

## **System Failure**

Male violence against women and children as treated by the legal system in Hungary today

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Editor: Judit Wirth

Copy editor: Petra Tüdő

English translation: Gábor Kuszing

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Dr. Júlia Spronz

## Caught up in Law

In strategic litigation we try to show, through specific cases, the way the effective Hungarian legal system treats, or rather fails to treat male violence in the family. We examine both the legal regulations and their application. We wish to contribute to the elimination of these problems by pointing them out.

### Premises:

#### 1. Male violence in the family is a nonexistent phenomenon for law

We have argued in several earlier publications<sup>1</sup> that the soil on which men's violence against women thrives and the barrier to addressing it is its invisibility. Through our cases we wish to demonstrate how law maintains and strengthens this invisibility.

#### 2. Law (the framework of legal regulations and their application) is unable to grasp the reality of battered women

The legal system is based on the viewpoint of the powerful (white, middle class heterosexual men) therefore if applied rigidly this framework cannot be applied, or only inappropriately, to domestic violence.

#### 3. Discriminative application of law

In choosing our cases for strategic litigation, we strove to show in an unambiguous way, how authorities apply the same regulations to the advantage of men and the disadvantage of women.

To sum up these theses derived from our experiences and the professional literature:

**Conclusion: For battered women the justice system does not provide justice in Hungary at present.**

## 1. Male violence made invisible

### 1.1. Lack of terminology

One of the most conspicuous proofs of the invisibility of domestic violence is that the term "domestic violence" does not exist in the effective legal regulations in Hungary. Currently it is only the National Police Chief's Order 32/2007. (OT 26.)<sup>2</sup> that contains a definition for domestic violence although – despite the suggestions of the organisations publishing this study – it is not comprehensive. The definition in the new "Act on restraining orders applicable in the case of violence between family members"<sup>3</sup> is not an improvement to this situation either. Under that Act domestic violence consists in *threats* against protected persons, which is difficult to interpret and its practical application is highly questionable.

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<sup>1</sup> NANE Egyesület: *Miért marad? Feleség- és gyermekbántalmazás a családban. Hogyan segíthetünk?* Második, bővített és átdolgozott kiadás. NANE Egyesület, Budapest, 2006.

Péter Szil: *Why does he abuse? Why can he abuse?* Habeas Corpus Working Group – Stop Male Violence Project, Budapest, 2005. See: <http://www.stop-ferfieroszak.hu/news/58/52.html>

<sup>2</sup><http://patent.org.hu/ORFK.int.pdf?phpMyAdmin=RHHogZ6tz7jKsV9f%2C6oz4Oc2oZd&phpMyAdmin=96o3YFg0aTqUEfwKFvuxL02lave>

<sup>3</sup> Bill T/6306 to enter into force on 1 July 2009, if signed by the president. [The Bill was not signed by the president, he sent it to the Constitutional Court for review and the Court found it unconstitutional. (Translator)]

## 1.2. Making battery disappear

The following case is an example of both the way material law makes violence invisible and how victims are marginalised in procedural law.

*Mr V appeared at his separated wife's workplace one day and complained to her about her refusal to "settle their relationship". The accused threatened the victim that they should either restore their marriage or he would rape her. He broke the victim's phone so that she could not call for help and locked the door. He undressed and made the victim undress. He thrust his penis into her mouth and later into her vagina. He asked her to have sex with him which she refused. Then the accused got dressed and asked the victim not to report him to the police. However the victim filed a valid private motion asking for the man's conviction. The victim suffered light injuries (which heal within 8 days).*

The abuser was found guilty for one instance of rape. Under the commentary of the Penal Code "in cases of sodomy and rape perpetrated against the same person at the same time, only the crime of rape may be established."

Although the man was taken into custody following the report and a preliminary arrest followed, he was unexpectedly set free during the procedure. His first way led home to his wife. Although the Police Chief's Order 32/2007 provides that "the victim of domestic violence ... shall be notified of the abolishing of a coercive measure limiting personal safety" no other authority is required to do so.

Another method to make battery disappear is the threat of **slander cases** which victims of domestic violence live under. This course of action chosen by the batterer, which is very common in our experience, means that if the victim of violence talks about the battery in public she is risking that the batterer will initiate a criminal procedure against her.

It is well known that there are difficulties to proving the terror going on in intimate relationships. Not only because there are actually no material pieces of evidence but rather because characteristically authorities do not accept these as evidence and subject them to the same requirements as in the case of violent crimes between strangers. However, in the case of domestic violence the relationship of the perpetrator and the victim, the site of the crime, the motive and the aim of the crime are so specific and so different from crimes against strangers that a differential treatment is reasonable in order for a successful investigation. Thus for instance we regularly encounter cases where the judge refuses the testimony of a family member on grounds that it is biased.

The second problem is with examining the truth of the statements, the content of slander in slander cases, as law allows its examination only in exceptional cases. The legal precondition for a procedure in which the truth of the statements is examined at all is that the stated information should be of public interest or someone's rightful private interest. Until recently we had no choice in cases where the court did not order examining the truth of the statements. However, in 2004 a decision was brought in one of our cases that clearly states: there is a public interest in publishing the facts of domestic violence. We have been successful in quoting that case since.

The most conspicuous examples of making battery and so batterers' responsibility disappear are **visitation** cases. During the existence of our legal aid service we have not seen a single case where the fact of abuse, even where it was proven beyond doubt, provided basis for abolishing the batterer's visitation rights over his children.<sup>4</sup>

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<sup>4</sup> For the detailed treatment of this topic see: Spronz J. – Wirth J.: *Integrated client service for victims of violence against women. The results of a pilot programme.* Nane Egyesület–Habeas Corpus Munkacsoport, Budapest, 2006. <http://www.nane.hu/kiadvanyok/kezikonyvek.html>

Even the suspension or limitation of visitation rights is uncertain in these cases and only happens for a limited period of time. In an earlier case we managed to convince the custody authority that the visitation should take place at the office of the local child care service between the children and the father who was involved in a procedure with a well-founded suspicion of rape against his children. The decision was not the result of the thorough, high-quality, professionally well-informed operation of the custody authority, rather it was thanks to the fact that the father, against whom the criminal procedure was still in process, was ready to compromise and the parties reached an agreement. However, the investigating authority, as customarily happens, ceased the criminal procedure in absence of a criminal act and the municipal prosecutor refused the complaint filed against that decision. As characteristic in incest cases, a forensic psychologist expert was called in to determine if the crime had occurred, who found that “the father exhibited no deviant sexual behaviour in his relationship to his son”.

The procedure for the re-regulation of the visitation is in process in this case in which the father asked the custody authority for the right to take the children with him. Although the custody authority, in absence of evidence, did not accept the sexual assault as a fact, they did not question the older child’s account of the range of tortures by the father either. The little boy told them about the father forcing them into hot water when bathing them, that he pushed his head into the toilet, that he set him on a horse and then whipped the horse to make it go wild, etc. The custody official’s reaction was that these events had happened six years before and that the father must have changed since then. The official also told the children that her father had abused her, yet they had been able to resolve their problems later. The procedure has not ended, but because the custody authority called in a forensic psychologist expert who had once worked on the case before and had called attention solely to the mother’s endangering behaviour saying she is turning the children against the father, chances are that the father will have the right to visitation at his home without external supervision.

In another case, the civil court proceeding in the dissolution of a marriage regulated the visitation as customary, that is from 9 a.m. Saturday to 5 p.m. Sunday every second week, despite the fact that a criminal procedure was in process against the father for endangering the minor. According to the judge:

*“It would serve the interest of the children and their healthy personality development to have a relationship with the respondent within calm circumstances as they need not only a mother but also a father. However, the court of first instance was right in referring to the fact that no evidence has been established to this day.”* the appellate court said in its decision. Nevertheless a criminal procedure was in process against the man at the time whose documents were filed in the civil procedure as well.

The act serving as the basis for the report was the physical abuse of the mother in presence of their two children. When the man tore the kitchen window out of the wall and was throwing food out it, he asked the little boy who was under 3 years at the time: “Shall I throw mum out?” His wife called her mother for help but when her ex-husband heard that, he came up to her, took the phone from her and started to break the phone to pieces by hitting it against her head. Their daughter, who was 11 months old at the time, started to cry badly so the mother took her in her arms to soothe her. However the man disregarded the fact that she was holding the baby in her arms and that their son was clinging to the mother’s leg; he started to hit her again.

These facts were not taken into account either by the court deciding on the visitation, nor did they establish the crime of endangering a minor. The prosecutor ceased the procedure in absence of a crime and the high prosecutor’s office refused the complaint against the decision dropping the case. We started a new procedure in the case through substitute private prosecution, which is in process now. The prosecutor stopped the investigation founded on the forensic psychologist expert’s opinion.

*"The expert established in the opinion that the father's behaviour did not have a pathological effect on the child's moral, mental or emotional development and no resulting psychological impact is to be expected later. The expert established that the child mentioned the battery of his mother during the examination, which is highly likely to have taken place, at the same time no pathological effect is discernible in the child's development that can be related to the behaviour exhibited by the father."*

Since this publication has a separate section on forensic psychologists, we will only briefly mention that in all of the sexual assault cases either against adults or against children that surface at our legal aid service the primary tool of "evidence" has been the **forensic psychologist's expert opinion**. We found the psychologist experts' activities outright detrimental in most of our cases therefore we have been looking at the solutions for these problems in our strategic cases. For instance we brought an ethical procedure against a forensic psychologist expert before the chamber of forensic experts. The ethical council of first instance endorsed our claim and fined the expert for HUF 80 000 (approximately EUR 300). We appealed the decision and requested the expert's exclusion from the chamber. Because of formal procedural errors that the ethical council made, the procedure had to be repeated twice, and it has been going on for three years now, all the while the expert continuing to practice.

Another possibility is to take criminal action against forensic psychologist experts. We filed a report against one expert for perjury and forgery of a public document during the project period. The objectionable opinion contains the results of the Szondi and Rorschach tests, which we had examined by three different psychologists. It turns out from their analysis that the measures gained from the interpretation of the tests (the medical record) and the conclusions drawn from them (the expert's opinion) are not in accordance with one another, thus the opinion contains false statements that are not supported by the test results.

Another method to make battery disappear that often comes up in our practice is when **the father who does not visit**, does not claim or disclaim the child for years changes his mind suddenly, after years of passivity and **claims rights** related to the child. In cases like this, the court rarely holds the father's earlier neglect and, in many cases his abuse of the mother and/or the child, against him not even at the level of a moral statement. Neither does it count what the effects of the appearance of the father, who has been unknown for the child or unseen for years, are on the child; in these cases it is only the fathers' rights that seem to be acknowledged. Judges seem to have an unwavering assumption that a child needs a father regardless of the circumstances; no matter how bad a father is and no matter what he did in the past. If the child happens to indicate either directly or through the forensic psychologist expert that contact with the father is not desired it is taken as an indication that paternal visitation is all the more desirable since children must, so judges think, be attached to their fathers even in cases of the most brutal of violence. If they are not, the sole reason for that must be the mother's hostile, influencing behaviour.

This practice is supported by an amendment of the government decree (149/1997. (IX. 10.) Korm. rendelet) that entered into force on 1 June 2006, which decree serves as the primary (and only detailed) legal framework for visitation. This amendment takes away the right of a 14-year-old to say if he or she wants to see the parent, as under it, the uninfluenced, autonomous statement of a 14-year-old that he or she does not wish to have contact with a separated parent is not enough to limit, suspend and/or abolish the visitation rights of the parent. In these cases the parent raising the minor is only exempt from the consequences of the failure to perform visitation if the parties are utilising a child protection mediation procedure or if either of the parties has applied for the re-regulation or abolition of the visitation. In an earlier publication<sup>5</sup> we

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5 Spronz J. – Wirth J.: *Integrated client service for victims of violence against women. The results of a pilot programme*. Nane Egyesület–Habeas Corpus Munkacsoport, Budapest, 2006. <http://www.nane.hu/kiadvanyok/kezikonyvek.html>

covered this in detail, therefore only a reminder is provided here: where one of the parents can be held liable for the non-performance of the decision regulating visitation, the custody authority warns the parent once, following which it may fine the parent for HUF 500 thousand (approximately EUR 1800) each consecutive time she or he fails. In addition to the fine the custody authority *“may initiate the process of taking the child into protection if the visitation is conflicted, obstacles are continually raised or if there are communication problems between the parties”*<sup>6</sup>. If the parent fails to ensure the visitation in spite of the above measures, the custody authority may initiate a lawsuit to change the child’s custodian and/or may report the custodian parent to the police or prosecutor for endangering a minor.

A special way of perpetrating the crime of endangering a minor was introduced by the September 2005 amendment of the Penal Code. Under this, the crime is perpetrated and is to be punished with up to one year of imprisonment where the custodian parent continues to prevent the visitation even after a fine has been imposed in order to enforce the visitation of the separated parent.

We have conducted several strategic procedures in order to gain a comprehensive and thorough view of the juridical practices applied in regulating and enforcing visitation. Based on these, we have arrived at the following conclusions:

1. In regulating and enforcing visitation plans neither the court nor the custody authority examine if domestic violence has taken place. The accounts of women are not taken into consideration; the general hypothesis is that women only make reference to violence to avenge their real or imagined grievances against their (ex-)partners. Officials treat the procedures on visitation as part of a war between the parents where mention of battery is seen as a tactics to smear the man. As a result, these women start from an already disadvantaged position as they not only have to explain the existence of earlier violence, which is difficult to prove to a sceptical authority, but they also have to fend off the explicit or insinuated charge that they are the ones who endanger their children by “manipulating the child against the other parent” and by “using the children for their own purposes”.

2. Several court decisions have stated that where a child does not want to utilise the right of visitation for any reason, this can be held against the custodian parent and be sanctioned. In all of the cases we have seen, children were against the visitation because of the father’s earlier violence or violence during visitation. However in none of our cases was this reason accepted. As one of the judges reasoned *„It is the custodian parent who has the obligation and opportunity to maintain the respect and love of the separated parent in children and to ensure visitation. The custodian parent may not transfer the liability for the consequences of hindering visitation on the child.”* This latter sentence is an allusion to the fact that the mother, who was held guilty, reasoned that her children were afraid to meet their father because of earlier, proven violence and it is her maternal duty to protect them from all kinds of violence. Thus it is not the perpetrator of the abuse who transfers the liability for the consequences of abuse on the non-abusive parent and the child, but it is the non-abusive parent who has the obligation to assume this responsibility under the threat from the court. That is how abuse by the father turns into endangering by the mother, that is “hindering visitation” in Hungarian legal practice.

3. Although the Child Decree, which contains the detailed rules for visitation, does not differentiate between the person obligated by and the person entitled to visitation when it comes to non-compliance with its rules, under current legal practice the custodian parent has to perform the decision on visitation under any circumstances and fully, while the separated parent may freely decide if he wishes to use the right of visitation or not. In none of our cases was there a

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<sup>6</sup> Government decree (149/1997. (IX. 10.) Korm. rendelet) on custody authorities and child protection and child custody procedures, hereinafter: Child Decree.



fine imposed because the father did not exercise visitation or exercised it contrary to the decision or agreement.

