 72/17, against the Granada First Instance Court Judgment n° 1442/16). Roj: SAP GR 486/2017 - ECLI: ES:APGR:2017:486

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could not exist in the case at issue since Spanish criminal courts had no jurisdiction to hear the complaint based on facts allegedly committed in Italy.

Finally, also regarding the minor's restitution order, Ms. Rivas presented several additional appeals: two before the Spanish Supreme Court, which were dismissed for breach of domestic processual rules (hence the Supreme Court did not rule on the merits of the matter)⁵⁵; and an appeal before the Constitutional Court, which was equally dismissed for having been filed extemporaneously.⁵⁶

B.2 PROTECTION MEASURES REGARDING MINORS

Within the Procedure for urgent measures for the protection of minors initiated by Mr. Arcuri due to Mrs. Rivas's breach of the order for the return of minors to Italy, the civil court partially estimated claim based on article 158 of the Spanish Civil Code; in particular, those on the authorisation of minors to leave the country.⁵⁷

2.2. *Juliana v. Baltasar*

2.2.1 *Facts:*

A couple with a minor resided in Bulgaria. The mother moved the child to Spain (Barcelona) without the father's consent while the divorce lawsuit and a criminal procedure for gender violence against the father were pending in Bulgaria. The father requested the restitution of the minor to Bulgaria, his habitual residence. The Court of First Instance declared the minor's move unlawful and accorded his return in order to continue the divorce proceeding together with the corresponding parental responsibility issues in Bulgaria.

The mother appealed arguing that the restitution could not be agreed until the divorce in Bulgaria was resolved. In addition, she denied the active legitimation of the father to request the return of the child since it is exclusively established for those who are assigned

⁵⁵ Supreme Court Orders (judicial decrees), 17/5/2017 (Roj: ATS 4531/2017 - ECLI: ES:TS:2017:4531A) and 24./5/2017 (Roj: ATS 4818/2017 - ECLI: ES:TS:2017:4818A)

⁵⁶ Providence of the Constitutional Court 16/8/2017 (Nº of appeal 4151-2017 J). https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2017_058/P%204151-2017.pdf

⁵⁷ Granada First Instance Court nº 3, Order (judicial Decree) nº 335/2017 22.8.2017 (Procedure: Urgent protection measures for minors / minor's assets no. 999/2017).



minor's custody (art. 778.4º, 3rd rule LEC) and this had not been resolved yet in Bulgaria. The mother alleged the freedom to circulate in Europe with the minor without authorization and added that the father did not effectively exercise the right of custody (arguing erroneously the application of the European Convention on the Exercise of Children's Rights⁵⁸). The mother concluded that the child is well in Spain and that returning to Bulgaria would mean putting him in an intolerable situation expressly referring to the gender violence.

The Sofia Regional Court (Bulgaria) issued a protection measures on November 11st, 2016 in favor of the father, granting him the custody of the child and a regime of visits for the mother (the second and fourth Saturday of the month from 10 am to 6 pm). The form provided in the Annex of Regulation 606/2013 (Protection Measures) was issued but, subsequently, the measures were left without effect without the father timely appealing. Therefore, it was not possible to request recognition and enforcement of the protection measures before the Spanish courts.

3.2.2 *Parties' claims* (before Spanish jurisdiction):

Minor's restitution proceeding: First Instance: Applicant: Baltasar (father); Defendant: Juliana (mother). Request: restitution of minor to his State of origin, that is, Bulgaria. Appeal: Appellant/Claimant: Juliana (mother). Claim: annul the minor's return order, allowing for his permanence in Spain, based on the interest of the child since she may be a victim of the father's violent behavior. Final injunction: return of minors to Bulgaria as the habitual residence of the minor.

