

27 THE PRACTICAL APPLICATION OF RESTRAINING ORDERS

*Erzsébet Tamási and Orsolya Bolyky**

Domestic or relationship violence is beyond doubt a grave social problem, in the prevention, mitigation and long-term management of which the intervention of criminal justice is also unavoidable. However, we would like to point out that the latter is just the ultimate solution, i.e. the *ultima ratio*. The efforts taken by organizations and experts outside the justice system, among others, those of child protection authorities, family support services and the non-governmental sector are critical and indispensable in this area. The primary task is the prevention, detection and signaling of abuse, which the immediate neighborhood, the schools, the kindergartens, the health care service providers may be able and obliged to perform.

However, an abusive situation can immediately be terminated, or can be stopped as quickly as possible by applying criminal law or criminal types of measures. The legal institution of restraining orders, which already functions more or less efficiently in other countries, was incorporated in the Hungarian legal system for this purpose, then it was further refined in the past few years, in order to increase efficiency and based on the suggestions from legal practice.

In our study, we aim to show to what extent this legal institution has been able to meet the predefined objectives since the institution of restraining orders was introduced. In the current Hungarian legal system, there are three types of restraining orders, i.e. temporary preventive restraining, preventive restraining and 'criminal' protective orders. The restraining orders were analyzed on the basis of the statistical data of the years 2011 and 2012, the criminal case files selected from this period, the interviews conducted with the law enforcement experts active in various branches of the law, as well as the relevant literature. In our study, we also discuss the legal, dogmatical, as well as procedural law anomalies of the three types of restraining orders, we explore the law enforcement issues arising from the operation of these restraining orders, as well as the criminological perspectives of the efficiency of restraining. It can be clearly established in the case of all three

* Dr. Erzsébet Tamási PhD, Senior researcher at Crime Research & Analysis Division of National Institute of Criminology and professor at Pázmány Péter Catholic University, Law and Political Sciences. Dr. Orsolya Bolyky, Researcher at Division of Criminal Law Sciences of National Institute of Criminology and PhD student at Pázmány Péter Catholic University, Law and Political Sciences. – ide a két csillag megjelölés szükséges.

legal institutions that human, subjective factors such as professional competence, the level of legal knowledge, experience, practice, etc. determine the efficient operation of restraining to at least as high an extent as the available financial resources and the anomalies arising from the laws.

27.1 THE REGULATION OF PROTECTION ORDERS AND THE DIRECTIVE ON EUROPEAN PROTECTION ORDERS IN SOME EUROPEAN UNION MEMBER STATES

In order to strengthen the victims' rights and to make the protection of women and children more efficient, a package of actions was adopted by the European Parliament in the context of the Stockholm Program established in 2010. This program is aimed at the coherent and comprehensive management of victims and the enforcement of their rights within the European Union. The goal of the European Union is to maintain a region built on freedom, security and law enforcement. According to Paragraph (1), Article 82 of the Treaty on the Functioning of the European Union, judicial cooperation in criminal matters in the Union shall be based on the principle of the mutual recognition of judgments and judicial decisions. This is supplemented by the Stockholm Program,¹ which extends the principle of mutual recognition to all types of judicial decisions on criminal or administrative matters. The Parliamentary position adopted on the elimination of abuse against women on November 26, 2009 can be regarded as the antecedent of the action package. In this position, the member states are instructed to include prevention in the list of measures adopted against the abuse of women through their laws and policies. The introduction of the European Protection Order to protect victims was supported by the resolution passed by the European Parliament on February 10, 2010.²

In the context of the schedule on the strengthening and protection of the rights of the victims of criminal actions, the Directive on *European Protection Orders* was adopted by the European Parliament in 2011.³ Pursuant to this directive, a victim protected on the basis of an order issued in one member state should be protected in the other EU member state as well. The Directive applies to protection measures adopted in criminal matters, and does not therefore cover protection measures adopted in civil matters (see Paragraph (10), Art. 1). The Directive extends the obligation of protection against such criminal

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- 1 Stockholm Program – An open and secure Europe serving and protecting citizens, Official Journal C 115 of 4.5.2010, p. 1.
 - 2 European Parliament resolution of 10 February, 2010 called 'Equality between Women and Men in the European Union – 2009'.
 - 3 Directive 2011/99/EU of the European Parliament and of the Council on the European Protection Order (13 December, 2011), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:338:0002:0018:HU:PDF>, downloaded on 18.12.2013.

actions as well which may, in any way, endanger a person's life or physical, psychological and sexual integrity, dignity or personal liberty (including any form of harassment, abductions, stalking, etc.), and also includes the measures which aim to prevent the recurrence of criminal acts or to reduce the consequences of previous criminal acts (Paragraph (9), Art. 1). A European protection order may only be issued at the request of the protected person and after checking this person's identity, as long as the protected person wishes to stay in another member state, or is already staying there (Paragraph (2), Art. 6). It is not a prerequisite that the criminal action committed by the endangering person is established in a binding judicial judgment. The state executing the order is not obliged to apply the same protection measure that was adopted by the issuing member state but it may ensure the protection of the affected person in compliance with the rules set out in its own national law. The Directive should not therefore apply to measures adopted with a view to witness protection, protection orders may only be issued in order to protect the actual or potential victims (Paragraph (11), Art. 1). Both the protected person and the person causing danger should be informed on the issuance of the European protection order, in a language that they understand. Before such order is issued, the person causing danger should be given the opportunity to attend a hearing and to challenge the protection measure.

A European protection order may only be issued when a protection measure has been previously adopted in the issuing member state, imposing on the person causing danger one or more of the following prohibitions or restrictions (Art. 5):

- 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, etc.;
- c. a prohibition or regulation on approaching the protected person closer than a prescribed distance.

The executing member state may apply, in accordance with its national law, criminal, administrative or civil measures (Paragraph (1), Art. 9). The competent authority of the executing member state shall inform the person causing danger, the protected person and the competent authority of the issuing member state of any measures adopted, as well as of the possible legal consequence of a breach of such measure without any delay (Paragraph (3), Art. 9). In certain cases, the executing member state may refuse to recognize the European protection order, for instance, if the order is incomplete and has not been amended despite an instruction to do so, if the conditions of issuance have not been met, if the protection measure was ordered for an act which does not qualify as a crime under the laws of the executing member state, the person causing danger has no criminal liability

in the executing member state due to his age, or the recognition of the protection order would run counter to the prohibition against double jeopardy.

It is the law of the executing member state that has governing effect on the execution of the issued protection order. Thus, if the protection order is violated, the competent authority of the executing member state may impose (and notify the issuing member state of) a criminal law sanction or take any other measure if the action qualifies as a crime under the law of the executing member state. This authority may adopt any other non-criminal decisions, or in an emergency situation, may take any measure in order to stop the breach of law as soon as possible (Art. 11). The competent authority of the issuing member state shall have exclusive competence to take decisions relating to the renewal, review, modification, revocation and withdrawal of the European protection order. After the modification of the order, the executing member state may modify the adopted measure accordingly, or may refuse to execute the modified order if the conditions are not met (Art. 13).

A measure taken on the basis of the European protection order may be terminated by the executing member state if there is a clear reference to that the protected person does not reside in the territory of the executing member state, or has left this territory with a final effect, or the maximum duration of the measure has expired according to the law of the issuing member state. In the latter case, the competent authority of the executing member state requests information on the necessity of protection from the issuing member state.

It turns out from the summary of the Directive on the European Protection Order that all this provides protection to the victims of criminal actions and does not affect the protection measures taken in civil matters. With regard to this, *a draft order was adopted by the European Commission on the mutual recognition of protection measures taken in civil matters* as well.⁴ The goal of this order is to ensure that a temporary preventive measures taken by the issuing member state should provide the same level of protection to the victims in other countries as well in cases where it can be substantially assumed that the physical and/or psychological integrity or personal freedom of the affected person is jeopardized. The orders adopted in the context of so-called *ex parte* proceedings, i.e. those which are passed without summoning the person causing danger, in their absence, are to be listed in this scope. The protection measures listed in the draft order are equivalent to those applied in criminal matters, supplemented by a further opportunity, according to which a decision on the exclusive use of the common flat by the protected person can also be made. The draft contains the recognition of *ipso iure*, i.e. the protection measure is acknowledged by the other member state without a separate procedure and the option to

4 COM/2011/0276, final version, Brussels, 18.5.2011, <http://eur-lex.europa.eu/legal-content/HU/ALL/?uri=CELEX:52011PC0276>, downloaded on 17. 05.2015.

challenge recognition, as long as an attestation⁵ was issued on the order in the member state of the original procedure. Recognition may only be refused for one reason: if the order is incompatible with a decision made in the member state of the place of recognition. The refusal of recognition may be requested from the competent authority of the member state of the recognition by the person causing danger. The draft order lays a lot of emphasis on the protection of the data of protected persons. The person causing danger should only be supplied with those data which are absolutely necessary for taking the measure. The requirements of a fair procedure, especially the right to counsel should be provided to the person causing danger. The position taken by the European Parliament is that the authorities of the two member states should communicate directly with each other officially, to ease the burden of the protected person. The forwarding of the attestation would not depend on the will of the applicant but it would be made obligatory in order to ensure efficiency and quick action, in the best interests of the protected person, maybe even despite their will.