To illustrate the legal practice that consolidates the father's interests above all things, here follows a case which is before the European Court of Human Rights at the moment:

*„A child was born from T. I.'s earlier relationship, which was not a marriage, nor did it include cohabitation. The relationship between the parents had become conflicted during the pregnancy, the father made no statement of acknowledgement of the child before his birth and questioned several times if the little boy was his. T. I. had the child registered under her own surname. The father had it entered into the records of the custody authority in K. city that he did not wish the child's surname to change.*

*Although the mother had requested it herself before the child was born, later she did not agree to the statement of acknowledgement of paternity by the father. Therefore the father initiated a lawsuit to determine the father of the child. As T. I. never contested that her ex-partner was the father, the procedure ended in an agreement that covered placement of the child, alimony and visitation.*

*When the child was 2, the father initiated a state administrative procedure to change the child's family name and requested that the child have his surname in the future. In absence of an agreement between the parents, the case was referred to the municipal court. The court decided to change the little boy's surname, agreeing with the father's request. The court reasoned primarily that it is a prevalent social practice for children to have their father's surnames. According to the decision of the court, only formal reasons warrant a deviation from this rule of thumb, for instance if the father's name has a strange meaning, can be misunderstood or if the mother has a historical-sounding name. In the court's opinion the common surname is especially important in cases where the parents do not live in wedlock because the common surname enhances the fact of belonging together for outsiders in such cases and ensures an undisturbed personality development for the child. The court stressed in its decision that they experienced an honest attachment and feelings of paternal responsibility on the father's part during the procedure as opposed to the mother, who tried to gain monopoly over the child and make the father-son relationship impossible. Further, the court of first instance found that no psychological problem is caused by a change in the name of a two-year-old.*

*Following the mother's appeal, the county court reaffirmed the decision of the court of first instance arguing that the municipal court established the facts of the case correctly and took an adequate decision without violating any legal regulation.*

*T. I. filed a request for a review of the binding decision, which the Supreme Court refused. The Supreme Court established that the court proceeded in accordance with legal regulations. It stressed that a common surname has an increased significance because of the mother's hostile attitude. The Supreme Court shared the view of the court of second instance that a change of name is not traumatic for a two-year-old.”*

## **1.2. Making the batterer disappear**

The practice of making the batterer disappear serves the purpose of avoiding his being called to account and maintaining violence against women. These cases are characterised by a kind of role reversal; the perpetrator gets out of the spotlight and the victim becomes the object of study instead. It is the most conspicuous in procedures for “crimes against sexual morality,” as the attention of the investigation is directed on the victim in the earliest phases of the procedure. Without exception in our experience, the credibility of the victims is examined, their sexual habits are researched, what she provoked the perpetrator with and which of her utterances and actions stand the test of “reality” is looked into. This latter criterion is quite mutable, since it is as disagreeable for the woman to give an account of the violence in an “automaton-like” fashion as it is for her to do so with “exaggerated” emotion, interspersed with sobbing fits. It is suspicious for her to make a report to the police at once, but neither is it real for her to turn to the authorities only after several days. As the procedure continues, we get to find out about all mischief, white lies and lapses of a survivor of a sexual attack in minute detail going back as far as

her birth almost; in the meantime the person of the perpetrator is lost in a haze and he becomes a side character in the case. While not sparing the cost of experts and effort the system tries to “reveal” the victim’s “lies,” there is rarely any reference to the fact that the perpetrator has as much or even more reason to lie, which should be examined with equal but rather with increased commitment. All the more so, as statistics show that only a small proportion of victims make a report, and few perpetrators are tried in court in these cases.<sup>7</sup> In one case<sup>8</sup>, the European Court of Human Rights has declared that through such legal practice the state violates its positive obligation as laid down in Articles 3 and 8 of the Treaty of Rome<sup>9</sup> to create legal regulations that effectively sanction rape and to effectively apply them in the penal procedure.

The following case is another extreme example of making the batterer disappear. This case was included in strategic litigation because it was deemed necessary to examine cases of multiple discrimination against victims. Besides being a woman, the person involved in the following case also received psychiatric treatment for schizophrenia.

*Our client initiated a procedure against her husband for the criminal act of light bodily injury. The procedure revealed that the battery had not stopped; it was continuous, what is more the beatings increased before the trials. The victim said that the abuse was not only physical but also emotional; her husband was harassing her in various ways including threats of taking her under custodial care and having her forcefully incarcerated.*

*The man did not deny the acts his wife charged him with, he only claimed that his wife needed psychiatric treatment. The court refused the victim’s request for a restraining order saying the husband’s behaviour was not sufficient cause for such a degree of fear that would endanger the evidencing, since the victim was able to report the crimes to the police, and that the future repetition of the crimes could be ruled out. In addition to hearing the two parties, the judge ordered a single procedure for evidencing the case that lasted as much as two years: the examination of the **victim** by a forensic psychiatrist expert. In its order for the examination, the court expected the forensic psychologist to determine if the victim “suffered from a pathological state of mind that influenced her making her statements and reports.” The judge asked this after the accused husband said himself that he had the habit of slapping his wife to discipline her. The court did not order the husband to be examined—neither by a psychologist nor by a psychiatrist.*

#### **1.4. Mechanisms of discouragement**

As we have seen, justice has several ways of ensuring that domestic violence remains invisible and so victims do not receive adequate protection and perpetrators can avoid being called to account. In addition, there are legal institutions that are embedded primarily in written law that make it difficult for the abused woman to access justice.

Almost all criminal acts that are commonly perpetrated within domestic violence are to be pursued upon **private motion**. This means that the state does not exercise its unconditional punitive power in these cases but makes the criminal procedure conditional on the victim’s “decision.” The legislator believed that in these cases the acts are either of a light weight (e.g. light bodily injury, trespassing) or the procedure is cumbersome for the victim (sexual crimes) or victims consider different resolutions of the cases as more desirable because they are relatives with the perpetrator (crimes against property). However, these acts are neither lightweight (a batterer may ruin the life of one or more persons for good, a yearly 200 homicide cases are domestic violence cases<sup>10</sup> and the lack of effective intervention costs EUR 400 million per year in a country the size of Hungary<sup>11</sup>), nor does the victim have a real freedom of choice as long as the

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<sup>7</sup> The fact that 98,92% of perpetrators remain unpunished can be established from comparing justice statistics of 1990 to 1999 with Olga Tóth’s research.

<sup>8</sup> M.C. v Bulgaria (39272/98) [2003] ECHR 646 (4 December 2003)

<sup>9</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950

<sup>10</sup> Police communication on data

<sup>11</sup> Combating violence against women, Stocktaking study on the measures and actions taken in Council of

legislator does not guarantee her safety if she testifies, and finally the procedures are not cumbersome for the victim “by nature” but because the legislator and the authorities make them cumbersome.

It is the unequivocal experience of our legal aid service that the meaning of the legal institution of private motion for victims is not that they are spared or their choices are respected but it hinders their access to justice. Its message not is that all citizens must be protected against violence but that the head of the family must have his control preserved. Beyond this lack of an adequate message to society, the obligation of having to make a private motion poses practical problems:

1. the state shifts the responsibility of starting the procedure onto the victim, which she is to keep up in opposition to the accused who usually lives under the same roof with her,
2. the deadline for filing a private motion is 30 days altogether, and if the deadline is missed no further request for an exception may be submitted for most crimes committed in the home (such exception is only possible for crimes that are publicly prosecuted),
3. in cases that are pursued upon a private motion and are privately prosecuted, the right of immunity is maintained, while the case may lapse, as opposed to other criminal acts,
4. no coercive measure (e.g. preliminary arrest, restraining order) is possible before the private motion has been filed.

A further obstacle to enforcing the rights of women victims of domestic violence is **private prosecution**. In cases of light bodily injury, breach of privacy, breach of mail confidentiality, slander, defamation and breach of a deceased person’s dignity the charges are represented by a private person. Similarly to the above, these crimes are committed against women as part of intimate partner violence thus the rules pertaining to these crimes, which hinder the enforcement of rights, burden women disproportionately and are so discriminative. In case of a private prosecution, the burden of proving the accused guilty lies with the private person, he or she has the rights and responsibilities concerning the representation of the charges. Although the private prosecutor fulfils the role of a prosecutor, he or she is not vested with the public powers and authority of a public prosecutor, therefore he or she may not order a coercive measure or an investigation. In addition to belittling the acts and conferring the responsibility of deciding on the pursuance of the case on the victim, private prosecutions present two further practical obstacles to the enforcement of the rights of battered women. One is the first legal action that takes place in litigation, where the court not only summons the two parties for the same hearing but it also entails a mandatory attempt at conciliation. A personal meeting with the perpetrator has a dissuasive power in itself as a significant majority of victims is afraid of the other person. This is all the more true if the perpetrator arrives with a large group of supporters (family, friends) at the trial. This constitutes psychological distress for the victim and in addition it puts her in physical danger. (In some cases the perpetrator attacked the victim in the hallway or the street before or after the hearing, but many battered women are afraid that the man will follow them from the court and so find out about their hiding place.) The danger of meeting in person weighs on battered women not only in private prosecution but in all criminal or civil proceedings where a confrontation is ordered. Naturally, the lack of victim protection raises similar obstacles for women.

Through these procedural rules the legislator sends an clear general message: “violence against women is not a concern for the state; whatever the number of women and children suffering

from it, women should protect themselves and their children the way they can although, of course, only within the legal tools provided to them, which we try to make impossible from the start.”

The practice of conciliation in domestic violence cases is cause for special concern; in these cases the state not only fails to provide victims with the effective protection they expect, but in an absurd fashion the victims are made responsible for the crime they suffered. They are blamed for the crime, because they must obviously have provoked the battery and because of taking the case out in the public. And the practice of conciliation takes this victim blaming attitude further: if women are reluctant to be reconciled, they are seen as “unable to compromise” or “hostile,” but if they do and they bring their case again before a court after another criminal act, they lose credibility and they are seen as capricious since “if they went back, the situation cannot be so bad.” In one of our precedent cases, the judge identified with the obligation of conciliation so much that she started each hearing with a conciliatory attempt and let the victim know continuously that the “family conflict” should be resolved in the home. The same judge told our client right at the first hearing that she had better not try to settle her private life with her husband in criminal court, since the court is unable to provide effective help as it may only impose a fine, whereas the couple’s 6-year-old child is adversely influenced by the fact that her parents are having fights in court. Finally, after two years of litigation, in this lawsuit we managed to have the batterer convicted to 3 years of probation.

Another obstacle to private prosecution cases is the obligation to pay fees. The fee payable in case of a procedure that may be pursued solely by a private prosecutor is HUF 5000 (approx. EUR 20), the fee for appeal is HUF 6000 (EUR 24) and the fee of making a motion for the renewal of the case or its review is HUF 7000 (EUR 28) paying any of which is an obstacle for women running away without money or being made poor through economic violence.

Finally, the threat of **false allegations** deserves separate attention among discouraging mechanisms. Victims of violence against women face authorities reminding them of the consequences of making false allegations in an outstanding number of cases. This practice reflects the general attitude in society and of the authorities that considers victims of domestic violence who turn to the state for protection as notorious liars, who are capable of anything driven by “vengeance.” The questioning of the credibility and reality of victims is of systemic proportions despite the statistical fact that false allegations make up the exact same proportion of violent crimes perpetrated in the home, 1 to 2% of all cases. The following case provides an accurate picture of the discouraging mechanisms in cases of violence against women and their effect on the victim:

*„R.L. made a report about forced sexual contact against G.Z. in February 2008 with whom she had had an intimate relationship without cohabitation. According to the report R.L. and G.Z. drove to a parking lot near the woman’s place of residence in the man’s car, where the man initiated sexual contact against R.L.’s wish: undressed her, penetrated her vagina with his finger, which made the woman bleed heavily, but this could not be seen in the dark. Then G.Z. lay on the car seat and forced the victim to have sex with him. The reasons given for the discontinuation of the investigation were that the parties regularly had sex before and after the act in question and that they had agreed earlier about having sex during their date. The investigating authority established and the municipal prosecutor acting on the complaint upheld that the woman’s light resistance previous to the act broke under the suspect’s persuasion, and no violence or threats were used. The detective [woman—JS] who questioned the victim stressed that it was necessary to prove the violence or a qualified measure of threat [against life or bodily integrity—JS]. The woman stated in her testimony that the man had beaten her repeatedly and that she had been afraid during the whole violent sexual act that this would happen again. The detective repeatedly stressed during the questionings that R.L. is to face long imprisonment and her case will be prosecuted by the military prosecutor if she fails to prove her statements beyond doubt. Under these threats, the victim modified her earlier testimony and recanted concerning the violence. The police officer provided copies of the testimonies taken during the procedure only after several requests and upon the intervention of the Budapest Victim Support Service of the Central Office of*

*Justice, delivering at the same time the decision on the discontinuation of the investigation. The police did not deliver the decision on the discontinuation when it was taken, thus if R. L. had not used her right to access the documents of the case she would not have been notified of the decision and would have missed the deadline for lodging a complaint.”*

As can be seen from the cases, the procedures do not aim at and thus do not serve the purpose of stopping and punishing the violence and so the prevention of further violence, and ensuring victims' safety. Seeing this, battered women are reluctant to turn to the authorities that should provide justice, instead they continue to endure the violence in silence, or take the law in their own hands. In the case just described, the victim did not want us to represent her in a lawsuit on a substitute private prosecutor basis after the decision that refused her complaint.

## **1. Disregarding the reality of battered women**

The disappointment of victims of violence against women in the family about the justice system is also, to a great extent, related to their experience that the authorities do not understand or consider their life situation. On the one hand, this practice is made possible by the legal norms that are gender neutral: they apply the same rules on every actor in society. However, by disregarding the existing power differences between the members of society, this seemingly politically correct solution results in disadvantaged groups' (women, children, the elderly, disabled persons, LGBT people, etc.) having to exert significantly more energy to access the same legal tools as those in power, if they can access them at all. Disregarding social differences also results in the fact that the life situation imagined and regulated by the legislator is attuned to the characteristics and needs of the social group in power and so it may not be applied to the members of social groups with less power, or only through severe distortions. The most conspicuous example is the much quoted evaluation of self-defence situations by judges. The judiciary practice regarding self-defence has evolved based on a model of interaction between two men and this set of criteria, in absence of an adequately flexible legal practice, remains far from the characteristics of domestic violence in real life. To make it simple: a woman who lives in fear and is typically weaker than the batterer cannot and is afraid to defend herself at the same time as the assault is perpetrated and without any tools. In addition, these situations involve not a single fight, as opposed to the situation hypothesised by the legislator when creating the legal institution of self-defence, but a long process that may last years or decades. Criminal law is capable of grasping only certain stages of this process, but these crimes may not be interpreted in accordance with the victim's reality if taken out of the context of the whole process. In its current state, criminal law is incapable of adequately evaluating such a long-lasting process, in which the victim lives in constant fear between two acts that are considered crimes formally and her psychological condition deteriorates and she becomes more defenceless as time goes on and the number of cases increases, while the criminal acts characteristically increase in severity and cover an ever-growing part of the victim's life-space.