3.2.3 *Court decisions*:

By decision of December 14th 2017, a Barcelona First Instance (Family) Court resolved that the minor had his habitual residence in Bulgaria, declaring illegal his mother's move to Spain without the consent of the father. Likewise, the judgment declared that there were no reasons to consider that minor had already acquired a new residence in Spain. Hence, the mother was ordered to return the child to his State of origin. The mother appealed alleging, among other issues, the lack of active legitimation of the father who

⁵⁸ Strasbourg, 25/01/1996



did not have the child custody expressly attributed (art. 778.4^a 3^a LEC) and had not effectively exercised it.

The Barcelona Provincial Court rejected the mother's allegations. In particular, the resolution expressly recognizes the active legitimation of the father (art. 778.4 3rd LEC and art. 3 Hague Convention)⁵⁹. Applying article 13.b of the 1980 Hague Convention, in addition to Brussels IIa Regulation, the Provincial Audience stated that it was not proven that the father did not effectively exercise the right of custody. In this regard, it was not enough that the Bulgarian court protection measure accorded at the father's request had become ineffective. Likewise, in the court's view, there were no elements to suspect that the minor's return would put him in a dangerous situation. The judgment expressly states that the possible aggressions that the mother could have suffered were not sufficiently defined as domestic violence (family environment) and, in any case, they did not mention considerations regarding risks for the child. For all these reasons, the Court established that the return of the minor to the country of origin did not imply risks for him, and that, in any case, the Bulgarian judicial bodies should ensure the minor's protection if they appreciate that the attitude of any of the parents could harm him somehow.⁶⁰

3.3. *Erica v. Arcadio*

3.3.1 *Facts*

Erica and Arcadio resided in France with her baby daughter (17 months old). The mother and the baby came on vacation to Spain, where the father joined for some days. Without the father's consent, unilaterally, the mother decided not to return to France and retained the baby in Spain getting settled in Valencia. Erica filed a criminal complaint before the Court of Violence against Women accusing Arcadio of physical violence, insults and threats that occurred since 2010, including the recent vacation period. Erica filed a second

⁵⁹ Art. 122 of the Bulgarian family code establishes parental authority joint of the children and art. 127 states that any children move abroad must be agreed by both parents.

⁶⁰ SAP Barcelona 21/2/2018 (SAP B 1638/2018 - ECLI: ES:APB:2018:1638). In this realm, see also SAP Islas Baleares 28/7/2016 (SAP IB 1416/2016 - ECLI: ES:APIB:2016:1416). Appealing the restitution order, the mother argued alcoholism and violence of the father who claimed the children restitution to Poland, where they lived before being retained in Spain after spending holidays in the country. Contrary to art. 13 Hague Convention, she provided no proof of the alleged arguments against restitution.

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criminal complaint for insults uttered by Arcadio to her by video conference for not coming back to the family home.

Arcadio filed a complaint for the baby restitution before the Valencia First Instance Courts (family). The claim was estimated and the court issued a return order of the baby to France. Whilst the procure was ongoing, provisional parental measures were adopted until the procedure was definitively resolved. Particularly, the Court established a right of visits in favor of the father, including vacations periods in which the minor could go to France (with a round trip ticked and previously informing the mother), and a weekly communication regime for the father, not allowing the minor to leave the country with the mother.

The mother appealed the judgment but the Valencia Provincial Court dismissed the appeal and ratified the ruling of the First Instance court.

2.3.2 Parties' claims:

Civil proceedings: Minor's restitution proceeding: First Instance Applicant: Arcadio (father); Defendant: Erica (mother). Request: restitution of minor to her State of origin, that is, France. Appeal: Appellant/Claimant: Erica (mother). Claim: reject the minor's return, allowing for her stay in Spain on the basis of the interest of the child since she may be a victim of the father's violent behavior. Final injunction: return of the minor to France as her habitual residence.

Criminal proceedings: Two complaints regarding physical violence, insults and threats (crimes). In both cases was plaintiff/complainant: Erica (mother) and accused: Arcadio (father). Both criminal proceedings were still in investigation phase (instruction) before the Courts of Violence against Women at the time of resolving the minor's restitution in the first and second instance (civil).