27.1.1 Regulation of Protection Orders in the Member States of the European Union

It is difficult to give a single definition for the protection orders that are aimed at protecting abused family members or any other victims closely related to the abuser. The point of all of these is to keep the person causing danger away from the abused or endangered persons. The difficulty of keeping the abusers away usually lies in that the abuser and the victim live together, or there is or there used to be an emotional tie between them, and also, the person causing danger can only be banished from the jointly owned or jointly used real estate property if substantial evidence is available. The rules of restraining orders are regulated differently in each country and the individual provisions generally affect several branches of the law, and this is the case in Hungary too. The following definition can be accepted as generally valid: 'any decision, provisional or final, adopted by a civil, criminal or administrative court or other judicial authority, imposing rules of conduct (obligations or prohibitions) on a person causing danger with the aim of protecting another person against an act which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity can be regarded as a protection order.'⁶ Coercive measures which limit the freedom of the accused person do not belong in this scope, and neither do witness protection orders. It is only those legal instruments that can be listed

5 A form which contains all the relevant information of the case.

6 Suzan van der Aa: Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here? *European Journal on Criminal Policy and Research* (2012), No. 18, p. 186.

in this category which deal with the regulation of the conduct of the abuser, and the definition of his/her behavior.

27.1.2 *Austria*⁷

Most European member states which apply the institution of restraining have built their system on the *Austrian model*⁸ based on the American *Duluth model*, which has been functioning efficiently since 1997, just as Hungarian legislation also considered the Austrian regulation its key example. In Austria the police may impose a barring order from the home *ex officio* as an immediate measure, for two weeks, which may be prolonged to 4 weeks if the victim has also requested the protection order from the court. Once a barring order has been imposed, the victim can no longer oppose this measure. The police communicate the fact of the barring order to the abuser at the site, they take his/her keys to the house and check compliance with the order on one occasion during the effect of the barring order, at an unexpected time. If further protection becomes necessary, the victim may request such in a written form from the civil court. The option to apply for a judicial barring order is now open to all individuals living in the victim's home (this option was previously available only to closely related individuals). The court can now issue this injunction for a period of up to six months but its validity can be extended if the perpetrator fails to comply with this injunction. If cases are filed for divorce and the use of flat as well, the period of barring may be prolonged until the lawsuit is finished. A barring order may also be requested in the case of emotional abuse, to which close relatedness between the endangering person and the endangered person is not a prerequisite. Under the Second Protection Act, this injunction can be requested by any person who cannot be expected to tolerate any further encounters with the perpetrator. The court can issue this injunction for a period of up to one year but its validity can be extended if the perpetrator fails to comply with this injunction. In Austria, the correct execution of the protection measures is checked by police surveillance and emergency phone numbers. No electronic devices are used. In case of violation of a protection measure, the victim can request a fine to be imposed for contempt of court. Victims may use intervention centers, where practical and psychological consulting is also available. There is no official register where the adopted protection measures would be centrally kept and there is no central authority coordinating all matters concerning protection orders either.

7 Teresa Freixes – Laura Román (eds.): Protection of the gender-based violence victims in the European Union, p. 19, source: <http://158.109.131.198/epogender2/images/news/Handbook/epogender-eng-web.pdf>.

8 Constitutional Court Dec. No. 53/2009 (V. 6.), Part III, Section 2.2.

27.1.3 Sweden⁹

In 1998, the Swedish Penal Code was modified by adding a new criminal offence penalizing repeated violent acts by a man against a woman who has, or has had, a close relationship to the perpetrator. Also in 1998, the Restraining Orders Act entered into force, which guaranteed protection to women who were victims of violence or harassment. In Swedish regulation, the so-called 'visiting ban' appears as a protection measure, which involves a prohibition of contact and communication with the protected person, including phone, electronic mail, or any similar means of communication, and also includes a prohibition to visit certain locations and spaces which the protected person frequently visits. The restraining order, on the other hand, is a protection order which limits the liberties of the endangering person to a larger extent, which is applied when there is a greater probability of a crime being committed against the protected person, so there is a higher risk for the integrity and life of the (possible) victim. According to Swedish legislation, the competent authorities for the adoption of the restraining order and the visiting ban are the criminal courts and the Public Prosecutor's Office. These protection measures can be applied for by the victim, the relatives of the victim, the authorities and other public agents, such as the public prosecutor, the police, medical doctors, social workers, and any other person who is aware of a case of the abuse or the realistic threat of an abuse, and such can also be ordered *ex officio*. Ultimately, it is the Public Prosecutor's Office that decides on the adoption of the order. The supervision of the correct execution of the protection measures is controlled by electronic monitoring as well.

27.1.4 The Netherlands¹⁰

In the Netherlands, criminal protection orders can be imposed under fourteen legal provisions, laid down in the Dutch Criminal Procedure Code. Based on their characteristic features, these measures can be generally divided in five categories: restorative, restrictive, behavioral influencing, care-oriented and other. Criminal protection orders are covered by the second category, as they generally imply restrictions of the offenders' liberty. Criminal protection orders can be imposed in four legal modalities: preliminary inquiry, out-of-court settlement, court-ordered sentence and/or measure, and the enforcement or coercion of a sentence or measure. The contents of the protection rules are basically the same as those of the barring orders applied in the other member states. The execution of criminal protection orders is formally in the hands of the public prosecution service but

⁹ *Ibid.*, pp. 51-52.

¹⁰ Esther van de Watering: Criminal Protection Orders: Effective legal remedies or False promises to victims? https://www.tilburguniversity.edu/upload/9a0a04a8-3829-47e0-8d6d-473e7b41713f_file130930.J.E._van_de.pdf, pp. 39-61.

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in practice, the responsibility for the actual supervision and enforcement is delegated to the police and the probation service. In certain cases, for instance, in case of the imposition of a street injunction, electronic monitoring, usually by means of a (GPS) ankle bracelet is also allowed. Furthermore, in the case of an extraordinarily high level of threat, the police may apply unexpected home visits for checking compliance with the requirements (proactive supervision). However, in most cases, the police act on the basis of reports made by the victim (reactive supervision). The consequences of violating a criminal protection order depend on the seriousness of the violation. The offender may receive a warning or be brought to trial, where the conditions of the order can be changed by the judge, or the criminal judge may decide to execute the underlying suspended sentence, as long as the rules of the restraining order were violated at the time of the suspension.

The consequences of violating the rules of the restraining order can only be applied based on evidence and on the conviction of the public prosecutor and the criminal judge. An important minimum rule of the so called ‘*unus testis nullus testis*’ principle is valid here, which means that the evidence may not rely on the testimony of the victim alone in the application of a restraining order. To sum up, the variety of the protection measures allows witness protection, however, the efficiency thereof is questionable, due to the majority of reactive supervision and the high-level evidence requirement.

27.1.5 *United Kingdom*¹¹

In a legal sense, English law has provided for domestic violence since 2004. This law protects all adults, without regard to their gender and sexual orientation, who have been victims of any (psychological, physical, sexual, financial or emotional) threat, violence or abuse by their partners, ex-partners or family members. The rules of the protection measures for domestic violence are contained by two acts: on the one hand, the Crime and Security Act (2010), and on the other hand, the Victims of Domestic Violence Act (2004). The first law regulates the opportunities of removing the endangering person from the common home (‘go orders’), the second one provides on restraining orders. The softer of the ‘go orders’ rules is the Domestic Violence Protection Notice, or DVPN, which may be applied by the police if they detect signals of violence, or if a person over 18 years of age threatens violence, or if a woman or her relative needs immediate protection. The warning is about the general prohibition of abuse, or the banning of a specific activity, and the obligation to leave the common flat is also included if the abuser and the victim live together. A warning can even be issued despite the victim’s will. If the abuser violates the rules of the warning, they may be arrested without an arrest warrant and detained until a decision is adopted by the magistrate judge. The magistrate judge may apply the harder type of the

¹¹ *Ibid.*, pp. 55-57.

'go orders' rules, i.e. the Domestic Violence Protection Order, or DVPO, which is requested by the police within 24 hours from detention. The protection order may be valid for 14-28 days, and its contents are equivalent to those of the protection warning. It can be imposed even despite the victim's will if it was preceded by a protection notice. Under the Harassment Act of 1997, the protection order can also be issued if the criminal case was concluded by the acquittal of the accused party but in the opinion of the court, the latter may pose a further threat to the offended party.

A restraining order is a criminal measure. Its validity is not defined by law, it can be decided freely by the judge. The victim, the offender or anyone who is concerned may request that the order be reviewed by the court. The violation of the restraining order is a crime punishable by even five years of imprisonment, a fine or both.

The victims of domestic violence may seek civil law protection as well, based on the Family Law Act of 1996. This kind of protection has two forms: one is the so-called non-molestation order and the other one is the occupation order. Non-molestation orders are aimed at preventing violence, harassment or threats against partners and children, their duration is determined by the judge and it can be renewed. Occupation orders regulate the use of the common flat and their validity is a maximum 12 months. The parties are heard separately, the victim or their legal representative should definitely attend.