Based on our legal aid service it can be stated that the so called child protection signalling system, where domestic violence usually surfaces for the first time, generally does not distinguish between the responsibility of the abusive parent and that of the other parent, who usually suffers abuse from the hand of the abusing parent herself. In practice, this manifests in the following: if a mother notifies a family support service, child welfare centre, custody authority, etc. that her partner abuses her and/or the children, the authorities usually respond by threatening to take the children into protection and/or remove them from the family. We attacked several administrative orders to take children into protection in our strategic cases. Under indent (1) § 67 of the Act XXXI of 1997 on the protection of children and custody administration a child maybe taken into protection, which is a child protection service, „...if the care of the child's bodily, emotional and moral development may not be ensured with consent from the parent and this situation endangers the child's development...”. In addition, the Act stipulates a further condition for

taking the child into protection: that the parent does not intend or is incapable of ending the endangered status of the child by using basic services.

Based on our cases, a practice can be discerned that these basic services are not offered before the child is taken into protection and that the child protection authorities are trying to solve the endangered status of the child not by uncovering the reasons, identifying the abusing parent and calling him to account, they do not even see the parents' universal responsibility, but blame the mother for the situation in most cases. The fact that the mother cannot stop the violence as she is one of its victims, too, is absolutely disregarded. Thus the system fails the victim: the authority that the abused parent turns to for protection does not provide help but threatens the mother by taking the child away from her in the end if she does not do something. Because if a child's being endangered cannot be resolved by taking the child into protection, the custody authority places the minor in a child institution or with foster parents. How blind the system is to the defenceless condition of the adult victims of domestic violence is exemplified by the documents quoted below. The first one is an excerpt from the indictment, the second document was submitted by our client in the lawsuit where she herself was the accused as a secondary perpetrator. The lawsuit took part for endangering a minor, which the woman was charged with because she suffered the beatings in the presence of the children.

The indictment:

*"The accused persons married in 1992, their two children are C.s. and T. The relationship of the couple deteriorated around 1999, they opened separate bank accounts and in 2000 the man filed a divorce case.*

*The man, K. V. was objecting to his wife attending a course on accountancy to find a workplace and so improve the family's financial situation on the one hand, and to gain more self-esteem on the other. On the day of ... 2000 K. V. battered his wife causing several open wounds on her head and contusions on her chest, which healed within eight days. In ... 2001 the accused persons tried to settle their relationship for the sake of the children, but this only resulted in a temporary success as the relationship had again deteriorated by 2002. Beginning from that time, the accused persons quarrelled with the child and about issues of the household and the divorce daily, and the disputes escalated into quarrels and the quarrels into violence where K. V. abused his wife several times, who tried to protect herself at these occasions. The disputes usually started by Mrs. K. objecting to her husband's behaviour at home, his less than adequate of contribution to household expenses or the child's needs, or sometimes to his eating the food bought for the child, while K. V. disapproved of his wife's chiding him and further that his wife was ore attached to their daughter and blaming the little boy always when there was a conflict between the children. K. V.'s answers to the wife's objections usually led to mutual reprimands and often assault on the father's part.*

[...]

*Mrs. K. V, by entangling in frequent verbal conflict with her husband and severely offending him before the children, and K. V., by physically assaulting his wife before the children several times, and both parents, by disregarding the children's presence with their loud and offensive quarrels, severely violated their parental obligations and so endangered the children's mental and moral development ...".*

The woman's affidavit to the court, who was a secondary suspect in the case:

*„My husband has been abusing me in words and physically since about 1996. These abuses were still occasional between 1996 and 2000. The main source of problem was that I really wanted a pretty and comfortable home and a good life for the family and the children. When I criticised my husband for not making enough effort to improve our lives, he always abused me.*

*In the second half of 1999, the beginning of 2000 our life became a hell. That is when he started to beat me about weekly. The little girl, C.s. wanted to go to extra classes and to take part in every interesting activity at school. I*

*was absolutely supporting her. Her father slapped the child several times, talked to her in a derogatory way when she asked him to let her go to some kind of course. [...] The “reason” for my battery was also that I wanted to ensure everything for my children and he refused this. So I decided that I would ask for help from the competent custody authority. I was expecting them to discipline my husband, to tell him he has no right to beat me and to inform him of his paternal obligations. [...] The custody authority took records, as well. In this I stated that ‘my husband beats me regularly’ (records p. 2). When they informed my husband about this statement and my asking for help, he beat me so that I had to be hospitalised [...] for two weeks. (Please officially request the documents from the hospital regarding this.) The hospital reported my husband but nothing happened. The custody authority made an environmental study following my report and ask for help, in which they found everything all right. They disregarded the information that my husband was beating me regularly. They did not inform me about what I could do, where I could turn.*

*My husband filed a divorce suit saying ‘there is a better partner to spend his life with...’ In the divorce case, which he started in 2000, I told the court about the fact that my husband was beating me regularly. The court had it recorded but I was not advised what to do. I could see that the procedure was taking very long (despite the fact that the fact of domestic violence was clear) and there was no change in our lives. So I decided to adapt to my husband’s needs for the sake of the children, to avoid battery and the extremely tense atmosphere. I adapted to him and his family in everything; I was taking all the financial burdens almost exclusively. I was striving to ensure the calmest possible background for my children and as much leisure activities as possible, so that they can have a balanced life in their home.*

*[...]*

*I said my husband continued to beat me. They told me every time that I should try to reach an agreement with my husband. But it was impossible with him.*

*I feel that I am not guilty of the charge against me. I myself never hurt any of my children, I acted with much love and care towards them. I was trying to save them from the tensions at home within the limits of my possibilities. I am not perpetrator, but I was a victim of my husband’s regular battery. During that, I suffered a head injury, a broken arm, a concussion and a finger injury requiring operation, among other injuries. Despite all this, I did not collapse, I did not start using drugs, did not neglect my children; to the contrary I summoned all my power to ease the tensions and spare them from the pain.*

*I asked for help to stop the domestic violence, but received none.*

Mrs. K. V. and her children could move back to their home after two and a half years whose exclusive right of use was granted to them. After three and a half years of litigation the woman was acquitted in September 2008 by the court of first instance and the prosecutor appealed the decision (!).

We have a strikingly similar case in which our client is being charged with disturbance of public peace because her husband happened to beat her in public after kicking her out of a shop.

Further, we regularly experience disregard for the reality of battered women in cases where the authorities have unreal expectations towards the victims, have hypotheses that victims do not meet and so they question their credibility, in effect they are not provided with state protection. Thus for instance we are involved in a case where the police failed to proceed against a man brutally battering his wife and her little daughter living in the same household because they saw the woman walk in the street several times and they thought that she could have escaped if her life had been really so unbearable. In addition this woman had returned to her husband several times after running away. We regularly face the lack of understanding on the part of helping professionals and often their hurt feelings when the battered woman returns to the batterer after a long helping relationship, after she has been helped with housing and finances.

A further example of the blindness of the legal system to domestic violence is the case in which we could not call the perpetrator to account for his violation of personal freedom and for

coercion because he did not use physical restraint, physical threat and/or violence but used psychological threat against his partner. The police refused our client's report saying that these crimes are perpetrated only when the accused limits the victim's freedom physically and it cannot be considered a criminal act if that limitation is achieved in another way, for instance through psychological terror, intimidation or threat.

To illustrate that disregarding the reality of battered women and children continues to be a conscious and systematic practice of legislators and the authorities applying the law, the legislative process of the crime of harassment and its application is a good example. On 31 December 2007 harassment was not criminalised in Hungarian law, only the crime called dangerous threat could be applied to a rather narrow set of harassing activities.<sup>12</sup> Because an overwhelming majority of the domestic violence cases ending in death is preceded by harassment and because harassment often influences the victim's life to a serious extent, women's organisations had been lobbying for the criminalisation of harassment for years. While earlier there had been only vague promises that a minor offence will be created, in the autumn of 2007 immediately after several politicians of the governing parties received white powder of unknown origin, an amendment of the Penal Code was initiated that would have acknowledged harassment as a crime. PATENT and NANE sent the experts dealing with codification at the Ministry of Justice and Law Enforcement their recommendations in a joint remark.<sup>13</sup> Through the recommendations, the NGOs wished to feed victims' reality back into legislation and so promote a regulation that could sanction harassment in a way that can be enforced in reality. The recommendations of the women's organisations had the exact opposite effect: the bill presented to the parliament was protecting the interests of victims of harassment even less than the version sent earlier for review by the NGOs. Thus for instance harassing a family member was deleted from the aggravating circumstances and only ex-spouses and ex-partners remained in the group receiving special protection, although there is no statistical data to support that ex-partners are more often harassed than a partner who has not formally got a divorce. On the contrary, our experience with the legal aid service is that the period after the woman lets the man know of her intention to get a divorce, when the parties are still spouses or partners on paper, is especially risky for harassment. Péter Gusztos MP of SZDSZ (liberal party) filed the majority of our suggestions in the form of amendments, however the majority of MPs did not vote for them. Gergely Bárándy (MSZP, socialist party) argued against the amendments in parliament, thus fiercely opposed the naming of what is called harassment by procedures (initiating unfounded procedures) in the law. According to this politician, sanctioning harassment through procedures would lead to redundancy, since the crime of false accusation covers these acts. The same Gergely Bárándy suggested the creation of the crime of "*false accusation related to domestic violence*" in the legislative process of the restraining order a year later arguing that a special crime is necessary to avoid women pressing false charges and so obtaining a restraining order. At the same time, a series of bills on the restraining order have been drafted that do not protect the victims, and the only criminal act, killing a newborn, that provided a privilege to women in the earlier Penal Code and acknowledged their reality (altered state of consciousness, being an abuse victim) has been deleted from the Penal Code<sup>14</sup> to give room to an

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<sup>12</sup> Under § 151 (in force until 31 December 2007) of Act LXIX of 1999 on minor offences:

„151. § (1) *A person who*

a) *with the intention of inducing fear, seriously threatens another person with perpetrating a criminal act that is directed against the life, bodily integrity or health of the threatened person or a family member of the threatened,*

b) *with the intention of inducing fear, seriously threatens another person with publicising before a wide audience a fact that is suitable to harm the honour of the threatened person or the threatened person's family member,*

*may be punished with custody or fined up to HUF hundred and fifty-thousand.*" In our experience, not even this rule on a minor offence is adequately applied.

<sup>13</sup> <http://patent.org.hu/content/view/26/55/lang.hu/>

<sup>14</sup> Point e) indent (1) § 88 of Act II of 2003 on amending penal regulations and certain acts related to them repealed § 166/A (on the killing of a newborn baby) of Act IV of 1978 on the Penal Code as of 1 March 2003.



aggravated crime that covers the same acts and sanctions them with the gravest punishment possible<sup>15</sup>. The bias of the legislators could not be more obvious.

### 3. Discrimination

All the women who turned to our legal aid service because of domestic violence during the past years were discriminated against. They usually experienced it as bias on the part of the authorities and tried to submit objections in almost all cases, which were refused without exception. The legal institution of bias usually covers cases where the neutrality or impartiality of the decision maker toward the specific case and the specific parties is not certain because of a personal acquaintance or some other reason that is considered objective. In dealing with the objection against bias, the proceeding judge must first make a statement if he or she considers him or herself biased. We have not met one judge in the past ten years who said yes to that. They do not consider themselves biased because typically they do not have an earlier acquaintance with either party and they are not friends or relatives. Why victims of domestic violence still experience the activities of those participating in the application of law as biased is the following. On the one hand, in absence of a special regulation and/or specific guidelines on the application of law, the decision maker's prejudices, subjective convictions or religious-moral beliefs are accentuated in the procedure, and characteristically these represent patriarchal morals that is they maintain the man's extra power over the other family members. However when bias is examined, the person's sexism or misogyny is not the subject of the investigation. On the other hand, this bias does not reflect the person's specific attitude toward the specific parties but is the sum of the bias in the system. As has been explained, domestic violence is structural violence, one of its pillars being law, which provides a license for batterers to commit violence unpunished. Law protects patriarchal values, thus discrimination is not the individual characteristic of those applying the law but it is a characteristic of the whole system, which is necessary to maintain violence. Nowadays, this discrimination is no longer included in written law as open discrimination but rather as the indirect discriminative effect of procedural regulations, or even more in legal practice.

Since Hungarian regulations use gender-neutral terminology, discrimination can only be discerned in an indirect way. For instance indent (7) § 33 of the already cited background regulation on visitation (149/1997. (IX. 10.) Korm. rendelet) enables the custody authority to start a lawsuit for the re-regulation of custody and to make a report on endangering a minor if the parent obligated under the visitation arrangement (the mother in 90% of the cases) continues to influence the child against the separated parent after a warning and a fine imposed. The regulation threatens with a similar sanction neither in the case when the parent entitled by the visitation arrangement continuously influences the minor against the other parent, nor if he (or she) abuses the right of visitation in any other way. As several public administration and court decisions attest, the custodian parent (the mother) is responsible for the failure of the visitation if the child does not wish to see the father because of the father's abusive behaviour. Meanwhile, the father's (the parent entitled to visitation) responsibility includes only the obligation to cancel the visitation in a lawful manner, usually in writing 48 hours earlier.

A provision of the Act on child protection<sup>16</sup> results in the discrimination of domestic violence victims, as by deviation from the general rule it stipulates that the client must pay a fee in visitation cases. In addition the Act also authorises the custody authority to make the client pay an advance on the fee of any expert that is ordered in a visitation case. Paying HUF 40 to 120

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<sup>15</sup> A woman who kills her newborn baby during delivery or immediately after delivery was punishable with two to eight years of imprisonment until 28 February 2003; since 1 March 2003 the punishment for the same act has been ten to fifteen years of imprisonment or life imprisonment.

<sup>16</sup> c) (3) and (4) of 133/A of Act XXXI of 1997

thousand (EUR 160 to 480) for a psychologist expert is more of a financial burden for battered women and many are unable to utilise an administrative procedure because of this rule.

In a report on an earlier research<sup>17</sup> it has been revealed that in adversarial divorce suits where the parties disagree on the placement of the child (and so it is not them who decide) the parent who has a legal representative (attorney) has more chances to have the child placed with him or her. And it is usually the man, who is in a better financial situation, that can pay an attorney. The same research dispelled the widely held misconception that in a significant proportion of the cases mothers get the custody of the child. The truth is that it is characteristic only of the custody schemes created or accepted by the parties themselves, which end in mutual agreement, that in 90% of the cases the mother will have the custody rights; where there is no consent, the courts only decide for the mother in 60 to 40% of the cases. If one compares this to the extremely low success rate of the investigations in domestic violence cases, while it is well-known that abusers are eager to use custody suits to maintain the abuse of the mother, one may easily come to the conclusion that in a significant proportion of these cases there is violence in the background and even a part of the 40% of favourable decision means that the child is rendered defenceless against an abusive parent.