2.3.3 Court decisions:

A. Civil jurisdiction: Minor Restitution



The Valencia Courts of first instance estimated the restitution claim filed by Arcadio and accorded the child's return to France. As an additional pronouncement, a regime of visits and communication of the child with the father during the procedure was established. Erica appealed the judgement.

The Valencia Provincial Court rejected the appeal and confirmed the return of the child to France, qualifying as illicit the retention of the child in Spain (art. 3 1980 Hague Convention) and clarified that none of the causes for refusal of return of the 180 Hague Convention and Brussels IIa Regulations were applicable. First, the time elapsed since the move to Spain took place was not enough to establish a new habitual residence in the country (less than one year from the refusal of return to France and the father's restitution claim). Secondly, in addition to the circumstances in which the retention occurred (holidays in Spain with the return tickets purchased), the young age of the child did not allow to conclude that she has established despite having been schooled in the country.⁶¹

As to the impact of the criminal procedures on domestic violence against the father going on before Spanish courts, the Valencia Provincial Court analyzed the specific facts in the light of article 13b of 1980 Hague Convention in order to determine whether the return to France would entail putting the child in a serious danger. The Provincial Audience considered that the accusations were related to violence against the mother exclusively and that she expressly manifested (in interrogation) that the father never touched the girl violently. The mere existence of these criminal proceedings was not enough to generate a presumption of danger or serious risk for the minor and, therefore, the return of the child could not be rejected. Nevertheless, the judgement refers the mother to the possibility of asking for protection measures in France under Directive 2012/29, on protection of victims of crime, as well as under Directive 2011/99, on the European protection order, without forgetting France is also a party to the Istanbul Convention.

In addition, the Appellate Court's judgement refers to the child's protection measures that could exist in her State of origin in article 11.4 RBII bis terms. In this regard, it clarifies that although the eventual the existence of such measures would simply avoid assessing

⁶¹ SAP Valencia 23/02/2017 Roj: SAP V 718/2017 - ECLI: ES:APV:2017:718.



the refusal of restitution under article 13.b Hague Convention, in accordance with article 11.4 Brussels IIa Regulation, but, on the other hand, the absence of such protection measures does not preclude ordering the restitution when the child is not exposed to a physical or psychological danger.

B. Criminal jurisdiction: Domestic violence

At the time of resolving the restitution claim the two criminal proceedings initiated before the Spanish courts were still in the investigation phase⁶². There is no information about the resolution of these procedures.

4. Findings on the use of or implementation of the Protection Measures Regulation and the European Protection Order

As to the protection of minors in domestic violence contexts in Spanish legal system, it seems necessary to begin recalling the cohabitation of the criminal and civil nature actions and measures. Courts for violence against women (with mixed civil and criminal competence in certain cases) and, eventually, first instance civil courts (only civil actions) are the ones initially involved in this kind litigation, particularly when it comes to child abduction cases. The factual and legal interaction of civil and criminal issues is specially highlighted when in a minors' kidnapping situation (criminal offense that must be substantiated in a criminal proceeding), the minor's restitution claimant (civil procedure) is accused of domestic violence by the kidnaper parent. This legal mixture of interrelated actions has not impeded Spanish courts to adequately hear and resolve the cases. Nonetheless, it is true that the operation of the rules becomes confusing for a number of legal operators if not reveals the unawareness of a number of legal operators about the scope of the different actions and the measures available in each of these jurisdictions.

Protection measures for victims of domestic violence available under Spanish domestic law can have a criminal, civil and even administrative nature. Whilst civil courts can only adopt civil protection measures, Courts for violence against woman can adopt criminal

⁶² Preliminary proceedings - abbreviated procedure 519/2016 and Preliminary proceedings 663/2016, both before the Court of Instruction nº. 1 of Valencia



and civil ones, depending on the case. As such, the so-called protection order in Spanish domestic system can only be issued by courts with criminal jurisdiction. In addition, Law 23/2014 resumes the domestic regulation of the EPO into the Criminal Procedural Law. Therefore, EPO can only be obtained in criminal courts and, obviously, on the basis of the existence of a criminal proceeding. Protection measures with civil nature adopted by criminal courts cannot not be covered by the EPO. Nevertheless, those measures, as well as the ones adopted by civil courts, may benefit from the mutual recognition system established under Regulation 606/2013. In this regard, following the respective UE norms, it is important to remain attentive to the nature and purposes of the measure, not of the authority that adopts it.