27.1.6 Germany¹²

The protection measures available for victims of gender violence in Germany are regulated at the federal level (Bund) and the state level (Länder). The main act on the federal level is the Act on Civil Law Protection against Violent Acts and Stalking (Gewaltschutzgesetz, 2002), while at the level of the Länder, protection measures are mainly regulated by the various acts on the maintenance of public order and security (police or administrative acts) adopted by each Land. There are no criminal protection measures in Germany but for the period of a suspended sentence, the court is entitled to provide on behavioral rules or may supervise the accused person's conduct. The competent authorities to decide on the protection measures for gender violence victims are the judge and the police and they may do so at the request of the victim, or the police may also issue such order for 14 days *ex officio*. The court is free to decide on the duration of the restraining order issued by the court. At the federal level, it is exclusively the court that can order restraining by means of a written request at any stage of the proceedings. The decision to grant or reject the measures can be appealed by the victim or the defendant. In Germany, there is no central official register where the adopted measures are registered. The correct execution of the protection measures is supervised by police surveillance and emergency phone numbers

12 Teresa Freixes – Laura Román (eds.), *op.cit.*, pp. 26-27.

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but no electronic device system is used. A breach of a protection measure is sanctioned in criminal proceedings: the perpetrator risks a prison sentence or a fine. As other measures, the exclusive use of the common home by the victim, custody of the person causing danger, as well as social support measures, such as financial and psychological support to the abused persons can be mentioned.

27.1.7 Portugal¹³

The main Portuguese act regulating gender violence is the Domestic Violence Act, which was adopted in 2009, and which is primary aimed at the prevention of domestic violence. Then it was an order adopted in 2010 that clearly regulated the statute of the victims of domestic violence. The protection measures may be granted by a judge or a public prosecutor. The measures can be adopted *ex officio*, or at request. Any person with a legitimate interest, i.e. besides the victim, descendants, ascendants, or other close persons such as ex-domestic partners may file such request. The regulations also cover the violence of women against men and violence in same-sex relationships. Protection measures can also be adopted *ex officio* at the request of the police, the public prosecutor, the medical services, and the social services, i.e. all the organizations that may become aware of abuse or threat in the course of performing their respective activities. The decision will be taken regardless of the will of the victim. No legal assistance is required to apply for protection, the only thing that the victim has to do is to complete the required form. During the proceedings, both parties must be heard, albeit separately. The duration of the measures ranges from 6 months to 5 years, depending on the court's decision, they can be renewed, suspended or modified several times. Both parties may oppose the measure. The supervision of the execution of the protection measures is done through police surveillance, emergency phone numbers available to the victims, and by electronic monitoring using radio frequency systems or GPS. The method used is decided by the judge, although the consent of the aggressor is required and, where applicable, the victim's consent as well. The breach of a protection order constitutes a criminal offence punishable with imprisonment or a fine. There is a central official register in Portugal in which the adopted protection measures are registered. The victim is provided with all possible information on the key steps of the procedure, including whether the accused is in prison or at liberty.

13 Ibid. pp. 48-49.

27.1.8 *Romania*¹⁴

It was in 2003 that domestic violence was defined on the level of the law, then the institution of restraining orders was introduced in the amendment adopted in 2012. The Romanian legal order still refers to domestic violence, and not to gender violence but the 2012 law already makes it clear that domestic violence includes acts which impede women to exercise their rights and freedoms. The measures aimed at protecting the victims can be both civil and criminal in nature. The court may also order restraining even within five years after the prison sentence has been served, which may also include a deprivation of the exercise of parental rights. This legal institution can be applied in the same way during the period of suspended incarceration or eligibility for parole. In the case of a criminal action, the obligation to undergo medical treatment may be imposed during the validity of the restraining order. Under the Civil Law Protection Act (Act 25 of 2012), when there is found to be a risk for the life, the physical integrity or the liberty of the victim, a protection order may be requested from the court without the need for the aggressor to have been tried and found criminally responsible. A civil protection order may be adopted with immediate effect, it does not require the institution of criminal proceedings based on family violence. The civil court may issue the protection order before criminal proceedings are initiated, during the examination phase, during the trial phase or after a criminal sentence has been reached. The protection order may also include measures such as the expulsion of the aggressor from the family home, the reintegration of the victim and her children in the family home, and the obligation to satisfy the expenses derived from the abuse that the victim has suffered. The law allows for the court to include measures for the supervision of the aggressor's observing the conditions of the protection order, and to oblige him to participate in psychotherapy, or take part in a rehabilitation program.

27.1.9 *Slovenia*¹⁵

In Slovenia, it was the Family Violence Prevention Act of 2008 that provided a definition for domestic violence, it was the 2006 modification of the Criminal Procedure Act in which the legal institution of restraining orders was introduced, then the Criminal Code of 2008 penalized domestic violence as a specific crime, and in 2013, the Police Tasks and Powers Act allowed the immediate issuance of restraining orders by the police in cases of domestic violence. In Slovenia, there are three types of protection measures (restraining orders) for victims of gender violence. The first one can be requested by the public prosecutor during the criminal proceedings and this is ordered by the court. The other type of protection

14 *Ibid.* pp. 50-51.

15 *Ibid.* pp. 52-54.

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measures is the application of barring orders issued by the police, which make it possible to immediately separate the aggressor from the victim for a period of 48 hours, which can be extended by a judge up to 10 days, and can be extended again by the court up to 60 days. The protection measures established in the Family Violence Protection Act are not linked to specific proceedings, but to an act of violence. These can be imposed for a maximum period of six months, and can be prolonged by another 6 months. The latter can only be issued at the victim's request, while the other two can be ordered *ex officio* as well. The supervision of the execution of the measures is done by the police, and the abuser can be detained in case the protection measures are violated, except in the case of barring ordered on the basis of the Family Violence Protection Act, the violation of which does not involve the use of any sanctions. All in all, the regulation allows for keeping the abusers in cases of domestic violence away from the victims but the three legal institutions are not duly harmonized and the fact that the violation of restraining orders outside the criminal proceedings remains without any consequences makes the efficiency of this legal institution with the longest duration highly doubtful.

27.1.10 Summary

In the individual member states of the European Union, the rules for restraining orders show a high level of similarity on the level of contents but there are several differences with regard to the circumstances of issuing the orders, the duration and supervision of the barring. There are differences in the types of the authorities issuing the orders and the proceedings (criminal, civil, administrative, or the combinations of these) as well, which also affect the legal consequences of the violation of the requirements set out in the restraining orders (infringements or criminal sanctions). Restraining orders most often surface in the laws as a legal institution of criminal law, and they are coercive measures. Since in these cases, this measure is applied after a criminal action has been committed, it is aimed at the prevention of further abuse. Civil law restraining orders can be requested as soon as the threat arises and their issuance depends much more on the will of the applicant (the protected person) than criminal protective orders, which can be applied *ex officio* as well in most countries, even despite the victim's will. In several countries, it is allowed that the court issue a restraining order in the civil law proceedings (e.g. in a divorce case) and uphold this until the end of the proceedings. Of course the review of the order can be requested by either party.

Most regulations allow the police to order barring with an immediate effect but the duration of such orders is usually short. However, they are suitable for stopping the threat in an emergency situation and preventing more serious abuse. Longer term barring is ordered by the court. There are differences also in whether the duration of barring has an

upper limit. If this duration is maximized, this is generally much longer than the one defined in the Hungarian laws (six to twelve months), which may be prolonged by the court at its discretion. In most cases, the violation of the rules of the restraining order qualifies as a crime punishable by incarceration or a fine.

As an example for good practices, the restraining orders applied in Finland and Switzerland and the operation of a well-coordinated and diverse support network in those countries can be mentioned. *In Finland*,¹⁶ the protective measures are equivalent to the general barring orders. These measures are adopted in criminal proceedings and are applied as preventive measures. There is a wide range of applicants, the adoption of the measure can be requested by any person who is affected by the violent act or feels threatened, or by those authorities and organizations which become aware of the violent act, and the measure can be requested *ex officio* as well. The effect of the restraining order may be a maximum of one year but it can be prolonged if necessary. In Finland, numerous support and assistance programs are available for the victims, several of which are aimed at helping a specific group. Worth mentioning, for instance, is the special assistance available to women with disabilities, migrants and members of ethnic communities residing in Finland. Besides supporting the victims, specific programs have also been created for aggressors, such as anger management training programs, prevention and rehabilitation programs.

In Switzerland,¹⁷ the Abuse Prevention Act,¹⁸ which provides on the rules of barring orders, became effective on April 1, 2007. The law provides protection to all victims residing or working in the area of the Canton of Zürich and the persons who live with them, who used to be the partners of the abusers, irrespective of whether they were married or just lived as common law spouses, or whether they lived or live in a common household. The act provides protection against abuse, threats and harassment as well and its scope extends to those children and youngsters who abuse their siblings or parents. Restraining orders against minors can only be issued with the parents' consent, while criminal measures can be applied against youngsters. The law also provides protection to those victims who were abused or harassed in the territory of the Canton of Zürich. So, the application of the law is determined by the actions committed in the area of the Canton of Zürich and it does not matter where the offender resides. Anyone who becomes aware of the abuse may report this to the police or to one of the support organizations. Teachers are obliged to make a report to the school board *ex officio*.