It constitutes further discrimination that the victim is in a significantly less sophisticated procedural position in penal procedures than the accused, who is protected by a highly detailed system of rights and guarantees. The burden of proof lies with the plaintiff in the procedure, and a fact that has not been proven beyond doubt cannot be taken as incriminating the accused. The perpetrator of the violence, as an accused person, is not obliged to tell the truth, not even when giving a testimony; not only is the victim obligated to tell the truth but she can also be found guilty as a result of the inadequate activity of the investigating authority if it “does not manage” to prove that the accused is guilty. Those applying the law—the police, the prosecutor, the court—often expect the victim to collect the evidence herself and do not undertake the necessary investigation procedures that they would perform in criminal cases between two strangers. The authorities tend to believe that violent criminal acts within the family are extremely difficult to prove; they believe from the beginning that it is only the victim’s statement against the accused person’s and no other evidence is possible. Out of the range of the possible tools of evidencing, forensic psychologist expert opinions are relied on the most often, which, as a separate chapter in this publication explains, is not suitable to prove the violence because of the unsuitability of the tests used, the prejudices of the psychologists, and because they do not receive training specifically on domestic violence. The witnesses’ testimonies usually produce unfavourable results for victims, since exactly because of the abuse, the abuser has a much wider social network and social support system than the abused. Despite all this, good practices from abroad show that a legal practice based on specially trained and prepared persons can prove crimes perpetrated in the home just as well as the ones perpetrated between strangers.

Finally the enforcement of enforceable decisions is discriminative: while the abused persons characteristically perform in a voluntary manner, as they are afraid, abusers are more likely to wait for the authority to enforce the decision. Thus often months or years elapse after an effective decision by the time the abused persons can exercise the rights they have been granted. The ceasing of coercive measures has caused much trouble in many of our cases. Currently, once the owner officially gives another person a permit to stay in his or her property, this may not be revoked, and the owner may initiate a procedure to have the other person’s address declared fictitious only if two witnesses attest that the person has moved out for good. However, most batterers have no intentions to move out themselves.

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<sup>17</sup> <http://www.nol.hu/archivum/archiv-424775>

## 4. Conclusion

As shown by the above summary, the legal system ensures the maintenance of domestic violence. The state systematically fails to take a firm stand that considers violence unacceptable in the family too; perpetrators are not called to account and victims are not protected from violence. All this unavoidably results in victims' disappointment in the justice system. True, victims are likely to ascribe the failure to a badly chosen attorney or a bribed official, the above summarised characteristics make it clear, hopefully, that we are facing a systematic failure of the system here. Without knowing the facts of domestic violence and without applying that knowledge widely, the officials applying the law will almost inevitably make the mistake of victim blaming, fall prey to their biases and will become party to the maintenance of abuse.

The fastest and most effective way to control this legal dysfunction would be to create a separate regulation that covers domestic violence in a comprehensive way.

Legislators have been refusing this task for years, without any well-founded reasons why, despite the fact that domestic violence affects 400 thousand women and children yearly and that the current legal system evidently cannot cope with it.

In absence of a special legal regulation and without adequate training and continued re-training of the officials, who enforce the law there is no chance of a significant change in the field of domestic violence.

Until the legislators take this step those applying the law have the chance to restore victims' faith in justice: for instance they may turn the approach over and not assume that the victim is lying but that she is telling the truth.

## **Domestic Violence as Reflected in the Statistics of NANE's Hotline**

NANE Women's Rights Association has been operating a telephone hotline for battered women and children since 1994, which is available toll free from 6 to 10 p.m. on six days of the week. The calls are received by trained volunteers who record them in a journal giving a short summary of the call and the experiences of the battered women. The following are the statistics and summary of the calls received by the hotline.

### **The time period examined and the aims of the research**

The first half of 2006 and the second half of 2007 were examined.<sup>18</sup> We strove to gain a thorough view of the calls received on the hotline, therefore the calls were classified into various categories including the type of the call, the person and the experiences of the caller.

Calls that are about domestic or intimate partner violence are called target group calls. In these cases the caller herself is an abused person or is someone trying to help an abused person. There were 307 target group calls during the examined half year in 2006 and 302 in the period from 2007. The largest number of target group calls is comprised of calls by battered women or persons helping such women (85 to 90%). This is followed by calls by or on behalf of abused children (6 to 10%). A relatively smaller group are those abused by their children or grandchildren (4.2 to 4.3%) and victims of sibling abuse (1 to 2%) and the rarest calls are from abused persons living in same-sex relationships; two such calls were received during the whole one year examined.

### **Types of violence that surface**

A call usually takes 30 to 60 minutes. Naturally, this time is not enough for the caller to relate all the violence suffered during several years of an abusive relationship thus the following summary is only a testimony of the kinds of violence that the women, children and helpers who call us condemn or consider important enough to mention. The volunteers working on the hotline define these broad categories of violence as defined in NANE's publication *Why Does She Stay???* (pages 13 to 14).

#### ***Physical violence***

It is conspicuous from the review of the hotline journal that there are much more calls on physical violence than calls because of other forms of violence. This is so probably because physical violence is what victims have a name for, what is most tangible for them, to what they expect a reaction from authorities or institutions the most. Within physical violence, serious acts are mentioned most often, such as the breaking of bones, locking someone in or out or limiting and controlling physical needs, sleep most often.

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<sup>18</sup> These periods were selected because we were interested if the Act on the restraining order, which came into effect on 1 July 2006 had any substantial effect on the situation of battered women. The data of the research show no discernible change.

## *Psychological and verbal violence*

Our callers do not usually mention the forms of psychological and verbal violence which most bystanders would consider weaker forms of violence, such as humiliation, cursing or shouting. Life threats, stalking and harassment, which are more serious, are mentioned most often.

## *Sexual violence*

Callers relatively seldom mention sexual violence but during the two times half-year period almost 50 cases were reported, which is 8% of all calls. The cases surfacing at the hotline are probably just the tip of the iceberg and callers report legal steps to call the perpetrator to account in the rarest of cases.

## *Social-economic violence*

Out of the various forms of social-economic violence the following is heard most often. As a result of isolating, callers' social support system ceases to exist and so they are left absolutely alone with their problem. We have spoken to several women who lost their jobs because their abusing partners repeatedly humiliated and harassed them at work and their employers did not tolerate that. Thus these women lose both their independent income and potential support system.

## **Interventions by professionals: alarming examples**

The hotline is typically called by victims who do not get the kind of protection or support that they need. I am only highlighting some trends that, based on numerous cases, seem to characterise some biased professionals in each profession.

Hotline callers usually criticise doctors for describing serious injuries as light injuries. Moreover, doctors seldom ever inform them of the possibility of getting a medical assessment free of charge in penal procedures thus certain poor women are excluded from having a medical assessment of their injuries. It is very common that doctors choose simpler solutions instead of providing thorough information: they prescribe sedatives and painkillers for the abused woman.

The experience with teachers is that they fail to report children in their classes who are witnesses of abuse at home or are victims themselves.

## *Social workers*

The biggest problem, as experienced by us, is that a part of the social workers working with abused women cannot adequately handle the situation when the abused woman has a child. It seems that while it is the father's abuse that endangers the child, social workers do not hold solely the abusive man responsible but treat the parents as a single unit and send them to mediation or couples therapy accordingly or assume the child under protection. Mediation and couples therapy are not to be applied in cases of abusive relationships as for these techniques to be effective, the couple must meet on an equal and voluntary basis which conditions are not met in the cases discussed<sup>19</sup>.

In the case of children reared in abusive relationships, one of the parents is unable to provide the child with safety because of the continuous abuse perpetrated by the other parent. Our opinion is that in such cases professionals need to clearly differentiate between the parents and put the

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<sup>19</sup>See: "Tudja-e Ön, hogy miért veszélyes a mediáció a családon belüli erőszak kezelésében?" <http://www.stop-ferfieroszak.hu/news/48/32.html>

responsibility for the situation on the person who is responsible for it; on the abuser. And not assume the child under protection against both parents.

Some professionals go further and remove the child from the family causing further psychological harm. Our recommendation is to support the woman’s recovery in addition to ensuring her safety and if the situation is really so serious then the child must be placed in a safe environment for the duration of the mother’s recovery. In addition, professionals should make sure that the child could live in his or her family with the abuser removed, as soon as possible.

**Police**

The national police chief’s order (32./2007) regulating police intervention takes into account victims’ interests in several points on paper. Nevertheless, we often hear about police officers not acting according to that document. Often, the officers on site:

- do not inform the victim of her right to have the event recorded and the crime reported;
- dissuade her from making a report (because its effectiveness is really doubtful);
- it also happens that an abusive man perpetrating a serious crime is not taken away by the police but is left at home, knowing that the man may avenge calling the police after they leave;
- blame the victim: “such women need to be disciplined with beating, really” or “I have just got a divorce, too, I understand your husband when he dislikes the fact that you are already living with your boyfriend”.

**Judges**

Judges have broad interpretative powers in the Hungarian legal system and their subjective opinions weigh heavily in a civil or penal procedure. Unfortunately this means that the judges who share views similar to the abuser’s or just fail to recognise abusive behaviour in absence of appropriate training, will decide on the side of the abuser. We have heard of several trials where the judge shouted at the abused woman and it is a regular phenomenon that judges not only fail to reprimand the abuser who openly humiliates or threatens the abused woman in court but silence the woman if she wants to answer the most degrading of remarks. Courts often refuse to listen to abused women’s accounts of their situation or the preliminaries saying that those do not pertain to the matter of the case. However, in cases of custody, visitation or bodily injury it is exactly these circumstances that are the reason for the lawsuit. Thus abused women are silenced and their viewpoints are not taken into account.

**Frequency of legal action**

The table shows how many times those calling because of physical violence mentioned that a formal report on the abuser had been filed and how many callers asked about the restraining order.

Percentage of legal action in calls at NANE’s hotline				
	January to June 2006		June to November 2007	
No report against the abuser	297	96.7%	292	96.6%
Report against the abuser	10	3.3%	10	3.4%
Caller asked for information on the restraining order	6	1.9%	2	0.6%

Because callers do not relate all details in every call and the volunteers note relatively few details per call, the above data are only approximate. Despite this fact it is appalling that only in 3.3 to 3.4% of the cases do callers mention that an official report has been filed. Even less callers asked for information on the restraining order. This data supports the fact, as thoroughly discussed in another study in this publication, the restraining order is difficult to attain.

## **Conclusions**

To this day it happens often that our callers relate experiences concerning the interventions of the police, the courts, the custody authorities, psychologists or even child welfare centres which show that many professionals working in Hungary not only fail to do everything in their power to support victims and call perpetrators of domestic violence to account but on the contrary: support the perpetrators and blame the victims.

For the sake of victims' safety, professional protocols for all professions dealing with domestic and intimate partner violence should be issued, which would work well in practice, would be obligatory and could be cited and recommended.

Gábor Kuszing

## The Practice of Forensic Psychologists in Domestic Violence Cases in Hungary

Forensic psychologists play an important role in domestic violence and intimate partner violence cases. They contribute to judging the credibility of the plaintiff, in child custody cases they examine the parental abilities of parents and they often have a decisive say when there is no other witness than the plaintiff, which is very common in these cases. This study provides an overview of the professional recommendations on forensic psychologists and examines the practices of forensic psychologists in domestic violence cases, and their attitudes and knowledge to a smaller extent.

Regarding professional recommendations, the quasi-legal methodological communications are reviewed. The practices of the experts were surveyed in structured interviews. The research included cases from the joint integrated client service of NANE and Patent and earlier cases of the Habeas Corpus Working Group, which has ceased operation since.

### Professional recommendations

The professional practices of forensic psychologist experts are regulated mainly in two methodological communications: Methodological communication No 10.<sup>20</sup> and 20.<sup>21</sup> of the National Institute of Forensic Medicine on the range of operations and activities of forensic psychologist experts. Here, the recommendations of communication No. 20 concerning sexual violence are reviewed as they are more detailed and many interview participants mentioned this quasi-legal regulation.

It is primarily the recommendations of communication 20 on credibility that merit an analysis. The communication provides for the examination of whether the testimonies of both the plaintiff and the accused party is “experience-like”. This may appear balanced as both parties are to be examined. However, it is worth looking at what, according to the communication, the psychologist should examine in the case of either party.

In Table 1 (next page), added emphasis shows the questions that relate to the credibility of the various witnesses. It appears that the question on the credibility of the plaintiff-witness is posed in many ways and times, while that of the accused is only posed in one way. The reader of the communication has all the reason to believe that the question of credibility is primarily a concern with the plaintiff-witness, although the text does not say so explicitly.

That is the methodological communication is not balanced: in the case of sexual crimes, it is primarily the plaintiff's credibility that needs examination. Thus the plaintiff-witness relating a case of sexual assault is already in a disadvantaged position in relation to the accused: it is her story which is received with doubt. The same disadvantage is true in relation to the plaintiffs of the plaintiffs in other types of cases as their credibility is not questioned from the beginning. The methodological communication prescribes the examination of credibility as a routine that is not only in cases where there is reason to believe that the plaintiff of a sexual assault case is not telling the truth.

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<sup>20</sup> Egészségügyi közlöny. 1984. 6. szám 128–133.

<sup>21</sup> The website of the Forensic and Insurance Medicine Institute of Semmelweis University. <http://igor.diogenes.hu/download/modszlev/20MSZLEV.DOC?PHPSESSID=020995b2969db11b5c545f4de0576ab6>. Accessed: 26 October 2008.



Table 1

Issues the forensic psychologist should examine in cases of sexual crimes for plaintiffs and accused persons according to methodological communication 20	
Plaintiff-witness	Accused person
<p><b>„a/ The probability of the act taking place,</b>  <b>b/ the experience-like quality of the account of the act,</b>            c/ psychosexual development, sexual stage,            d/ knowledge of sexuality, its source,            e/ traumatisation and impact on further development,  <b>f/ role of fantasy played in the quality of experience-likeness,</b>  <b>g/ any coached accounts,</b>  <b>h/ readiness for confabulation,</b>            i/ quality of emotional relationship with the accused,            j/ presence of pathological sexual character.”<sup>22</sup></p>	<p><b>„a/ the reality of experience,</b>            b/ general psychosexual development,            c/ divergence of personality structure from average,            d/ special differences in personality traits determining sexual behaviour,            e/ are the personality traits that define the deviant possibilities of sexual behaviour supplemented by personality traits that may contribute to perpetrating the crime?”<sup>23</sup></p>

## The Penal Code

Although it does not pertain directly to the experts, the commentary of the articles of the Penal Code on sexual violence seems to strongly influence experts’ work. While in many countries of the world it is enough to prove for the claim of rape that the woman did not consent to the sex, in Hungary it must be proven that the woman showed physical resistance (fought). In addition the following excerpt from the commentary on the Penal Code (which is as binding as the law itself) differentiates between real resistance and apparent resistance and it advises courts to examine if the defendant was in error because of the plaintiff’s misleading behaviour.