This way, there is not only a possible interaction between both EU instruments but also a clear practical complementarity. However no such interaction has been verified in Spanish case law.

Generally, in cases of domestic violence where the crime has been denounced by the victim, all protective measures with respect to women and eventual dependent minors are adopted within the criminal procedure, including, where appropriate, those civil measures such as the exercise of custody and visits rights. However, as mentioned above, a request for a European protection order can only be admitted in respect of the measures specifically provided for in the Criminal Procedure Law and in the Law on gender violence (LO 1/2004).

As has been mentioned, the enforcement in Spain of other member States EPOs would fall under the criminal jurisdiction, be it the Courts of the Violence against woman or the ordinary criminal courts.

From the Spanish perspective, the utility of the EPOs adopted in another EU member State in the context of a child restitution proceeding ongoing before the Spanish courts, may be limited. The existence of an EPO in favor of a victim that has abducted her children, will not be of use in a context of a restitution proceeding against her as long as the children are not expressly covered by the protection measure. It could only have a



potential impact on the outcome of the restitution procedure if the measures are expressly referred to the children subject to restitution (exclusively or together with the mother, as victims). If that is the case and the return of the child implies a transgression of the protection measure, the restitution will be denied as long as that transgression fits within article 13.b of 1980 Hague Convention (with the nuances introduced by article 11.4 Brussels IIA Regulation). Otherwise, the danger for the minor will have to be demonstrated. Hence, the EPO regarding the mother could, at most, constitute a piece of evidence to be taken into consideration by the judge.

Moreover, the existence of protective measures in the member State of origin, or even from the absence of such measures (for example, due to the prescription of actions or because the parent who claims the return is the originator of the domestic violence) cannot imply a presumption of lack or effective exercise of custody rights. Therefore, in such circumstances, there would not be a cause to reject the return claim (art. 13.a Hague Convention).

5. Conclusion

It has been noted that there is certain confusion between the measures that can be requested in civil and criminal jurisdiction respectively by the parties involved in these types of cases.

There is also confusion about the type of procedure and measures that are linked to a case of international abduction / restitution of minors on the application of an international instrument (convention or European instrument).

When, in a custody civil case, parallel to the minor's restitution procedure, the restitution claimant (usually the father) requests urgent protection measures for the minors (for example, deprivation of the mother's parental rights) it would be possible to imply his acceptance of the Spanish jurisdiction since, in accordance with article 10 Brussels IIA Regulation, prorogation of jurisdiction is available.



Domestic jurisprudence has clarified that a preliminary criminal issue is not possible within a restitution procedure.

Regarding the EOP and the Regulation on protection measures, it seems apparent that they both could play a significant role in the cases at issue, where they could be used simultaneously for protection within the criminal and the civil law areas. However, Spanish case law cannot provide references in this sense for the time being. On the contrary, there is no record of the use of the EPO for the protection of minors in a domestic violence context and neither is there a single reference on the application of the Regulation 606/2013 for this purpose.

In any case, within domestic case law it has not been verified that any returns requested before Spanish courts under the 1980 Hague Convention or the Brussels IIa Regulation have been denied resorting to either of these two instruments. In this regard, case law shows that the existence of a Spanish protection orders -or of any protection measures adopted in another EU Member State- in favor of a mother victim of domestic violence who moves to, or retains minors in, Spain, is not a sufficient cause to deny the return of the minors to their State of origin. To that end, it has to be demonstrated that there is a specific danger for the minors in question.