16 Ibid. pp. 32-34.

17 Domestic Violence Protective Measures. Kanton Zurich Direktion der Justiz und des Innern Generalsekretariat IST Interventionsstelle gegen Häusliche Gewalt. http://neu.bif-frauenberatung.ch/wordpress/wp-content/uploads/2014/12/HG_Schutzmassnahmen_englisch.pdf.

18 Gewaltschutzgesetz. The law was announced in the Canton of Zurich on 19 July, 2006, then it became effective on 1 April, 2007. No. 351.

The police may immediately order barring for 14 days and the offender may be arrested for 24 hours. The police notify the offender, as well as the victim support agency in a written order, and if a child also lives in the household, the child protection services are to be notified too. The police may order barring regardless of the will of the victim. The abuser may also be banished from a flat that is owned or rented by him. When a restraining order is issued, the offender must supply an address where he receives postal consignments. If the offender fails to give such address, the notices will be sent to the police and they are to be assumed as accepted. It is the obligation of the abuser to take care of the family as he used to before, so he has to leave his cash or bank card at home. If he fails to do so, the court will make provisions on the offender's income. The abuser may lodge an appeal against the restraining order at the Zurich Administrative Court within 5 days of receiving it but the appeal has no dilatory effect. In the case of an approval, the costs of the proceedings are to be borne by the appellant.

If the conditions of the protective measures are violated, the police may detain the offender for 24 hours. The victim may request the court to prolong the restraining order to 3 months in a written form, within 8 days of issuing the police protective order if he/she deems the 14-day barring insufficient, or if the offender violates the rules of the restraining order. In the first case, it should be proven that the threat still exists, while in the second case, the court presumes that the restraining order is still necessary. Such presumption will also exist when the party requests barring during a divorce case or another court proceeding in progress between the abuser and the victim. The court hears both parties before it makes a decision. If the offender does not attend the court hearing, the court will decide on the basis of the available information. It is possible to lodge an appeal within 5 days, in lack of which the court decision will take binding effect in 5 days. If the conditions change, the court may modify its decision at request. If the request proves to be unsubstantiated, the expenses of the proceedings will be borne by the 'losing' party.

The protective measures applied in Zurich show a high level of similarity with those used in other countries. What makes the Zurich proceedings 'special' is the network and high level of coordination of victim protection services and those of the rehabilitation and therapy of the offenders. Several types of financial and emotional support are available to the victims. The police notify the victim support services of the adoption of the restraining order, so the service agency will get in touch with and offer support to the victim within 3 days. In Switzerland, there are as many as 18 shelters with 247 beds, to which endangered women and their children may escape. Furthermore, there are 20 women's aid agencies (out of which 17 are available for the victims of domestic violence) and 6 agencies for the victims of sexual abuse.¹⁹ A voluntary consulting agency, *ex officio*, gets in touch with the

19 Country Report 2012 – Women Against Violence Europe, www.wave-network.org/sites/default/files/05%20SWITZERLAND%20END%20VERSION.pdf.

offender as well. Opportunities to attend anger management and violence-free conflict management therapies are offered, which can be used free of charge. Probation service and prison services also actively help the convicts under the effect of the restraining order.

The Service for Protection against Violence started its operations on January 1, 2012. On June 20, 2012, a political decision was adopted on that in 2012-2015, the fight and protection against violence will be a key topic in legislation as well. A coordinated effort with the joint activities of the authorities and different organizations began, which included the following: early recognition of risks, interdisciplinary cooperation for the tackling of this problem, taking information security aspects into account, the formation of an expert group for ad hoc risk assessment. Special emphasis is laid on the treatment of psychiatric conditions and mental disorders, as well as the application of psychotherapies both for the offenders and the victims.²⁰

In summary, it can be concluded that the provisions of the individual EU member states on restraining orders are suitable for ensuring efficient, cross-border protection for the victims of domestic violence and against the aggressive and harassing actions committed by persons close to the victims both in criminal and civil cases.

27.2 THE LEGAL BACKGROUND OF THE INTRODUCTION OF THE LEGAL INSTITUTION OF RESTRAINING ORDERS IN HUNGARY

The first definite legislative intent to stand up against domestic violence²¹ was traceable in National Assembly Resolution No. 45/2003. (IV. 16.), which provided on the necessity of developing a national strategy to prevent and effectively manage domestic violence. The strategy first appeared in National Assembly decree No. 115/2003. (X. 28.),²² in the chapter entitled 'Violence Hiding in the Family.' Attention was called to the need for immediate and efficient action from the authorities in response to any violent behavior demonstrated in the family, this is why the development of the terms and conditions of applying restraining orders with effect for 72 hours or more was defined as a legislative task.

It was after these antecedents that bill No. T/9837 on restraining orders adoptable for cases of domestic violence was drafted. The proposed law was rejected during the National Assembly discussions, so it did not become effective on the planned date of July 1, 2005.²³

20 Reinhard Brunner – Angela Guldemann: Finland and Switzerland on their way to become the safest countries in Europe. Good Practice from the Canton of Zurich www.intermin.fi/download/59334_Brunner.pdf?e2d49de56b3ad288.

21 Based on research conducted by the National Institute of Criminology, domestic violence is defined as '*violence, aggression, abuse between persons who live together and depend on each other physically, emotionally, financially and legally, which includes all forms of physical, sexual, emotional abuse or neglect.*' György Virág: On Domestic Violence, *Belügyi Szemle* (the Journal of Domestic Affairs), issue 2005/9, Budapest.

22 National Assembly Res. No. 115/2003. (X.28.) on the National Strategy for Social Crime Prevention.

23 The bill was finally not put to a final vote after the detailed National Assembly and panel discussions.

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Finally, it was the 2006 amendment of the Hungarian Penal Code that allowed the application of restraining orders as criminal coercive measures. This form of barring orders, however, can only be applied after the abuse takes place and based on the well-founded suspicion of a criminal action.

27.3 THE REGULATION OF RESTRAINING ORDERS IN HUNGARY

27.3.1 *Criminal Protective Orders*

In Act 51 of 2006, by amending the Criminal Procedure Act, the institution of restraining orders was qualified as a coercive measure.²⁴ Although the very text of the law does not provide for whether barring can only be adopted in cases of violence in the family, it becomes obvious from the justification that this is such a coercive measure restricting free movement which was introduced for the management of violent actions in the family, by taking the rules of home detention as a starting point.

ORFK (National Police Headquarters) Directive No. 32/2009 (OT.26.) on criminal protective orders details the responsibilities of the police concerning the management of domestic violence and the protection of minors.

The duration of criminal protective orders may extend to 10-60 days (earlier 30 days).²⁵ The *general condition* of the adoption of such orders is the existence of the well-founded suspicion of a criminal action that is also punishable by incarceration and a situation in which leaving the accused person in the same environment with the persons with whom he shares his household would pose a serious threat to the latter.²⁶ The forms of causing danger as *special conditions* are equivalent to those defined in other coercive measures that restrict personal freedom: on the one hand, the evidence process would be prevented, made more difficult or jeopardized by the intimidation or manipulation of the witnesses, or on the other hand, the attempted or planned criminal action would be committed against the victim, or the offender would commit another crime punishable by incarceration but the preliminary detention of the accused person is not necessary.²⁷ At least one of the special conditions should exist besides the general one. If the criminal procedure allows a private motion, the adoption of a restraining order must always be preceded by the filing of a private motion.²⁸ If the victim is incapacitated or partially incapacitated, the private motion can also be filed by the victim's litigation guardian or the public guardianship

24 Section 59 of Act 51 of 2006 on the Amendment of the Criminal Procedure Act

25 Section 138/B (1) of Act XIX of 1998 on Criminal Procedures (Hungarian acronym: Be.).

26 Section 138/A (2) of Be.

27 Points a.) and b.) of Section 138/A (2) of Be.

28 Section 138/A (3) of Be.

authority. It should be noted that the filing of a private motion by the victim in the case of violent actions in the family as the prerequisite of launching the criminal proceedings may result in the action remaining latent, due to the intimidation or shame of the offended party.²⁹

It was on January 1, 2008 that the statutory definition of *harassment*³⁰ was included in the Hungarian Penal Code. The committing of harassment also allows the application of restraining orders between persons who are not related to each other, i.e. it is not only harassment in the family that may result in the adoption of a restraining order.

Restraining orders applicable in the criminal proceedings have not lived up to the expectations. This legal institution, due to its circumstantiality and slowness, is not suitable for the immediate protection of the abused family members, it is especially unsuitable for preventing violent behaviors and the management of abuse of a less serious nature. It is also supported by statistical data that restraining orders are adopted relatively rarely in the course of criminal proceedings: in the second half of 2006, there were 24 cases in the whole country, while in 2007, there were 77 cases in which such orders were adopted by the court, and preliminary detention remained the more frequently applied coercive measure.³¹

The European Court of Human Rights also pointed to the deficiencies in the operation of criminal protective orders when they condemned Hungary because of an adopted restraining measure. The Court underlined the necessity of decision-making without delay and they were critical of³² the fact that the law specifies no concrete deadline for the adoption of decisions in this area.