Section 4./c. [...] For instance, the plaintiff woman may exert apparent resistance out of coquetry or to arouse the man’s sexual desire. Often it is not easy to judge and prove the seriousness of resistance and, especially in absence of other direct evidence, this necessitates the examination of the credibility of the accused and the plaintiff. Injuries of the plaintiff or perhaps the accused may point to serious resistance, and the traces on their clothes and the site. The relationship between the accused and the plaintiff must be examined thoroughly, as well: had they known each other earlier, was there a stronger relationship, perhaps sexual relationship between them. The plaintiff’s life history and perhaps objectionable lifestyle does not provide a secure basis for the inference of whether she was willing to have sex with the given partner at the given time. The woman may exert serious resistance against a man with whom she has had a sexual relationship earlier. The plaintiff’s “inviting” or outright provocative behaviour may point to the lack of serious resistance (e.g. goes up to the man’s flat, tolerates such intimacy from the man as usually precedes intercourse: kissing, petting, etc.) [...] However, in the event of the plaintiff’s provocative behaviour special care must be devoted to the examination of whether the perpetrator was in error regarding the seriousness

<sup>22</sup> Ibid., p 7. Emphasis added.

<sup>23</sup> Ibid., p. 8. Emphasis added.

of the resistance. The careless, unthinking behaviour of the plaintiff must be taken into account as a mitigating circumstance.<sup>24</sup>

This commentary enacts the right of men over women's sexuality by questioning the woman's right to change her mind during sex or to desire only certain forms of being with the man. In the majority of cases a man rapes a woman whom he knows therefore usually it happens in a situation where the woman does want some kind of relationship with the man (as the commentary says: goes up to his flat, kisses him) but does not want sex or a certain form of it, which the man forces on her nevertheless. Although the commentary acknowledges that serious resistance exists even if the woman has had a sexual or other relationship with the man, yet with the exception of this statement the commentary is about the rule that any behaviour by the plaintiff can be brought up to support the man. If she resists, she resists to arouse the man, if she wants any kind of relationship with the man, she clearly wants sex. Therefore the commentary provides excuses for the authorities, so that they do not have to consider cases of rape even if the woman tries to resist him physically. Further, the commentary is full of undefined concepts that can be moulded to fit any behaviour (coquetry, objectionable lifestyle, provocative behaviour, intimacy), which provides further ground to arbitrary interpretations of the law. No wonder, primarily authorities instruct psychologist experts to look for details that undermine the victim's credibility and the seriousness of the events, as we shall see below.

## The practice of forensic psychologist experts

The material presented here comes from two sources: on the one hand, from interviews with forensic psychologists, on the other hand the cases emerging at the legal services of NANE, PATENT and the once Habeas Corpus Working Group that include forensic psychologist experts and their opinions.

### *Participants of the interviews*

The interview participants were recruited from the internet database of the Ministry of Justice and Law Enforcement on forensic experts<sup>25</sup>.

Age of participants					
Age group	30–	41–	51–	61–	Average age
	40	50	60	70	age
Number of participants in age group	2	4	3	7	54 years
Gender		Female: 13		Male: 4	
Place of residence		Budapest: 14		City in country: 3	
Education		Psychologist: 3		Clinical psychologist: 14	
Cases participants deal with					
Type of case	Number of participants dealing with case type				
Homicide	4				
Other violent crimes	2				

<sup>24</sup> Berkes Gy. (szerk.) *Magyar Büntetőjog - Kommentár a gyakorlat számára*. HVG ORAC Lap-és Könyvkiadó Kft, Budapest. A Btk. 197 §-hoz fűzött magyarázat - 22. pótlás 595. o.

<sup>25</sup> <http://szakertok.irm.gov.hu/>

Sexual violence against adults	8
Sexual violence against children	14
Endangering a child	12
Child custody	15
Non-pecuniary damages, accident	13
Economic crime	2
Employment	1
Drug abuse	2

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The reader may wonder why cases of physical violence against female partners are not included in a research on domestic violence. However no expert reported dealing with such cases and according to the legal aid service of Patent, psychologist experts are rarely involved in these cases.

## Results

### Whom does the expert examine?

The interviews (and the statistical trials conducted on their basis) supported the hypothesis that forensic psychologist experts examine the plaintiff-witness more often than the accused in cases of sexual assault against adults or children and in cases of endangering a child.

For victims, the result is that their personality pathology is assessed, their credibility is questioned, their psychological illnesses are discovered, while the same questions are raised less often in the case of the accused. This practice is biased for the accused party, whose psychological state or personality problem, if any, is not discovered by examination.

One of the legal aid cases shows the tendency that it is always the plaintiff-witness that must be examined, as if in a caricature:

*A mother accused the father of her little girl of endangering the child during visitation as he regularly took her to a dirty and overcrowded cottage with no lavatory, where she had suffered sexual molestation from another child. Therefore the mother denied visitation and asked the court to terminate the father's visitation rights. The court ordered the examination of the mother and the child by a forensic psychologist expert requesting the expert to determine if there had been any changes in the father's behaviour that would warrant the re-regulation of the father's visitation rights. Instead of refusing the examination because it is impossible to draw conclusions on the father's behaviour from the child's and the mother's examination, the expert concluded that no changes had occurred in the man's behaviour that would justify the re-regulation of visitation. The court repeated this evaluation in its verdict verbatim and denied the re-regulation of the visitation. (Case No. 3)*

As it appears from this case, and as shown by the cases of Patent's legal aid, often those parents are examined, as well, who represent the interests of a minor plaintiff-witness before the authorities.

It is only in child custody and visitation cases that any good practice seems to exist, where it is statistically supported on the basis of the interviews with the psychologist experts that they regularly examine all parties. Therefore if the charge of violence is raised in such a case the probability that the accused is examined is higher. However it may be true even in such cases that the authorities are interested in undermining the plaintiff-witness's (woman or child) credibility, as shown below. It is also the germ of good practice that in one city, it is the practice of the local police to examine all parties in cases of sexual violence and child endangering.<sup>26</sup>

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<sup>26</sup> Participant No. 13

## The examination of credibility in domestic violence

The statistical trials based on the interviews supported the hypothesis that the credibility of the plaintiff-witnesses is more often examined by psychologist than chance in cases of sexual violence against children or adults and in cases of child endangering based on the request of the requesting authority (child custody authority, court, police). According to a research report by Amnesty International in 2007 „ rape is one of the few crimes in which the victim is treated as guilty until she can prove her innocence, while the accused is deemed innocent until proved guilty.”<sup>27</sup> From the present study it seems that in addition to rape, this is true for cases of violence against children.

Many experts inquire for similar reasons, especially in cases of sexual violence against adult women, in what way the claimant-witness contributed to the violence with her own behaviour:

[It must be examined] if there is a pathology in [the claimant's] personality, that would be a justification [for the crime] – not justification, but she has a weak personality, suggestible, does she have an understanding of the action, the circumstances. Sometimes she gets into a situation in which she can't be assertive. [...] Since she also contributes with her behaviour to the act, [the perpetrator] will be judged lighter. (Participant No. 8)

For the reader unfamiliar with Hungarian legal practice it may seem strange why the victim should have an understanding of the act and its circumstances and not the perpetrator. And why does her suggestibility, weakness and incapacity to be assertive not count as aggravating circumstances when the perpetrator exploits these characteristics? In sum, psychologist experts often concentrate on collecting evidence to undermine the plaintiff-witness's testimony in such cases.

## What makes an account experience-like?

The majority of those interview participants who gave a definition of what makes an account experience-like (7 persons) defined this notion as whether the emotional reactions and non-verbal expression are consistent with the narrative of the events. Although the statistical trial did not support that this could be generalised to all experts, the failure of the trial may be attributable to the small sample. Therefore it is worth considering what the experts that defined an experience-like account had to say:

[The witness] becomes embarrassed, becomes tense reaching a given topic, avoids it, won't answer, eludes the question. Protests against the examination or simply refuses to participate. (Participant No. 1)

How honest they seem, how adequate the emotions are that are related to the events. (Participant No. 15)

## Experience-like accounts and PTSD

Meanwhile, one of the main symptoms of post-traumatic stress disorder (PTSD), which is a psychological disorder that follows severe traumatic events, is the distancing and splitting off of emotions. It seems that people who undergo trauma try to protect themselves by avoiding the strong negative emotions that are related to the event. Therefore their accounts may seem unemotional, they may become tense when they have to recall the trauma or may try to avoid talking about the events.<sup>28</sup>

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<sup>27</sup> Amnesty International: *Hungary: Cries unheard: The failure to protect women from rape and sexual violence in the home*. Amnesty International, London, 2007. p. 3. <http://www.amnesty.org/en/library/asset/EUR27/002/2007/en/dom-EUR270022007en.pdf>. Accessed: 15.01.2009.

<sup>28</sup> For more on PTSD and its appearance in intimate partner violence and violence against children, see: Herman, J. L.: *Trauma and Recovery: The Aftermath of Violence from Domestic Abuse to Political Terror*. New York: Basic Books, Harper Collins, 1992.

Several psychologists mentioned drawing conclusions on the experience-like nature of an account on the basis of its chronological and logical structure.

It is worth paying a lot of attention to chronology, times, whether events come from one another logically. If there are no gaps in time. Gaps in time in the story may suggest that the witness wants to conceal something. (Participant No. 4)

Another symptom of PTSD is that the chronological and logical order of the narrative of events may become fragmented. This may range from a non-logical, chronologically disordered account to the inability to remember the events.<sup>29</sup> Therefore if it is conceivable in a case that a plaintiff-witness has experienced a traumatic event, the fragmented and illogical nature of the narrative and the unemotional, tense and elusive style of the account does not warrant the conclusion that the account is not experience-like.

The reader may think that if the survivor manages to tell her story with emotions, in a logical narrative she will be believed. However, this is how one psychologist expert explains what must be taken into consideration when an abused woman gives a credible account:

When I am presented in an extremely convincing way, with lots of feeling, I must pay attention because it is presented in a hysteroid manner. And she believes what she is saying and that's why it's convincing. (Participant No. 11)

Obviously, no conclusions can be drawn from the practice of one psychologist on how widespread this approach is, but it seems to support its widespread nature that my colleagues from NANE's and Patent's legal aid service also pinpointed this phenomenon in a publication in 2006:

Some professionals have a difficulty believing victims who do not seem to show signs of PTSD and/or have a determined vision on what they want to do, or what kind of service they are willing to accept and what they refuse. In these cases professionals often question the reliability of the victim, are incredulous towards her reports of violent acts and disregard her experiences. Nevertheless, victims showing symptoms of PTSD may find themselves in the same situation. In their case it is usually their highly emotional state, or else, their apparent indifference, their unexpected mood changes, or the misreading of other typical signs of this condition which makes professionals question their credibility or even consider the client manipulative.<sup>30</sup>

One unexpected result was produced by the question of what psychologist experts base their judgement concerning the lack of real experience: several psychologists use the lie-scale of questionnaires as a test of credibility. Numerous personality tests include questions that are designed to screen how honest examined subjects are when they answer the test, whether they want to make a favourable impression of themselves. This practice wholly misinterprets the lie-scale of questionnaires: that scale is only an indication that the person is concealing something or wants to make a good impression but they do not say anything about *what* the person is concealing or *why* the person is trying to make a good impression. These scales are not suitable at all to make judgements if the person is lying about a particular question or about the matter of the case, for which numerous psychologists use them.

## Further methods and tools

One of the most important method of forensic psychologist experts is talking to the person examined (exploration) during which they try to establish a good relationship as well as to get information.

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<sup>29</sup>Ibid.

<sup>30</sup> Spronz J., Wirth J.: *Integrated client service for victims of violence against women: The results of a pilot programme Policy recommendations for successful prevention and treatment of domestic violence*. Nane Egyesület–Habeas Corpus Munkacsoport, Budapest, 2006. [http://www.nane.hu/english/integrated\\_english\\_nane\\_hcwg.pdf](http://www.nane.hu/english/integrated_english_nane_hcwg.pdf). Accessed: 15.01.2009. p. 49.

In addition, all the participants said that they take at least one personality test or other diagnostic procedure. Of the personality tests, the Rorschach is used by virtually all participants<sup>31</sup> and the second most popular is the Szondi test (11 out of 17 persons mention it).

Participants spend 1.95 hours with the examination of adults on average (SD: 0.53, minimum 1.5, maximum 3 hours) and 1,76 hours with children on average (SD: 0.83, minimum 0.5, maximum 3 hours).<sup>32</sup> The majority of forensic psychologist experts meet the subject of the examination usually once and has no other source of information than the meeting, the tests taken and the case files.

It seems that the forensic psychologist experts manage to collect data on the personality of the persons examined when in forensic work it is usually the behaviour of a person related to a situation that is the matter of the case. In domestic violence cases it would be especially important to meet the environment. It is common that the whole of the environment (a block of flats, a village) knows about the violence but because no one makes a report, this is not documented in writing that the forensic expert could receive with the case files. It is common that a teacher or relative abusing a child is notorious for his harassment with unwanted sexual approaches or sexual jokes. These details are rarely included in case files and are probably only discovered in a personal meeting.

It has also been revealed in this research, that experts do not routinely screen visitation and custody cases for violence. They only examine this question if something in the files specifically suggests that there is violence. At best, experts may examine routinely the child rearing principles and practice of parents, which does not guarantee the discovery of other forms of violence (e.g. sexual violence) and intimate partner violence.

Experts' fees plays a significant role in the fact that they only spend 2 to 2.5 hours on each person examined and that they do not examine their environment: they receive HUF 5000 (EUR 18) per persons examined.<sup>33</sup> This very low pay encourages experts to get over with the examination as soon as possible.

## Tests

### The Szondi test

The Szondi test was developed by a Swiss psychiatrist of Hungarian origin, Lipót Szondi at the beginning of the 20<sup>th</sup> century and has continued to be popular in Hungary to this day. In the test, the persons examined are shown several photos of the faces of psychiatric patients and conclusions are drawn about their personality based on which faces they like or dislike.

Like most psychological tests, the Szondi test makes inferences about a person's characteristic on the basis of several answers. One scientific requirement that a test must meet is that if a sample of people well representing the given (i.e. Hungarian) population takes the test, then the answers given to the questions that according to the makers of the test measure the same characteristic should be more or less uniform. For instance, if a test measures the psychological characteristic of sociability with ten questions, it is expected that each person taking the test should give rather homogeneous answers to these ten questions. If the same person answers the series of questions

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<sup>31</sup> One participant did not mention if she used this test.

<sup>32</sup> One participant is not included in this statistics, who typically spends 9 hours per adult and did not mention the time typically spent with children.

<sup>33</sup> Az igazságügyi és rendészeti miniszter 65/2007. (XII. 23.) IRM rendelete az igazságügyi szakértők díjazásáról szóló 3/1986. (II. 21.) IM rendelet módosításáról, valamint az említett IM rendelet. Egységes szöveg: [http://www.misz.hu/images/stories/dijrendelet\\_modositott.pdf](http://www.misz.hu/images/stories/dijrendelet_modositott.pdf). Accessed: 01.12.2008.

that should measure the same characteristic in a haphazard manner, the researchers conclude that the series of questions cannot measure some unified characteristic.