27.3.2 Rules of Non-Criminal Protective Orders

27.3.2.1 Preventive Restraining Orders

The currently still effective Act 72 of 2009 *on restraining applicable in case of violence among relatives* (Hungarian acronym: *Hketv.*) was created in order to promote the prevention of domestic violence and to make restraining orders more efficient. It was simultaneously to this that ORFK (National Police Headquarters) Directive No. 37/2009 (OT22.) on the performance of police tasks related to temporary preventive restraining orders applicable in cases of violence against relatives was developed. Under Section 1(1) of the

29 Ágnes Dóra Alföldi: A családon belüli erőszak megítélése és megelőzésének eszközei a magyar és az európai uniós jogban (Assessment of Domestic Violence and the Tools of its Prevention in the Hungarian and European Union Law). *Jogelméleti Szemle* (Journal of Legal Theory), No. 2011/3, p. 9.

30 Section 222, Act 100 of 2012.

31 In 2006, 1,734 persons, while in 2007, 3,177 persons were in preliminary detention.

32 European Court of Human Rights, *Kalucza v. Hungary*, Case No. 57693/10, Section 64, resolution adopted on July 24, 2012.

Act, ‘any and all activities or neglect committed by the abuser against the victim which seriously and directly endanger dignity, life, the right to sexual autonomy, as well as physical and psychological health qualify as domestic violence.’ In the law and in the justification thereof, it is not made clear what specific types of conduct belong in this category, the decision on this is left to the discretion of the police officer or judge acting in the case in question.

It is the local court competent according to the habitual residence of the victim that will adopt a decision *on preventive restraining orders* in a non-litigious procedure. The procedure can be launched *ex officio* at the initiative of the police, or at the request of the victim or the victim’s close relative. Preventive restraining orders can be adopted for a maximum of 30 days. During their effect, the abuser is obliged to keep away from the victim, from the real estate property that serves as the victim’s habitual residence, another person indicated in the order and he should also refrain from getting in direct or indirect touch with the victim.

While preventive restraining is ordered in the context of a non-litigious civil procedure, and it relies on the provisions of the Hungarian Civil Code in defining the concept of a relative, the adoption of criminal protective orders is tied to the launching of a criminal procedure and the level of relatedness between the victim and the offender is not examined. The conditions of adopting restraining orders in the two types of procedures also differ by the legal title that the abuser has for using the real estate property. No preventive restraining order can be adopted if the victim is a courtesy user of the flat and they have no common children with the abuser under legal age living in the same flat. However, criminal protective orders can be adopted by the court irrespective of the legal title of using the flat.

It should be noted here that according to the European Union’s draft directive on the mutual recognition of protective measures adopted in civil matters, it is not only in the case of domestic violence that the issuance of the protection order would be regarded as applicable but also, in any other situation when a person is exposed to abuse or threat in co-habitation, for example, in the case of violence or threat in old-age homes or long-term residential social institutions as well. The definition of a civil case allows for the protective order adopted in the civil case in progress (e.g. a divorce case) to be applicable in another member state as well. This is currently not allowed by the Hungarian laws because restraining orders are exclusively adopted in non-litigious civil or administrative (police) procedures according to the provisions set out in Hktv.³³

33 Erzsébet Kormos: Gondolatok a polgári ügyekben hozott védelmi intézkedések kölcsönös elismeréséről szóló uniós rendelettervezetről (Thoughts on the European Union draft directive on the mutual recognition of protective orders adopted in civil matters), source: www.mjsz.uni-miskolc.hu/201301/5_kormoserzsebet.pdf.

27.3.2.2 Temporary Preventive Restraining Orders

The antecedent to preventive restraining is the option to order *temporary preventive restraining*, which is delegated to the competence of the police, to which the rules of the administrative procedures are applicable. The point of this is that in order to prevent more serious abuse, the police officer should be in the position to take immediate measures on banishing the abuser and adopt an order on the restraining of the latter for a maximum duration of 72 hours. Temporary preventive restraining orders can be adopted *ex officio* or based on a report. Simultaneously to this, the police initiate the issuance of the preventive restraining order at the competent local court. *The detailed rules of temporary preventive restraining orders* are contained by IRM (Ministry of Justice and Law Enforcement) decree No. 52/2009. (IX. 30.), which helps the police officer arriving at the site to draw the right conclusion from the conditions that exist on the site of the crime and to apply the appropriate measures in order to manage and prevent domestic violence.³⁴

27.4 CONSTITUTIONAL CONCERNS ON PREVENTIVE TEMPORARY RESTRAINING AND PREVENTIVE RESTRAINING ORDERS

It was established by the Constitutional Court that

the management of domestic violence has passed beyond the private sphere, its elimination has become a public matter [...] ³⁵ Violence that appears in the private sphere, in personal and family relationships, may constitutionally justify the intervention of the state in such matters, as well as the limitation of personal liberty if the level of violence and the threats that may qualify such intervention necessary and proportionate to the goal (i.e. to protect the victims of domestic violence) are accurately and clearly defined by the law.³⁶

The Constitutional Court reacted to the constitutional concerns that had arisen in connection with preventive restraining orders in its decision No. 53/2009. (V. 6.) during the preliminary review of Hketv. They explained that the regulation of the adoption of restraining orders outside criminal law is acceptable, since the rights of personal freedom, free move-

34 IRM (Ministry of Justice and Law Enforcement) Decree No. 52/2009. (IX. 30.) for example, contains the following guidelines: checking identity, checking the level of relatedness, clarification of the legal title of using the real estate property, inspecting the condition of the real estate property (traces suggesting the consumption of alcoholic beverages, narcotic drugs, physical fights), clarification of whether the child under age is common, hearing of witnesses on the background of the violent action, the hearing of the abuser and the victim so that they can give an unbiased statement of the circumstances, etc.

35 Constitutional Court Dec. No. 53/2009. (V. 6.), Part III, Section 2.3.

36 Constitutional Court Dec. No. 53/2009 (V. 6.), Part IV, Point 4.1.

ment and the freedom to choose one's residence are to be interpreted more broadly, this is why these rights cannot only be limited during a criminal procedure.³⁷ There are numerous laws outside criminal law by applying which free movement and the freedom to choose one's residence can be temporarily restricted.³⁸ Temporary preventive restraining orders and preventive restraining orders also belong in this category, however, it should be strongly supported by majority rules, since the fundamental constitutional rights of the persons against whom these orders are issued are violated. As a result of the Constitutional Court decision, the bill had to be amended at several points, since the concept of violence was partly defined too broadly, and partly in a way that could not be interpreted by law enforcement, and the concept of relatives was also defined unacceptably broadly.

Any type of restraining *limits the right to property*, as well as the partial rights thereof, with regard to the real estate property owned by the abuser. The protection of human dignity, life, physical and emotional integrity and health takes priority over the right of property. The right of property with an absolute structure is a limitable fundamental right: the owner is obliged to tolerate a proportionate and necessary level of limitation *for the public interest*. The prevention and management of domestic violence are social interests, this is why restraining as a measure that limits the right to property can also be regarded as restriction in the public interest.³⁹ Criminal restraining as a coercive measure strongly affects some of the fundamental rights, including the partial rights included in the right to property, without regard to the ownership details of the real estate property jointly used by the abuser and the victim. It is a majority rule that it is only the court that can issue such orders. In the case of preventive restraining that can be ordered by the police and the civil court, the legislator sets conditions for the limitation of the abuser's property rights, including the possibility to order preventive restraining, with the above-mentioned differentiation by the legal title to the use of the flat. It should be added that civil judicial practice has recently started to take common law marriages into account as a legal title in the case of legal disputes about the use of flats. Under the new, effective Civil Code (Hungarian acronym: Ptk.),⁴⁰ the ex-common law spouse may be entitled to continue using the commonly used real estate property after the common law marriage is dissolved on the basis of the exclusive legal title of the other common law spouse, as long as the co-habitation has existed for a minimum of one year and it is necessary in the best interests of the common child under legal age.⁴¹

37 Gábor Halmai: *Távoltartás és személyi szabadság (Restraining and Personal Freedom)*, the journal *Fundamentum*, issue 2009/2, p. 114.

38 E.g.: Statutorily regulated police arrest can be applied against those persons who 'are not able to duly identify themselves at the instruction of a police officer, or who refuse to identify themselves.'

39 Andrea Noémi Tóth: *A távoltartás anomáliáinak polgári jogi vetületei (Civil Law Perspectives of the Anomalies of Restraining Orders)*, *Jogelméleti Szemle (Journal of Legal Theory)*, issue 2013/2, p. 7.

40 Act 5 of 2013 on the Civil Code (Hungarian acronym: Ptk.).

41 New Ptk, Section 4:94.

27.5 THE CORRELATION BETWEEN RELATIONSHIP ABUSE AS REGULATED IN THE NEW PENAL CODE (HUNGARIAN ACRONYM: BTK.) AND DOMESTIC VIOLENCE AS DEFINED IN HKETV

Section 212/A of the new Hungarian Criminal Code,⁴² which came into effect on July 1, 2013, rendered violent or slandering actions a stand-alone statutory provision under the title of '*relationship violence*'.⁴³ By defining relationship violence, the new law made up for several deficiencies that had occurred earlier and it had also eliminated some anomalies in interpretation. Thus, it became clear that in the criminal sense, the victim of domestic violence can be the ex-spouse, the ex-common law spouse and all such relatives with whom the abuser used to share a household before he committed the crime, and also, the other parent of this person's child, even if they had never lived in the same household. It is stipulated by the law that the sentence of banishing can also be imposed on the person who commits relationship violence. It may cause difficulties later how the actions in relationship violence and those of domestic violence which are out of the scope of Btk can be distinguished from each other. Where can we draw a line between an action that seriously endangers the human dignity, life, physical and psychological health of the abused relative and relationship violence, which was committed by neglect, humiliation, or serious deprivation?

42 Act 50 of 2012 on the Criminal Code (Hungarian acronym: Btk.).

43 Section 212/A. (1) 41 of Btk:

1. Any person who, on a regular basis:

a. seriously violates human dignity or is engaged in any degrading and violent conduct,
 b. misappropriates or conceals any assets from conjugal or common property, and thus causing serious deprivation, against the parent of his/her child, or against a family member, former spouse or domestic partner living in the same household or dwelling at the time of commission or previously, against his/her conservator, person under conservatorship, guardian or person under guardianship is guilty of a misdemeanor punishable by imprisonment not exceeding two years, insofar as the act did not result in a more serious criminal offense.

2. Any person who commits:

a. battery under Subsection (2) of Section 164 or slander under Subsection (2) of Section 227 against a person defined in Subsection (1) is guilty of a felony punishable by imprisonment not exceeding three years;
 b. battery under Subsections (3) and (4) of Section 164, or violation of personal freedom or duress under Subsection (1) of Section 194 against a person defined in Subsection (1) is guilty of a felony punishable by imprisonment between one to five years.

3. Banishment may also be imposed against persons found guilty of domestic violence.

4. The perpetrator of the criminal offense defined in Subsection (1) shall only be prosecuted upon private motion.

27.6 PRACTICAL DIFFICULTIES IN THE APPLICATION OF RESTRAINING ORDERS

27.6.1 *The Practice of Temporary Preventive Restraining Orders between 2011 and 2012*

It turns out from the annual statistics that there are some counties in which there is a very high number of adopted temporary preventive restraining orders, which suggests good practices, while in several other counties, this legal institution seems to be hardly functioning. In the majority of the counties, the past three years have seen a slow increase in the number of temporary preventive restraining orders but there are some other counties where not only are the numbers very low but a decreasing tendency is also noticeable.

The execution of the police tasks of temporary preventive restraining is regulated by ORFK (National Police Headquarters) Directive No. 37/2009. (OT.22.) (hereinafter referred to as: the 'Directive').

Since 2010, ORFK has prepared an evaluation report every year on the police procedures related to domestic violence on the basis of the annual reports of Budapest and county police headquarters. The following summary was prepared on the basis of the conclusions of these reports.⁴⁴

27.6.1.1 **Problems Arising from the Practice of Temporary Preventive Restraining Orders**

1. Besides the patrol sent to the site where relationship violence takes place, the police officer on duty prioritizes and supervises the abuser and the specified address in criminal registration systems.

After receiving the signal at the police station, the acting patrol will appear at the site and will make a decision on whether the issuance of a temporary restraining order will become necessary. The officer notifies his colleague entitled to issue such order, who is in the position to make an ultimate decision on the issuance of a temporary preventive restraining order. The police officer authorized to issue such order is required to have at

44 1. Report on the execution of police tasks related to temporary restraining orders adoptable for domestic violence from January 1 to December 31, 2012, No. of ORFK (National Police Headquarters) report: 29000/14377/2013, General, pp. 1-9.
 2. Report on the execution of police tasks related to temporary restraining orders adoptable for domestic violence from January 1 to December 31, 2011, No. of ORFK (National Police Headquarters) report: 12194/2012,/General, pp. 1-14.
 3. Report on the 2011 experience gained in the execution of police tasks related to the management of domestic violence and the protection of minors, No. of ORFK (National Police Headquarters) report: 12194/2012, General, pp. 1-8.
 4. Report on the 2012 experience gained in the execution of police tasks related to the management of domestic violence and the protection of minors, No. of ORFK (National Police Headquarters) report: 29000/7675/2013, General, pp. 1-8.

least 5 years of professional experience. Until the police chief authorized to issue such order appears, it is the responsibility of the policeman on the site to safeguard the place, to keep the offender there, and to obtain data and information, as well as to record all these in writing or by using the appropriate technical devices.

According to the practices to date, it has been difficult to decide from the wording of the law in which cases temporary preventive restraining orders must and may be adopted. Usually, such activity is more intensive at those police stations where the staff has been properly prepared for the task and the enforcement of the law.

2. The real estate ownership, right of use and other housing conditions of the real estate property where the abuser and the victim live together should also be checked by relying on Land Registry databases (Section 5(3) of Hktv.), however, if the police officer on duty is not able to obtain the Land Registry data for some reason, the policemen will be compelled to make a decision on the basis of the parties' self-statements, or in more fortunate cases, on the basis of certification by official documents.

Hktv. allows the ordering of a temporary preventive or preventive restraining order with regard to a person different from the abuser ('another person') as well, without the offender's having abused this other person and it is not a precondition either that this person should be a relative. However, restraining orders under Hktv. can only be issued in the case of the victim's courtesy use of flat if the victim has a common child under legal age with the abuser, so if they live together with a child whose parent is not the abuser, no 'civil' restraining orders can be requested or issued. By this narrowing regulation, Hktv. makes it impossible to protect such minors who lived together with the abuser, or were raised or supervised by him but are not his biological children, or are adopted children.

Policemen are concerned about adopting orders in cases when banishing from property at the same time means the banishing from workplace. The situation is that it often happens that there is a business whose site is the real estate property in question, where the abuser is the owner or employee of this enterprise.

3. Besides their obligations set out in the laws, policemen are also obliged to inform both the abuser and the victim of their opportunities to enforce their rights and of the institutions that may provide shelter. The shelters whose contact details are collected by the police stations or those operating in their respective areas of competence are often difficult to access, or are overcrowded.

There are numerous problems in the case of homeless shelters, as those in need cannot be accepted if they are under the influence of alcohol, or if they do not possess a certificate on lung screening not older than 5 days. According to practice, this latter requirement is usually disregarded.

4. It is stipulated by Section 7(1) of Hktv. that the temporary preventive order shall be issued on the site, except if the abuser has been presented by the police. It often happens that the abuser is not on the site any more when the police arrive, or he leaves during the

procedure but this is not an obstacle to adopting the order. In such cases, the police officers authorized to issue the orders can very rarely notify the party concerned.

5. According to the police summaries, the decision on the adoption of a temporary preventive restraining order must be sent to the competent family support and child welfare services *at the victim's request* if there is a minor living in the household exposed to the abuse.⁴⁵ However, according to the established practice, police officers act in line with the provisions set out in Sections 12 and 39 of ORFK (National Police Headquarters) Directive No. 32/2007. (OT. 26) when they establish that a minor is endangered. The signalling system should be notified *ex officio, without the request or consent of the victim*, even if there is no crime or infringement involved. Failing to do so may involve disciplinary action.

6. It is to be highlighted that if the abusive action also qualifies as a crime, and a criminal procedure is launched as well, this is not an obstacle to ordering temporary preventive restraining and then preventive restraining under the provisions set out in Hktv. In most cases, the police authorities become aware of the occurrence of the violent behavior from the victim's report, so the criminal proceedings and temporary preventive restraining will be launched on the same day, as long as the suspicion of a crime arises on the basis of the abuse. It is stipulated by Section 5(7) of Hktv. that if the court orders restraining against the abuser in the context of criminal proceedings, then both the temporary preventive restraining order and the preventive restraining order will lose effect.

7. The duration of 72-hour temporary preventive restraining orders is extraordinarily short. During this period, the documents, the records and the order should be prepared, and this is the timeframe that is available to the judge for holding the hearings and adopting his decisions.

8. This legal institution is safeguarded both from the side of the abuser and that of the victim, by Act 2 of 2012 on Offences, which has been in effect since April 15, 2012. On the one hand, those who violate the rules set out in a temporary preventive restraining order or a preventive restraining order commit offences and they may be punished by a maximum sentence of custody arrest for misdemeanor.⁴⁶ On the other hand, an unrealistic report also qualifies as an offense: this means situations in which a person makes an untruthful report on an emergency to the authority or another body fulfilling public responsibilities, or the authority or another body fulfilling public responsibilities unnecessarily goes to the site indicated in the report or is compelled to take any other measure on the basis of a false report.⁴⁷

9. It has happened in practice that during the effect of a house arrest or home detention, a conflict or abuse that may trigger the issuance of a restraining order occurred in the

45 Section 9(3) of Hktv.

46 Act 2 of 2012, Section 168.

47 Act 2 of 2012, Section 175.

family. In such cases, it was impossible to issue a temporary preventive restraining order because the conditions of house arrest could not have been met, and as no crime was committed either, no preliminary detention could be applied either. In these cases, separate sections in the house were designated for the parties but the observance of the ban could not be supervised.

10. There is no established practice for what objects the restrained person may take from the jointly used flat, or how he can enter the flat to fetch his personal belongings.