The modern psychometric examination of the Szondi was performed by András Vargha in Hungary, who examined this requirement of homogeneity in respect of the likes and dislikes of the faces in the Szondi test. He came to the following conclusion after a large representative sample took the test:

[The] psychometric analyses regarding the factors of the test point to the fact that the composition of the test does not meet several trials of psychometric reliability criteria. The main problem is that the factors, which are the fundamental pillars of the test, do not seem to be unified constructs. Four of the eight (h, s, p and m) are more or less acceptable, but the rest (especially e, hy and k) are so heterogeneous that the like or dislike of a single photo is absolutely independent of the attitudes towards the other photos in the same factor; thus the photos comprising the factor may not form the basis for a summary interpretation.<sup>34</sup>

## **The Rorschach test**

The Rorschach test was developed by Herman Rorschach, a Swiss psychiatrist in the 1920s. The persons examined are shown inkblots of various shapes and they must say what the blots resemble. There were severe concerns about the reliability of the Rorschach test already in the 1950s and lately, at the end of the 1990s. Currently the international psychologist public is divided on the issue of whether the Rorschach is a valid personality measure. Because the results that make the applicability of the Rorschach test doubtful are largely unknown in Hungary, I will cover these mainly.<sup>35</sup>

### ***The Rorschach test gives a flawed picture of the person's psychological problems***

In a study in the 1950s, Rorschach experts of the age were no better than chance at distinguishing individuals who, based on their psychological history, had or did not have psychological problems,<sup>36</sup> and several similar research results were produced in the 1950s.

### ***The Rorschach makes healthy individuals look ill***

The debate on the reliability of the Rorschach, which has been going on since the 1990s, was started by a study in which the Rorschach was administered to thousands of individuals from various European and Central and North American countries, and in which much more participants looked psychologically ill on the test than could have been expected from such large random samples of normal populations.<sup>37</sup> Back in the 1950s, Little and Shneidman asked Rorschach experts to evaluate Rorschach protocols. Based on the test, these experts diagnosed perfectly normal individuals as schizoid, hysteroid and dependent and none of the participating Rorschach experts correctly identified healthy individuals as healthy.<sup>38</sup>

### ***The Rorschach corrupts the accuracy of judgement based on other sources***

Little and Shneidman also found that (1) surpassing all the tests examined in their study, the most accurate diagnosis could be made on the basis of the medical history of the patient and (2) that the Rorschach undermined the accuracy of the diagnoses when psychologists received the test

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<sup>34</sup> Vargha A. *A Szondi-teszt pszichometriája*. Universitas Könyvkiadó, Budapest, 1994. p 59.

<sup>35</sup> The following critique of the Rorschach is based primarily on the following book: Wood és mtsai: *What's Wrong with the Rorschach? Science Confronts the Controversial Inkblot Test*. Jossey-Bass, San Francisco CA, 2003.

<sup>36</sup> Holtzman, W. H. és Sells, S. B. (1954). Prediction of flying success by clinical analysis of test protocols. *Journal of Abnormal and Social Psychology*, 49, 485–490. Quoted in Wood et al, see above.

<sup>37</sup> Shaffer, T.W., Erdberg, P., Haroian, J. (1999). Current nonpatient data for the Rorschach, WAIS-R, and MMPI-2. *Journal of Personality Assessment*, 73, 305–316. Quoted in Wood et al, see above.

<sup>38</sup> Little, K. B. és Shneidman, E. S. (1959). Congruencies among interpretations of psychological test and anamnestic data [the whole of issue No. 476.]. *Psychological Monographs*, 73(6). Quoted in Wood et al, see above.

results in addition to the medical history. A publication from 1985 came to similar conclusions: the Rorschach could not differentiate depressed and non-depressed individuals better than chance and corrupted psychologists' judgements that they would have given solely on the basis of the MMPI.<sup>39</sup>

In sum the use of the Rorschach test is highly problematic as:

- There has been an almost decade-long controversy over its validity among psychologists;
- The results that support the validity of the test are all based on the data of a single group of researchers who are very likely to have made mistakes and are biased for the Rorschach<sup>40</sup>;
- Serious scientific evidence shows that it gives a false picture of the personality, it makes healthy individuals look ill and that it undermines the accuracy of psychological interviews.

For an illustration of how the weakly supported Rorschach test can influence forensic psychological experts, here follows the account of one of the participant forensic psychologist experts.

I examined a family with the Rorschach, where the mother [...] left the father because he used to beat her. They asked if the father was endangering the child. On table IV I got *Versagen* in the child's Rorschach, however on table VII two conf. answers from the mother. So that her ego is weak, etc. So who endangers the child? Well, both of them. (Participant No. 14)

There are different ways of interpreting the Rorschach test. According to one method of interpretation, each table has its meaning; the answers given to table IV reflect people's attitudes towards their fathers. The term *Versagen* means the case where the person examined simply does not say anything to the table or refuses the table. According to Rorschach believers this means a strong conflict related to the subject of the table; here the child has a strongly conflicted relationship with his father.

The conf. (confabulation) answers mentioned by the expert show a kind of disorganisation of one's sense of reality according to Rorschach believers. A single conf. answer is enough to diagnose a person with psychosis or severe personality disorder. In this example then, the psychologist believes that the woman is seriously ill on the basis of a scientifically unfounded test.

We don't know but it is possible to imagine that based on the case files and the conversations with the persons examined, the psychologist originally came to the self-evident conclusion that it is primarily the man who beats the woman who endangers the child, as it is psychological abuse for children to see their mother be beaten by their father. In contrast, an abused woman who is capable of moving away from the abusive man despite the known obstacles that hinder abused women<sup>41</sup> is a capable parent. Following this, the expert takes the Rorschach with the child and the mother and concludes that the child's relationship is conflicted with the father and that the woman is psychotic. For the present example, it is enough to know that psychotics have bizarre fantasies, hallucinations in severe cases and they are not always legally capable. In addition to the possibility that such a person may seriously endanger a child emotionally with her bizarre and

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<sup>39</sup> Whitehead, W.C. (1985). *Clinical decision making on the basis of Rorschach, MMPI, and automated MMPI report data*. Unpublished doctoral dissertation, University of Texas Health Science Center at Dallas. Quoted in Wood et al, see above.

<sup>40</sup> Wood et al, see above.

<sup>41</sup> On this topic see: NANE Egyesület: *Miért marad?* See above.



unpredictable behaviour and may be unable to take care of the child physically, perhaps she is unreliable in respect of whether the abuse occurred at all. Anyhow, now the psychologist believes based on the test that it is not just the physically violent father who is danger to the child but also the mother, who is believed to be seriously ill.

### *Conclusions on the tests examined*

These results are especially problematic when the Szondi and Rorschach tests are used in cases of endangering children or sexual crimes against children or adults. In these cases it is the plaintiff-witness who is most often examined with the tests so it is her or him about whom a scientifically questionable result is produced. For the Rorschach this means that it is the children and women victims of abuse whom the test will portray as more ill and less credible than in reality and it is for them that the psychologist's first, perhaps accurate judgement will be corrupted by the test results. This happens less often to the accused man, who is usually less often examined, therefore the application of tests with a doubtful validity deepens the imbalance that examining only one of the parties produces. Because the Rorschach test usually shows the subjects in a less favourable light, the practice of the forensic psychologist experts is biased for the accused as they are less often examined with this test.

### **Attitudes**

In assessing experts' attitudes I was interested primarily in the question of whether these psychologists show zero tolerance against violence or they acquit the perpetrator in thought, look for excuses for the violence, blame the victim or perhaps outright deny the existence of certain forms of violence.

Out of the 16 psychologists whose interviews could be used to make inferences about their attitudes on physical and sexual violence against women and children, only 3 gave interviews that contained no traces of tolerating violence. In my opinion, no psychologist expert should tolerate violence and all should be familiar with its extent in society. The following are examples of such attitudes from the 13 participants who made remarks tolerating violence. According to the statistical trial conducted there is a statistical tendency that the majority of psychologists have attitudes that acquit the perpetrator or blame the victim.

According to many experts, there is justification for physical or psychological violence and several popular stereotypes appear in their justifications such as every conflict needs two parties or that women provoke and men are violent in response.

After what provocation did he pour [hot cocoa] over her? Everything has two sides, and always two sides. And it is not up to me to decide these, luckily, this is not my responsibility. [...] It is men who are usually carried away by passion, that's more common [...] It is not the same if he gets carried away, throws the plate against the wall with the food, because it is not hot enough or too hot or doesn't matter or because he came home drunk and the wife said, it's not fair. Or because he came home after work, they had a chat with the friends on the way and he had a beer but nothing's wrong with him, he has been planning to fix the child's bed that evening. [...] The woman turned upon him in a hysterical manner that if you come home smelling of alcohol then you had better not touch the child's bed. [...] And when this happens at the nth time the man throws down the drill and the hammer and goes back to the pub. Or throws the plate against the wall. (Participant No. 17)

Recently, it has become a fad to provoke the other until he loses his temper and then we run for the police. (Participant No. 11)

Several experts relativise rape in a similar way. For instance, they do not consider all acts that are against the victim's will rape. Participant No. 8 has been cited, but other participants shared such attitudes:

A process takes place, in which the victim actively participates, and perhaps they reach a point where she is no longer certain if she wants it. [...] There have been such claims several times that it's rape and then it

turns out that she was actually into the act but then things turned in a direction that she didn't want that thing, or didn't want it that way and then she tries to take revenge. (Participant No.1)

She goes into a situation where her behaviour is easily misunderstood. Has sex and then runs away screaming that she has been raped because it comes to her mind that she has a fiancé. [...] Goes into a relationship. She goes to a young man's hotel room at night, they have sex, and then she runs out naked and screaming that she has been raped. (Participant No. 4)

These two participants give rather accurate descriptions of the kind of rapes where a woman feels like being with a man but does not want sex or a form of it, yet the man forces it on her. Forensic psychologist experts should consider these cases rape in the same way as cases where the woman wants no relationship with the man. They cause psychic and physical injury in the same way, and they are based on the man's not asking for the woman's consent, in the same way. The already cited legal regulation and methodological guidance however encourage experts not to uncover the woman's psychological injuries but to look for excuses that acquit the man.

One of the participants (Participant No. 2) related a case in which a child who was raped by her grandfather enjoyed the sex, according to the expert. In her opinion, because of this, the case could not entirely be considered violence. This opinion is in sharp contrast with Judith Lewis Herman's view explained in *Trauma and Recovery* that sexual violence is violence even if the victim enjoys it physically. In Herman's view, irrespective of whether the stimulation of the sexual organs during rape or other forms of sexual assault provides some level of pleasure, it takes away all form of control from the victim and she is often in fear of her life nevertheless, just as if she had not had any pleasure from the physical stimulation.<sup>42</sup> Therefore it is unprofessional to consider sexual pleasure as an excuse in the case of rape.

According to one participant, most accounts of sexual violence can be questioned.

I don't like girls whose trousers can be pulled off in a second because trousers cannot be pulled off in a second. (Participant No. 14)

Although it may seem bizarre that an expert may think that trousers may protect against rape, there is a known court decision from Italy that refuted the charge of rape based on the fact that the woman was wearing tight jeans, which are difficult to take off.<sup>43</sup> It is possible that the participant was only speaking figuratively meaning that women only lie about rape. Both statements are untenable as clothing can be removed with force and rape is quite widespread. For instance, the UN estimates that 10 to 20% of women worldwide have suffered rape from a man who is not their partner<sup>44</sup> and the world organisation estimates that a further 10 to 15% suffered rape from a partner.<sup>45</sup>

The same expert also believes that if the victim does not report the rape immediately, it questions her credibility.

It had happened three days before, and she comes with her female friends and her partner on Thursday that she was raped on Monday. If I suffer some form of harm and something big, I take action immediately. (Participant No. 14)

The participant's expectation that a survivor of a trauma should immediately report the case is unrealistic. Victims of violence typically need several days or weeks until they raise enough social support and overcome their first shock to be able to report the case to the authorities.

One expert outright denied that rape exists. In his opinion, if the woman keeps moving her hip or closes her legs tight, it is impossible to rape her. (Participant No 12)

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<sup>42</sup> Herman, J. L., see above.

<sup>43</sup> See for instance the CNN's account: CNN: Italian women warn court ruling makes jeans 'alibi' for rape. CNN, 11.02.1999. <http://www.cnn.com/WORLD/europe/9902/11/jeans.rape.02/index.html>

<sup>44</sup> UNIFEM: Facts & Figures on VAW, lásd fent.

<sup>45</sup> UNICEF (2000) Domestic Violence Against Women and Girls, UNICEF Innocenti Research Center, Florence.

Some psychologists intimidate child witnesses when they report sexual assault which the expert considers false. The literature on sexual abuse describes how children and adults who have suffered abuse will only talk about the assault if they feel safe; for instance about the adult not using the information against them.<sup>46</sup> It happens that incest survivors protect the perpetrator of the incest even in their adult life and this tendency may be stronger when their existence and psychological wellbeing can actually depend on the perpetrator. The children receiving the following answers can justifiably feel intimidated and may well think that if they maintain their testimony they may suffer harm endangering their psychological or even physical wellbeing (placement in children's homes, losing parent providing their physical livelihood). The participant who believes that there is no sexual violence says the following when asked what he does if a child reports incest:

I tell her it didn't happen, I provide standard feedback that I don't believe it, I look in her eyes sternly and there's silence to that and silence equals consent. (Participant No 12)

Another participant says the following about her methods used for questioning children:

I habitually ask them: "Do you exactly know what you are talking, what the consequences will be? That if you maintain your claim, he will go to prison?" (Participant No. 14)

It is neither ethical nor professional to intimidate a child witness. There is a debate on what circumstances are necessary to consider a child's testimony reliable. However, the literature is unanimous in that intimidating and influencing a child only deteriorates the credibility of either the statements supporting the events or the retractions, since it will never be known what the child would have said without influence and if he or she would have retracted.<sup>47</sup> Such behaviour on the part of the experts may not have the purpose of revealing truth; these experts only want to coerce the retraction of the testimony, based on their biases.

It is possible to disregard the existence of a certain form of violence not only by denying its existence or intimidating the witness talking about it but also by denying that such cases get to the courts, consequently to the expert:

Women provoke, they try to make one believe that something happened. Which is true. They really get hit but in cases where there is an aggressive, a seriously abusive husband, those cases are very rarely examined in child custody suits because that chap, when it gets to getting a divorce, will not sue for the child. [...] So I have not met such brutal, seriously abusive men in these lawsuits. Those life-situations have an entirely different dynamics. [...] They don't play it before the court. When an abused woman gets to the point of being able to leave the marriage, in those cases the man knows that he has no chance in the legal sphere to enforce his intention. (Participant No 11)

In addition to the fact that this interview shows that the expert considers some level of violence acceptable, she is mistaken and applies this bias to judging the cases. The majority of cases at Patent Association's legal aid service are related to custody procedures and the man is physically or sexually violent in them. What is more: the statistics on domestic violence and the experience of the organisations serving victims show that a number of men become physically violent when the woman manifestly expresses her will to separate<sup>48</sup>, and these men often use the lawsuits on custody and visitation to harass the woman (legal harassment).

Three participants consider the proportion of those cases where the mother lies about incest or physical violence maliciously in order to denigrate the man or couches the child to lie extremely high.

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<sup>46</sup> MacFarlane, K., Waterman, J., lásd fent.

<sup>47</sup> U.o.; valamint: Marxsen, D. Yuille, D.C., Nisbet, M., lásd fent.