28.6.2 *Problems in the Adoption of Preventive Restraining Orders ('Civil Law Restraining Orders') in Judicial Practice*

Based on the conclusion drawn by the National Office for the Judiciary (OBH), the court data show that there is a decrease in the number of temporary preventive restraining orders issued by the police, while the number of preventive restraining orders has increased.⁴⁸ The judges reckon that sometimes the police find it difficult to decide on the quality of the action concerned and they prefer to leave decision-making to the court to issuing restraining orders and acting with an immediate effect.

By failing to order temporary restraining, the police do not meet their obligation to act with immediate effect, also, some evidence difficulties may also arise later, as the subsequently attached medical reports or other items of evidence do not always truly reflect what actually happened.

By introducing the institution of preventive restraining orders, the law has assigned the following responsibilities to the civil courts:⁴⁹

- a signalling obligation to promote prevention,
- the judicial review of temporary preventive restraining orders, as well as
- carrying out the procedure for the adoption of preventive restraining orders.

Proceedings carried out in cases of violence against persons is rather uncommon for family law and administrative justice.⁵⁰ However, as we have seen earlier, regulation with regard to the legal instruments available to combat domestic violence is very similar in the majority of European countries.

48 Proposal by the President of OBH (National Office for the Judiciary) No. 30.022-21/213.OBH.

49 Dr. Zsuzsanna Geréby: A hozzátartozók közötti erőszak miatt alkalmazható távoltartásról, avagy egy jogszabály 'sötét oldala' bírói szemszögből (Restraining Orders Applicable for Domestic Violence, or the 'Dark Side' of a Law from the Judge's Perspective), *Családi Jog* (The Journal of Family Law), No. 2010/4.

50 Károly Szabó: Néhány gondolat a megelőző távoltartásról (Some Thoughts on Preventive Restraining Orders), *Magyar Jog* (The Journal of Hungarian Law), No. 2012/7, p. 436.

1. *The concept of relatives*, which was criticized by the advocacy groups and law enforcement experts, was broadened.⁵¹ The list earlier did not contain ex-common law spouses, despite the fact that the overwhelming majority of cases of domestic violence are against ex-partners. According to judicial practice, on the basis of an analogy, preventive restraining orders are allowed in the case of ex-common law spouses with a child under legal age, in protection of the child, although the court has no express statutory authorization to do so. This practice was corrected by the legislator, this is why now an ex-common law spouse may also apply for the adoption of a preventive restraining order.

2. The law only allows the application of a preventive restraining order in the case of an offender who is a capable relative and leaves the issue of removing those abusers from the family who are under the age of 18, or are under conservatorship because of their incapacitation unsolved. In such cases, the only options left are criminal protective orders without an immediate effect or the application of any other criminal coercive measures.⁵²

3. The procedure for ordering preventive restraining may be launched *ex officio*, or at the request of a private applicant. This is where the problem of waiving an application in the procedure launched by the police arises, as in these situations, the case is brought to court without regard to the victim's will. It is rather difficult to harmonize the presence and right of initiative of the police with the party's right of autonomy as provided as a general rule in the Act on Civil Procedures (Hungarian acronym: Pp.).⁵³ Under the provisions set out in Pp., the party who launched the procedure has the right of waiver.⁵⁴ Thus, if the adoption of the preventive restraining order was initiated by the police, the party concerned will have no right of waiver.⁵⁵ This conclusion is contradicted by the judicial position according to which, if the parties reconcile at the hearing and the applicant does not request the adoption of the restraining order any more, the court will be compelled to rely on the statements made by the parties according to the fundamental civil law principle of 'the applicant is the master of the case', so the proceedings cannot be resumed in such cases.⁵⁶

4. The Supreme Court of Justice states in its uniformity decision⁵⁷ that in the procedure on preventive restraining, the court takes the documents related to temporary preventive restraining into account but its decision does not overrule these, so the court may establish

51 Under Section 1. § (5) of Hktv, close relatives and relatives as defined in Points 1 and 2 of Section 8:1 (1) of the Hungarian Civil Code, as well as ex-spouses, ex-common law spouses, registered partners, ex-registered partners, conservators, persons under conservatorship, guardians or persons under guardianship are to be regarded as relatives.

52 Geréby, *above* n. 49.

53 Section 3 of Act 3 of 1952 on Civil Procedures.

54 Section 160 of Act 3 of 1952 on Civil Procedures.

55 Geréby, *above* n. 49.

56 Section 3 (2) of Act 3 of 1952 on Civil Procedures.

57 Uniformity Dec. No. 3/2012 (the Supreme Court of Justice, Pfv.II.22341/2011.).

facts that are different from those recorded in these documents and can also extend the restraining order to further victims.

5. Although in principle the court hears the parties at the hearing, and the sole or decisive rule is enforced, in practice the orders may also be adopted in the absence of the abuser. In making his decision, the judge uses the available police documents, which were prepared in the course of the adoption of the temporary preventive restraining order (witness testimonies, police reports, outpatient medical records, etc.) but in the lack of a temporary preventive restraining order, such documents are not necessarily available.⁵⁸

6. Although the preliminary enforceability of restraining is not stipulated by the law, in judicial practice, the effect of the restraining order starts when the order is communicated to the abuser and the potential appeals have no dilatory effect on the fulfillment of the obligation.⁵⁹ All these uncertainties could be eliminated if the preliminary enforceability of judicial decisions on restraining were provided for by the law.⁶⁰

7. It is not specified by Hktv. when temporary preventive restraining with an effect of 72 hours begins. According to the established practice, the 72-hour period begins when the order is received but the abuser does not always accept the order at the site of the abuse or at the police station. In such cases, the rules of presumed delivery will come into effect.

8. While Hktv. requires /that the authorities, such as public prosecutors, who, as part of their basic activities, perform tasks related to the prevention of domestic violence signal the cases of abuse to the authority responsible for the coordination of family protection, the law contains no such obligation for the authority responsible for the coordination of family protection. Judicial experience shows that in many cases, the family protection services were aware of the cases of domestic violence, however, they did not request any police intervention and did not report these to the police either.⁶¹

27.7 DILEMMAS ON CRIMINAL PROTECTIVE ORDERS

Although the result of the different types of restraining orders is the same, i.e. the abuser is not allowed to get in touch with the victims for the period specified in the order, the goal of restraining is different by each branch of the law. The goal of restraining regulated

58 József Lugosi: A megelőző távoltartás intézményének jogalkalmazási nehézségei (Law Enforcement Difficulties related to the Institution of Preventive Restraining Orders), *Magyar Jog*, pp. 6-7.

59 Majority position on the right interpretation of the law agreed upon by the Board President's meeting of the Civil Law Department of the Supreme Court of Justice held on October 14, 2009. Quoted by: Brigitta Pesti: A hozzátartozók közötti erőszak miatt alkalmazható távoltartásról, alkalmazásának gyakorlati problémáiról (Restraining Orders Applicable for Domestic Violence, Practical Difficulties of Its Application), *Jogelméleti Szemle (Journal of Legal Theory)*, No. 2013/2, p. 145. Source: <http://jesz.ajk.elte.hu/pesti54.pdf>.

60 Szabó, *above* n. 438.

61 Éva Tóth: 'Szabadíts meg a gonosztól!' A távoltartás dilemmái ('Deliver us from Evil': The Dilemmas of Restraining Orders), *Ügyészek Lapja (Public Prosecutors' Journal)*, year 18, issue 4/2011, pp. 24-25.

in Hkctv. is 'to ensure the quick and efficient protection of the victim and the endangered minor or any other affected person(s) living together with the victim. The goal of criminal protective order, besides the protection of victims, is to carry out the criminal procedure in an uninterrupted, efficient and effective manner.'⁶²

1. The adoption of a criminal protective order can be launched not only by the public prosecutor but the private prosecutor, the substitute civil suitor, the offended party, the litigation guardian of the incapacitated or partially incapacitated victim, as well as the litigation guardian of the minor living in the same household with the accused party. According to the provisions set out in Be., i.e. the Criminal Procedure Act, the restraining order can be adopted with regard to the victim, as the goal is to prevent the intimidation and manipulation of the offended witness, as well as the committing of a new criminal action, or accomplishing an already commenced criminal action against him/her.

2. In the case of a motion filed by a public prosecutor, the occurrence of which is rather rare, the accused party is typically detained, this is why there are no obstacles to his presentation at the hearing, the presence of the offended party is not obligatory and not necessary either. However, if the motion is filed by the victim, and such cases are rather frequent, no such obligatory procedural protocol is stipulated by the law or another regulation which would allow the hearing of the accused person within a short period of time, thus the efficient protection of the victim.⁶³

3. Since the well-founded suspicion of a crime punishable by incarceration is a precondition to adopting a criminal protective order, the restraining cannot be ordered until the accused party is heard as a suspect and the well-founded suspicion is communicated. According to practical experience, as well as arising from the situation affected by the criminal action, the necessity of restraining typically occurs in the initial phase of the investigation, this is why such decisions are the competence of the investigatory judge. The well-founded suspicion is most often communicated in the later phase of the investigation when there is already a substantial amount of evidence against the defendant. Consequently, the motion filed by the victim at the outset of the investigation is rejected by the investigatory judge. In such cases, it would be worth diverting the motion to a non-criminal preventive restraining order in parallel to this rejection.⁶⁴

4. If the adoption of a restraining motion is considered, a *hearing* must be held. According to the currently effective rules, such hearing is organized by the investigatory judge if the motion was filed by the offended party. In order to be able to hold the hearing,

62 Éva Tóth: 'Szabadíts meg a Gonosztól!' A távoltartás dilemmái ('Deliver us from Evil': The Dilemmas of Restraining Orders), *Ügyészek Lapja* (Public Prosecutors' Journal), year 18, issue 4/2011, p. 15.