<sup>48</sup> NANE Egyesület: *Miért marad?*, see above; Jasinski, J.L., Williams, L. *Partner Violence: A Comprehensive Review of 20 Years of Research*. 1998, Sage Publications. Quoted in: Kaufman Kantor, G., Jasinski, J.L. Dynamics and Risk Factors in Partner Violence: Chapter Summary. <http://www.musc.edu/vawprevention/research/dynamics.shtml>.

According to American and Canadian statistics, among allegations that surface in divorce and custody cases where she accuses the other party with acts of sexual nature against the child, and they reviewed a large sample, it turned out that these false allegations are from 50% to  $\frac{2}{3}$  of the cases. (Participant No 15)

The two other participant believes that it is especially in custody cases that the rate of malicious false allegations by mothers is very high, primarily to gain financial advantage over the man (Participants 1 and 2).

These views are contrary to the statistics of countries where, in contrast to Hungary, data on domestic violence are collected separately. A Canadian representative study based on data from 1998 examined incest claims specifically in child custody and visitation cases. It concludes that the charge of sexual abuse is supported in 40% of the cases, it is suspected but is impossible to prove in 14%, in 34% the allegation is false but is not malicious (e.g. based on misunderstanding) and an intentional false allegation is made in only 12% of the cases. Within the 12% intentional false allegations, 43% of such claims are made by the parent without custody rights (typically the father), 19% comes from acquaintances and only 12% (less than 1.5% of all cases) comes from the parent with custody rights (typically the mother) and a further 2% come from the child.<sup>49</sup> Thus it is not true that women use the false allegation of incest to gain custody over children; contrary to popular belief, it is exactly the fathers who do so. Hungary does not collect data on domestic violence; however there is no reason to believe that Hungarian women enter lawsuits more often than Canadians and use the false allegation of incest as often as the quoted experts believe.

## Conclusions

The regulation of the work of forensic psychologists is imbalanced in several aspects when it comes to judging domestic violence cases. Methodological communication 20, which defines the work of experts to a large extent, is not balanced as in cases of sexual violence it calls for the examination of the plaintiff-witness, and her credibility primarily, while the accused person's examination and credibility is less of a question. The commentary on the Penal Code suggests that in rape cases women's alluring behaviour may excuse the perpetrator and so this quasi-legal regulation also calls for the examination of plaintiffs. Accordingly, psychologist experts examine primarily the plaintiff-witness in cases of sexual crimes and the crime of endangering a child and most often they examine the credibility of the witnesses. An exception is child custody, when both parties are examined, but if sexual violence is a charge a custody case, it is likely that the credibility of the plaintiff-witness will be examined.

Experts almost never observe their subjects in their own environment, nor do they collect information about the events leading up to the case from those living with or near the person, and they do not get in touch with the examined person's psychologist or psychiatrist. This leads to collecting data primarily about the person's personality as shown in the laboratory situation, and less information about the person's behaviour in a natural situation; while it is the latter that is the subject of the legal procedure.

The methodological communications recommend and the experts use two tests of dubious scientific quality, the Rorschach test and the Szondi test, the most often. It is of special concern that according to numerous studies a large proportion of healthy individuals appear to be ill on the Rorschach, so the plaintiff-witness, who is examined more often than the accused, will appear to be psychologically ill more often than the suspect, who is less often examined. Thus unfounded data suitable to undermine the plaintiff-witness's credibility may be created while similar false data are less likely to be produced of the accused.

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<sup>49</sup> Trocmé, N., Bala, N. (2005) False allegations of abuse and neglect when parents separate. *Child Abuse & Neglect* 29 1333–1345

The majority of forensic psychologist experts do not exhibit zero tolerance for violence. Their majority has an attitude based on which the male perpetrator of domestic physical or sexual violence can be acquitted, or the whole or part of the responsibility may be shifted to the victim. Several experts hold that violence can be justified, that the victim has some responsibility in certain cases for the violence, and there are experts who deny the existence of certain forms of violence or minimize their occurrence, while some experts overestimate the proportion of plaintiff-witnesses who lie in incest cases or do not say the truth under a malicious influence. All this means a bias on the part of the perpetrator whom an unbiased expert should hold solely responsible for all kinds of violent crimes; just as in the case of other violent crimes.

## **Recommendations**

### ***Recommendations for forensic psychologist experts and their professional organisations***

The forensic psychologist experts and their professional organisations should follow the literature on the methods used by experts and their validity, and the experts' practice, and where the use of a method is not substantially founded they should refrain from its use, and the organisations should intervene by issuing a methodological recommendation to that effect.

The experts should stop using and their organisations should forbid the use of the Szondi and the Rorschach tests until widely accepted literature supports the reliability and validity of these tests.

Experts should only interpret the hysteria index of MMPI as a sign of hysteria if the person examined does not suffer from chronic illness or pain. The organisations of experts should issue a recommendation to that effect.

The professional organisations of the forensic psychologist experts should make the currently unbalanced regulations of Methodological communication 20 balanced: the accused person's credibility should be examined routinely while the plaintiff-witness's credibility should only be examined if there is some kind of data or fact to justify this.

The forensic psychologist experts should endeavour to make their examinations balanced by notifying the authorities that order the examination that the suspect's credibility must be examined routinely and that in absence of data or facts that justify the plaintiff-witness's examination, that is not necessary.

The professional organisations of forensic psychologist experts should include methods for the examination of sexual violence perpetrated by men not characterised by sexual perversions, psychopathy or personality disorders. The experts should examine the attitudes of the man on gender equality, male and female sexuality and power inequalities entailed in it.

In cases where a suspicion of any form of domestic violence arises, the experts should routinely carry out a heteroanamnesis with persons living in the suspect's and the plaintiff-victim's environment, should visit their family and environment, and this should be prescribed in written professional recommendations.

In all kinds of domestic or intimate partner violence cases, including sexual violence, and in cases of endangering a child and custody and visitation cases, the expert should routinely examine the occurrence of kinds of violence in the family or partnership that have not arisen in the case. This requirement should be enshrined in written professional recommendations.

Forensic psychologist experts should consult the available literature on gender inequality, male and female sexuality and power inequalities entailed in it and on traumatisation caused by long term, low intensity situations. They should especially acquaint themselves with how PTSD, severe

depression and other psychological states that impair emotional expression are related to the “experience-like” nature of accounts. The professional organisations of experts should include such training as a regular part of experts’ training.

The training of forensic psychologist experts should include the dismantling of attitudes that accept violence and shift the responsibility for violence on the victim.

In domestic violence cases, experts should call on the authority ordering the examination to have the credibility of the accused examined.

Forensic psychologist experts should routinely screen the plaintiff-witness for PTSD in domestic violence cases. This should be prescribed by professional norms.

### ***Recommendations for authorities ordering the examinations***

In cases of intimate partner violence and physical or sexual violence against adults or children, the authorities ordering the examinations should request the psychological examination of the accused person, and they should only request the examination of the plaintiff-witness if there are special data suggesting that necessity. The examination of the plaintiff-witness should only be ordered where an equivalent examination is ordered for the accused.

In cases of domestic violence, the authority ordering the examination should in all cases request the plaintiff-witnesses and their family members acting on their behalf to be screened for PTSD. In all cases, they should regularly ask the psychologist expert to state whether the PTSD that may occur can have an influence on the perceived “experience-like” character of the plaintiff-witness’s or the family member’s account.

### ***Recommendations for the government***

The government should lay down in a legal regulation that in cases of intimate partner violence or physical or sexual violence against adults or children the authority requesting an examination must request the psychological examination of the suspect, if it requests an examination of the plaintiff-witness. It should be stipulated in the procedural regulations that the results of a forensic psychological examination concerning the plaintiff-witness, and especially those on the plaintiff’s credibility, shall only be taken into account in the procedure where equivalent data are available on the suspect, and his credibility.

The government should prescribe the obligatory screening of plaintiff-witnesses or a family member acting on the plaintiff-witness’s behalf for PTSD in cases of domestic violence. It should be laid down in procedural regulations that forensic psychological expert testimonies on the plaintiff-victim or the person acting on his or her behalf, and especially opinions on their credibility, shall only be taken into account where these persons have been screened for PTSD.

The government should increase the fees of forensic psychologist experts to motivate them to carry out time-consuming examinations.

The government should order the collection of statistical data on physical and sexual violence in intimate partnerships, on sexual and physical violence against children and on other forms of sexual and domestic violence.

## The Two Years of Restraining Order in the Practice of Hungarian Courts

### 1. The preliminaries of the institution of the restraining order in Hungary

*The preliminaries of the legal institution of restraining order in Hungary is comprised of two resolutions of the Parliament in 2003 and a bill on a separate regulation of the restraining order submitted to Parliament in April 2004 and subsequently revoked. Following this, the rules on the restraining order were enacted as part of the Act on criminal procedure and came into force on 1 July 2006.*

#### 1.4. The effective legal regulation of the restraining order

The main points of the legal regulation are as follows:<sup>50</sup>

A restraining order

a.) **may be applied for by**

aa) the prosecutor,

ab) the private complainant,

ac) the substitute private complainant,

ad) the victim,

ae) the legal representative of an incapacitated or partly incapacitated victim,

af) and the legal representative of a minor living in the same household as the suspect.

(for points ab) to af) **victim** hereinafter)

b.) **Its duration** ranges from 10 to 30 days, may not be prolonged but another restraining order may be issued again.

c.) **The conditions for its issue** are

the criminal act must be punishable with imprisonment

the objectives to be attained with the restraining order must be possible to ensure with this intervention

the preliminary arrest of the suspect is not necessary

there is reason to believe, especially with regard to the nature of the crime, the behaviour of the suspect before and during the procedure, and the relationship of the suspect and the victim, that the suspect, if left in the home,

would confound, hinder or endanger the evidencing of the case by influencing or intimidating the plaintiff witness, or

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<sup>50</sup> See in Hungarian: Be. 138/A-139. § A távoltartás; Be. VIII. fejezet: A kényszerintézkedések; Be. IX. fejezet 6. cím: A nyomozás, A nyomozási bíró eljárása. The rules of the procedure after the indictment has been submitted, the general rules of the court procedure and the preparations for the trial are in Chapter XI to XIII on first instance court trials.

would carry out the attempted or prepared criminal act or would perpetrate criminal acts punishable with imprisonment against the victim.

d.) **The restraining order is a coercive measure** (regulated after custody, preliminary arrest, home detention and house arrest) that can be ordered both before submitting the indictment or after that.

e.) **Before the submission of the indictment**

the matter is decided by the investigating judge,

who must hold a session, and

must take a decision 3 days following the motion, which

may assent to the motion, assent to it in part or may refuse it.

f.) **Where a prosecutor makes a motion for a restraining order before the submission of the indictment, the prosecutor must ensure that the suspect, the defence counsel and the applicant are notified, so that the session may be held.**

g.) **However, where the motion is not submitted by a prosecutor**

the investigating judge must send the motion to the suspect and the defence counsel,

must take steps to acquire the necessary documents,

and must notify the applicant, the prosecutor, the suspect and the defence counsel of the place and time of the session.

And if the applicant is not present at the session, then it must be considered as the withdrawal of the application.

## **2. The effective legal regulation as compared to the contents of the Parliamentary resolutions**

### ***2.1. The relationship of the effective regulation to the objectives laid down in the Parliamentary resolutions***

Can the objectives laid down in the Parliamentary resolutions be achieved with the current legal regulation? My answer is an obvious **no**.

Why not? Because it is

**not fast,**

**not effective,**

**does not realise** the protection of the life, bodily integrity and safety of the abused family members and as a result of all this it is

**not effective, as it is not a suitable tool to combat domestic violence.**

The above statements are proven as follows.

#### **2.1.1. The role of the police**

When called to the site of domestic violence the police may arrest a person caught in the act of an intentional criminal act and may take that person before the authorities<sup>51</sup>, or the police may

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<sup>51</sup> Act on the police.



take the person who is suspected to have committed a criminal act before the authorities<sup>52</sup>. This arrest may limit personal freedom for a maximum of 8 hours and may be prolonged for 4 more hours. The order of the national police chief provides separately that the abuser must be called to account at the premises of the police when the above circumstances are given.<sup>53</sup>

Where the police apply the rules in that way, their intervention will be *fast and effective for 12 hours for which time they can eliminate the abuser from the presence of the abused*.

Can the police do more?

Not in effect, because a perpetrator may be taken into custody only if there is well-founded suspicion of a criminal act punishable by imprisonment, which condition is met even in the case of a perpetrator causing injuries that heal within 8 days, however, a further condition is that the preliminary arrest of the suspect should be probable. However, in such a case, the preliminary arrest is not probable, therefore the person may not be taken into custody.

So after a maximum of 12 hours the abuser comes back to the abused as the police may not issue temporary restraining order, nor take any other measure.

If the act is a more serious act of abuse, with injuries that heal over 8 days or longer, then the suspect may be taken into custody, which ends in being lifted, or the prosecutor applying for a preliminary arrest or incidentally in an application for a restraining order.

### **2.1.2. The situation after the abusive man returns**

What happens if the abuser comes home to the abused person after 12 hours of detention? (Strictly from a legal point of view.)

The abused person may not simply request a restraining order, she (or he) can only do so if she makes a report against the abuser who caused an injury that heals within 8 days, and at the same time she may request a restraining order. To do so, the abused person must of course know that there is such a legal institution, but the police will not inform her, at least this is accidental as the computer program Robotzaru Neo (Robot Cop Neo) does not contain such information (but contains information on the Act on victim assistance).

The procedure following this is covered under a separate title on procedures with private prosecution.

### **2.1.3. Restraining order in the case of public prosecution**

Criminal acts where the prosecutor represents the charges are called public prosecution acts. As for domestic violence, these include criminal acts against public morals (sexual violence). The overwhelming majority of the criminal acts under the Criminal Code are public prosecution acts, private prosecution acts are listed separately in a separate chapter.

**A restraining order stands the biggest chance to be issued before the indictment is submitted when it is applied for by the prosecutor.**

I have been monitoring the restraining order since the beginnings and this was obvious after the review of its application in its first and second half years and remained so in its third half year summarised in this report.<sup>54</sup>

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Point a) indent (1) Section 33

<sup>52</sup> Police Act b) (2) 33.

<sup>53</sup> Point II/7/A of Police chief order 13/2003

<sup>54</sup> The details can be followed in the data of the annex, which contains the data on the prosecutors offices.

#### 2.1.4. The victim as applicant

What is the situation however, when the victim is the applicant, and how can the victim attain the position of applicant at all?

If the best situation arises, namely the police inform the victim of the possibility to apply for a restraining order and its content, or the victim knows about it from another source, then she may file the application.

Following this, the course of the case is that the police sends the victim's indictment to the prosecutor's office (or the court and notifies the prosecutor), and the prosecutor sends that to the investigating judge of the court. Each prosecutor follows a different practice, sometimes they only act as "postal service" and do not put forward a motion, and sometimes they do so by either "joining" the victim's motion or by suggesting its refusal. Exceptionally, the prosecutor sometimes files a separate motion in addition to the victim's. This latter case is important because in this case the prosecutor must ensure that the session can be held, and since the prosecutor has the operative tools to notify those concerned, to access the documents, etc. it is highly likely that the court session will be possible to hold within three days following the indictment.