63 Tamás Matusik: A büntetőeljárás távoltartás szabályozásának jogalkalmazásbeli problémái (Problems of Enforcing the Regulation of Criminal Protective Orders), *Belügyi Szemle* (Periodical of the Hungarian Ministry of Interior), issue 2013/9, pp. 17-18.

64 *Ibid.*, p. 18.

the parties concerned should be summoned regularly, which can primarily be done by post, due to the lack of all the available data. This, however, takes an extraordinarily long time, and as a result, the goal of the legal institution of restraining is missed. It would make sense to have the hearing organized by the public prosecutor in the case of a motion filed by the victim, so the investigatory authorities could also be used in allowing the personal hearing of the accused person (apprehension).⁶⁵

5. It is not clear what procedural rights the victim has to be warned of when he is being heard by the investigatory judge. Since the victim is a mover rather than a witness in this situation, no warnings meant for witnesses should be communicated to him. If the motion filed by the victim also qualified as a witness testimony and his/her confrontation with the accused person appeared as part of the evidence procedure, except for the cases specified in Sections 207(3) – (5) of Be. (the Criminal Procedure Act), the carrying out of these proceedings would not be in the competence of the investigatory judge any more.⁶⁶

6. It may cause a problem that under Section 138/B (1) of Be. (the Criminal Procedure Act), restraining can only be ordered for a maximum of 60 days and it is not renewable. It can only be ordered again if new circumstances arise. It is illogical why the legislator does not regard it as possible that the circumstance that serves as the basis for ordering the restraining exists even after 60 days. In the case of unchanged circumstances, with a high level of probability, the circumstance that serves as the basis for ordering the restraining will not change either.⁶⁷

27.8 ANALYSIS OF RESTRAINING ORDERS OF SZABOLCS-SZATMÁR-BEREG COUNTY, GYŐR-SOPRON COUNTY AND BUDAPEST ON THE BASIS OF CASE FILES

Based on the records of the Office of the Prosecutor General, we have selected those three areas where the highest number of adopted restraining orders was registered in the years 2011 and 2012, in a breakdown by counties and crimes. The other criterion for selection could only be the crime related to the restraining order, based on which we tried to choose from several types of crimes, by taking the frequency of the occurrence of the individual crimes into account. We paid special attention to the fact that the correlation between harassment (as a new statutory definition) and restraining orders is also important to public opinion. Our survey ‘only’ included the cases involving criminal protective orders. Thus, we were given access to as many as 27 case files from Szabolcs-Szatmár-Bereg County, 18 case files from Győr-Sopron County, and 18 case files from Budapest.

⁶⁵ *Ibid.*, p. 26.

⁶⁶ *Ibid.*, p. 21.

⁶⁷ *Ibid.*, p. 22.

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The key goal of reviewing the files was not only to get familiar with the procedural aspects and investigation processes of restraining orders but to assess the function and efficiency of this legal institution as well. We were trying to find out who, for what reasons, and related to what types of crimes request the adoption of restraining orders. We assumed that restraining orders are mostly related to one or the other form of relationship violence. This assumption was justified by the case files that we had selected, it was only in 2-3 cases where restraining orders were requested against neighbors or strangers, for disturbance of peace.

1. It is harassment that occurs most frequently among the crimes related to restraining orders, besides which bodily injuries, deprivation of personal freedom and disturbance of peace that also occur frequently but in a significantly lower number.

2. Most of the offenders are men with technical school qualifications, unemployed or living off odd jobs, aged between 30 and 60, in a high number of cases with criminal records (having committed non-violent actions) and drinking problems (in a large number of cases, alcoholics). The sample only had four female offenders.

3. It is typical of all restraining cases that the actions take place at the time of divorce, breakup, or the termination or deterioration of domestic partnerships.

4. The offending men, contrary to the assumptions, do not live in a common household with the offended parties but they live with their parents or in a rented apartment. This fact gives a partial explanation to the violent actions, also listed in the case files, which take place between elderly fathers, mothers and alcoholic, unemployed sons moving in with the elderly parents. The afflicted women usually stay in the earlier common households, which are very often owned by the common child of the couple and in many cases it is the restrained offender who pays the repayment installments of the flat.

5. The crimes are usually caused by the announcement of the intention to get a divorce, the filing for divorce, the unsettled conditions of the division of property, or the contradicting interests with regard to contact with the child. It is relevant but not at all understandable why the man's jealousy has a key role in the motivations for violent actions, while in most cases, both parties already have new partners at this point. The crimes take place after 3-12 years of living together, and according to the account given by the parties, the regular disputes, the deteriorated relationships, the man's alcoholism and joblessness (in most cases, the woman has no gainful employment either, the basis of the family's income lies in state aids and child care allowances) lead to the moving out of the man from the common household, and it is after this that the man usually commits the action that serves as the basis for the adoption of the restraining order.

6. Those cases where the child also has his/her habitual residence at the site of the crime are without exception reported (by the police or the court) to the child welfare services, which then act in line with the seriousness of the case. We have not come across any such

cases in which the father was not allowed to keep in touch (on the phone, or in a written form) with his children during the effect of the restraining order.

7. It very rarely turns out from the case files whether any previous preventive or temporary preventive restraining orders have been adopted.

8. The rejection of adopting restraining orders, and the termination of procedures had diverse reasons. In most cases, it is impossible to contact the parties, or they do not appear at the hearing because they have reconciled. However, the request for a restraining order sets a rather complex and quick, also very costly bureaucratic machinery in motion, which requires a great deal of organization and effort (police, court, public guardianship authority, mothers' shelters, etc.), and which can be halted by a single sentence uttered by the applicant, or the latter's failure to appear in court, and the efforts taken to date will thus become unnecessary. A statutory amendment which would not make it possible to withdraw a request for a restraining order should be considered, and this would mean that the applicant would be assigned a more serious decision-making responsibility by the legislator.

9. The most frequent complaint voiced by the victims is that the duration of a criminal protective order (and also, that of a preventive restraining order) is very short, their effect is 60 days in most of the cases, and even 20 days were imposed in some cases, mainly because of the lack of a serious criminal action. However, it becomes obvious from the files that in a very high number of cases, harassment stops after the restraining orders are adopted, so their deterrent effect can also be experienced.

27.9 SUMMARY

27.9.1 *Key Conclusions of the Research Project*

1. There is no regular, coordinated, logical contact between the three legal institutions.
2. In the practices of all three legal institutions, most of the problems are caused by the brevity of time and the subjective human factors.
3. The statistical registration of all three legal institutions of restraining orders is different, each of them is prepared on the basis of contradictory criteria, so we have no accurate view of their efficiency and frequency.
4. The primary aim of restraining orders is to quickly remove the abuser from his environment, and to stop violence. The practices of temporary preventive and preventive restraining orders are different by the type of contact between the players in the justice system in each area (in the different counties) and what qualifications those who work together hold. In some of the counties (e.g. in Borsod-Abaúj-Zemplén County), this

legal institution functions very efficiently, while it hardly operates in some other counties. The same is true for the cases of criminal protective orders.

5. The restraining orders adopted in criminal cases are almost without an exception issued during or directly after split-ups. The offenders are men and they do not live together with the offended parties. The most frequent accompanying crimes include harassment and bodily injuries. The main reasons for applying for the adoption of a restraining order are related to the division of property, contact with the child and child care benefits.
6. The supervision of the violation of restraining orders is not resolved, not regular. The violation of temporary restraining orders qualifies as an infringement, custody arrest for misdemeanor may also take place but generally fines are imposed. The exception from this is the situation of Borsod-Abaúj-Zemplén County, where due to the agreement between the local police headquarters and the management of the courts, the sentence of confinement is applied more frequently depending on the seriousness of the case in question, which seems to be effective due to its deterrent effect. As it turns out from the reviewed case files, the violation of criminal protective orders is not too frequent.
7. According to the case files, those types of harassment which do not involve personal contact and there is no violence or threat either but in which the offender observes, stalks or harasses the victim via electronic means is not a settled issue. No restraining orders can be adopted in such cases.

Our study has shown that the statutory background of the legal institution of restraining orders does not allow a uniform functioning of the law enforcement practice, it leaves space for subjective and ad hoc evaluations of the situations, and leaves the use of this legal institution to the expertise and willingness to cooperate of the players in law enforcement. It is the legislator that is expected to develop a system in which the various types of restraining orders constitute a subsequent, uninterrupted process because this is the way that they can fulfill their original mission. The coordination of the definition of relationship violence as provided for in the 'new' effective Penal Code and the concept of domestic violence defined in relation to restraining orders would require a statutory amendment. Finally, the forms and opportunities of the application of those legal and other awareness tools which serve providing information to the citizens on how the institute of restraining orders can be used should be considered in detail. This should help citizens have realistic information on the results that can be achieved by using restraining orders.