Where however this is not the case, and typically it is not, it is absolutely certain **that the session will not be held within the three days prescribed by the law.** But this coercive measure, just as for instance preliminary arrest, may only be decided in a session.

However **for the investigating judge to deal with the restraining order in effect, it is necessary to communicate the well-founded suspicion to the accused. As long as this does not happen, no discussion of the restraining order is possible, the investigating judge has to refuse it, even without a court session being held.**

However, for the criminal case to achieve the status where the well-founded suspicion has been communicated, it is necessary to order the investigation, which may be preceded by the supplementation of the report, and the investigation has to reach a stage where a well-founded suspicion can be communicated.

The above process is hastened only if the act has such a weight that the police take the perpetrator under custody because its preconditions are met, that is the perpetrator's preliminary arrest is probable. Since the custody may only last 72 hours, the suspect must be either released or the preliminary arrest must be applied for. Since the preliminary arrest may not be applied for before there is a well-founded decision, the events are hastened in these cases in order that the prosecutor can submit a motion to the court on the preliminary arrest. In this case, the investigating judge either decides for a preliminary arrest or does not (the latter is not typical) or it is also possible that the court issues a coercive measure lighter than preliminary arrest such as home detention, house arrest or a restraining order (which is not typical either).

With the above we have come back to our starting point namely to **the prosecutor, who investigates and has the operative tools to hasten the process, and with whose contribution a restraining order can be issued in the 73<sup>rd</sup> hour from the criminal act (or in a shorter time).**

However the review of the cases shows that it is not a restraining order which is issued in such cases but typically an order for preliminary arrest. Restraining orders initiated by prosecutors is typical only when the prosecutor makes a motion for a restraining order instead of prolonging the preliminary arrest.

To return to the starting point **where the prosecutor does not "support" the victim's motion for a restraining order, the restraining order can be issued in 30 to 40 days at best.** And the best situation is where

the authorities inform the victim of the possibility to put forward a motion for a restraining order and the victim uses this, or

knows about it without being informed and uses the possibility,

the investigation is ordered with or without a supplement to the report to the police,

the investigation gets as far as communicating the well-founded suspicion with the suspect,

the police has sent the victim's motion to the prosecutor (or directly to the investigating judge with notice to the prosecutor) and the prosecutor has forwarded it to the court (acting as postal service or with a motion)

the investigating judge has set the date of the session within 10 to 15 days of the receipt of the motion,

it was possible to hold the session as its legal preconditions had been met,

and the investigating judge established at the session that the general and specific conditions for a restraining order are met and ordered that.

It can be seen from the above course of procedure that the 30 to 40 days are only a minimum, only longer periods are to be expected.

It is necessary to stress however that the investigating judge should hold the session within 3 days of the receipt of the motion under the law. However if the judge wants to meet this requirement it is certain that the restraining order will never be issued as the notification of those required by law cannot take place within 3 days as the judge does not have the operative tools the prosecutor does.

It must be added that the law does not allow the session to be adjourned that is to hold it another time if its preconditions are not met. It follows that the investigating judge either keeps the three days and then it can be stated with utmost certainty that the judge will not be able to decide on the matter of the restraining order, or breaks the rule on the three days, in which case it is possible to take a decision in the matter of the case. Nevertheless, sometimes investigating judges do set a new date for the session if the communications could not be made according to the rules.

### **2.1.5. The “favourable” decision**

In the case of the most favourable decision for the victim, the restraining order is issued for a period of 30 days maximum, which **cannot be prolonged in a simplified procedure such as known for preliminary arrest** when it elapses. (In the case of a preliminary arrest, the investigating judge decides in a summary procedure based on the documents and there is no need to hold a session for 6 months as a rule of thumb, only exceptionally.)

**However, in the case of a restraining order, everything starts anew; the victim must put forward a motion again,** it must be furthered to the investigating judge, the date of the session has to be set, etc. Where is the fast and efficient procedure?!

## ***2.2. Questions concerning the implementation of the restraining order***

When the victim has overcome all hindrances and the investigating judge has taken the restraining order, its efficacy, implementing and compliance with the behavioural rules, is still in question.

There is a very useful practice of the investigating judges in most cases to prescribe that the suspect should check with the police headquarters investigating his case once or twice a week at given times and days. However the police have no rules as to how they should proceed. Thus

what is to be done if the suspect does not turn up at the time given by the court, and it varies if they ask for a report on the behaviour required in the restraining order and if so, to what extent.

Reviewing the cases it seems that the control is exercised by the victims themselves, with the paradox that they are the ones who perceive and report the breach of the behavioural rules to the police, the prosecutor or sometimes the investigating judge.

### ***2.3. Summary***

**The right of the victim to put forward an individual motion is not strengthened and supported by procedural rules to ensure the fast and efficient legal protection.**

**The effective procedural rules only ensure the prosecutor fast and efficient action; however this is fast only relative to the victim's position and it is a separate issue to what extent the prosecutor utilises or does not utilise the right to motion for a restraining order.**

## **3. Problems arising in private prosecution cases<sup>55</sup>**

These cases are characterised by the fact that the procedure commences as a result of the victim's report directly in court (thus there is no stage of investigation typically by the police) and the charges are comprised of the victim's report.

Naturally, there are variations depending on where the victim makes the report. If the report is made at the police then there is a chance that she will be asked the questions that have a legal relevance for the act in question. If she is asked, good. If not, the case will share the fate of a written report filed to the police, which it will further it to the court, or one filed directly to the court. In this case, it is not sure if the report will contain all the relevant data, what is more it is almost certain that the report will be lacking in detail.

The best situation is when the victim makes the report at the court during office hours. The situation is similar when the victim has a legal representative.

Where the report is perfect, that is both its material and procedural legal aspects are adequate, the judge proceeding in the case may still not decide on the restraining order but has to hold a preparatory session<sup>56</sup>.

However, while this is held by the investigating judge in a public prosecution case, and should decide within three days, in private prosecution cases the competent court shall hold the preparation session within eighty days.<sup>57</sup> While 3 days for the victim to file a motion is impossibly short, these 90 days are unreasonably long and violate the interests of the victim.

Where the court holds a preparation session within ninety days it still proceeds in accordance with the legal regulations – but where is the fastness and efficiency that the Parliament Resolution deemed necessary and unavoidable?

Where the court wants to deal with everything in the shortest possible time, the date of the preparation session will still be 10 to 15 days, as both the accused and the defense attorney must be invited to the preparation session (and naturally the court will enclose the report with the

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<sup>55</sup> The cases where the charges are represented by the victim are called private prosecution cases and for our purposes such cases include light injury, breach of mail confidentiality, slander and defamation. Note that the already cited Chief of National Police Order 13/2003. (III.27.) lists those crimes specifically that may be committed within domestic violence and as has been mentioned, defines the concept of domestic violence, as well.

<sup>56</sup>Point a), indent (1) Section 272 and Section 138/A of the Act on penal procedure.

<sup>57</sup> The 30 days for the preparatory session start after 60 days under indent (1) section 263 of the Act on penal procedure.

subpoena) and this is the amount of time needed for the postal delivery record to return and it could be established the the accused has been summoned in a lawful way (see more under the investigating judges).

However where the report is incomplete, unclear and self-contradictory then the court shall, in absence of a legally founded charge<sup>58</sup>, cease the procedure<sup>59</sup>. However the court applies this only in absolutely unambiguous cases and what happens in practice is that the case is to be tried at a preparatory session<sup>60</sup> and so the court tries to clear up the shortcomings of the report.

In principle, when the court has cleared up the contents of the report at the preparatory session, it may go on to order an investigation<sup>61</sup> typically to collect evidence. This may take two months maximum but can be prolonged twice for one month each time thus this may last for up to six months all together. It is possible that the court will decide on the restraining order and appoint a date for a new preparatory session, which is obligatory in this case, only after that time.

Naturally, a preparatory session can be used not only to clear up the shortcomings of the report but also to hear the accused if he appears, and after hearing the victim, the court may decide that the evidence for the well-founded charges are given.

The above illustrates that **the situation created by the procedural rules is even more complicated and tiresome in a private prosecution case and fastness and efficiency are even further removed than in public prosecution cases.**

However, it seems that up to this point no one decides on the motion for a restraining order and when the case gets back to the court, the victim may only be a substitute private prosecutor—another situation defined in procedural law with new rules whose most important aspect for our purposes is that there is still no decision on the restraining order.

To conclude this chapter, **I believe that it has been proven that the current procedural regulations do not ensure the aim set in the Parliament Resolution that the procedure should be fast and efficient to adequately serve the protection of victims.**

## 4. Recommendations

**The victim should be informed in all stages of the procedure**, whether it is a report, a call to the police, hearing the victim as witness, **on her rights to put forward a motion, its contents and must be asked separately whether she makes a motion for a restraining order or not.**

Where the victim has put forward a motion, **the procedure should be carried out in a special hastened manner**, in other words this rule must be added to the rules on exceptionality.

**In the case of an individual motion from a victim, the prosecutor should ensure the conditions to hold a session in the investigating judge's court** (in the same way as when the prosecutor puts forward the motion). **It must be provided unambiguously that the prosecutor should always make a statement about the victim's motion.**

The concept of domestic violence must be created and for the event of these acts it should be provided that the police and the **prosecutor must** examine the question of whether restraining can be applied as part of his or her official duty.

The rules on the **monitoring** of the restraining order must be created, which could be contained in regulation of a lower order.

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<sup>58</sup> Indent (2) section 2 of the Act on penal procedure.

<sup>59</sup> In the time defined in indent (1) section 263 of the Act on penal procedure under point f) indent (1) section 267.

<sup>60</sup> Indent (1) section 272 of the Act on penal procedure.

<sup>61</sup> Indent (2) section 499 of the Act on penal procedure.

A regulation should be created to make it possible to change the fine for the breach of the restraining order to **custody**.

It would be reconcilable with the aim of this legal institution for the police and/or the prosecutor to issue the restraining order, and only its review to be carried out by the court<sup>62</sup>.

## 5. Statistics on the restraining order

The annex contains the statistical data of the Supreme Prosecutor's Office in three tables for 2006, 2007 and the first half of 2008. The following are noteworthy out of it:

In 2006, the courts issued 24 restraining orders, within that 16 were requested by prosecutors and 8 by victims.

In 2007, the courts issued 77 restraining orders with 49 requested by prosecutors and 28 by victims.

In the first half of 2008, courts ordered 40 restraining orders with 22 originating from prosecutors and 18 from victims.

Although court statistics have limitations, according a survey by the National Council of Justice of Hungary 362 motions for restraining orders were received by the courts between 1 July 2006 and 30 June 2008. Within those, 123 were prosecutors' motions, the rest were submitted by the victims and persons considered in the same way as victims (private prosecutor, substitute private prosecutor, legal representatives of incapacitated or partially incapacitated persons, legal representative of a minor living in the same household as the accused). **Thus in 2/3 of the cases the victim put the motion forward**, which stresses the findings of this study, especially in respect of the lack of adequate legislation and application of the law.

Out of the 362 motions, restraining orders were issued in 132 cases, another kind of coercive measure was ordered in 12 cases (including one preliminary arrest) while the in the remaining cases the motion was turned down or another type of decision was brought.

Out of the 139 restraining orders issued, 135 were issued between 25 to 30 days, and one was issued between 20 and 25 days, another between 15 and 20, and two more between 10 and 15 days.

It was my observation above that **where the prosecutor made the motion or supported the victim's motion, then the courts usually issued a restraining order and it they only exceptionally denied it**. This is supported by the statistics quoted here.

## 6. Legal cases

Following the analysis of the effective legal regulation of the restraining order, let us turn to the legal cases for a specific portrayal of this legal institution.

- 1.) The accused perpetrated the crime on 7 November 2006, was taken into custody on 8 November and the prosecutor applied for a restraining order while ceasing the custody.

During this time, the well-founded suspicion was communicated, which said that the accused, who was drunk, insulted his partner verbally, tore her clothes, kept hitting her without any reason, hit her in the nose with his fist and after the victim fell down, kept kicking her all over her body and knocked her against the floor and the wall

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<sup>62</sup> Similarly to indent (7) Section 160 of the Act on penal procedure.

several times at their joint home. He kept following and hitting the victim, who was trying to escape, around the flat. He reached her in the bedroom, where he pushed her on the bed, dragged her to the floor by her leg, kept strangling her and threatened to kill her. The victim lost consciousness repeatedly during the attack and wetted herself from the fear and pain. Meanwhile their 7-week-old child started to cry, when the accused stopped hitting the victim, went up to the child, kicked at the cot, then grabbed the child out of the cot and when he failed to calm the child, he got angry and forcefully threw the child back in the cot. Following this, he left the home and returned shortly to continue to batter his partner. He dragged her on the floor, kicked her in the back, and knocked her head against the floor again, despite the fact that she was holding the child in her arms. The victim managed to run out of the flat, taking the child with, and escape to the neighbour's, where the accused followed her, and where he dragged her down the stairs by her hair, all this time the victim holding her baby in her hand. Meanwhile the neighbours got hold of the accused and the victim managed to run back to the flat, where she called the police. The accused person's partner suffered bruises and soft-tissue injuries on 80% of the surface of her body with a healing time within 8 days, and their children suffered injuries with a healing time within 8 days. (The criminal acts were attempt of grave injury, light injury against a person incapable of defence, endangering a minor.)

The court called issued a restraining order and it was not appealed.

The hearing by the investigating judge revealed that the accused had moved to his mother's who lives in another locality and the victim and her child had moved to the same locality to her parents'. The prosecutor did not put forward the motion that the accused should leave the joint home that was the scene of the battery but suggested to keep him from the current place of residence and the court decided accordingly.

(Nevertheless in my opinion it would have been reasonable to issue a restraining order so that the accused could not move back into the joint flat that was the site of the battery as this would have opened a realistic opportunity for the victim and the child to move back to the joint flat.)

- 2.) In this case, the victim's legal representative put forward a motion for a restraining order at the police on 18 October 2006. The attorney's motion detailed that the accused should be kept from the partner's child, the primary school the child attended and the partner. The police sent this motion directly to the court where, after a lengthy examination, the court established that several procedures had been going on at the same police department based on the various reports by the victim against the accused, and that these entailed criminal acts perpetrated against the victim and her child, however at the time of the submission of the motion by the victim's legal representative, no procedure was being conducted against the accused. With respect to that the court established that no penal procedure against the accused was in process for the criminal acts perpetrated against the victim and her child. Thus the motion put forward by the victim's legal representative was unfounded, it did not meet the legal requirements, a penal procedure in place and the notification of the well founded suspicion. Based on the obvious lack of basis for the procedure, the judge did not even hold a hearing but refused the motion.

The contents of the earlier report by the victim was that her ex-partner had been regularly threatening her over the telephone, stalked her in various ways, which is a criminal act under the current Penal Code, stalking, however at the time of this procedure this act was only the light offence of dangerous threatening, if anything. (And a restraining order may not be based on a light offence.)

- 3.) In a penal procedure for the crime of grave injury the victim put forward a motion for a restraining order, which the prosecutor forwarded to the court without a statement and the date of the court hearing was set. The victim did not appear at the hearing and let the court know by phone that she had discussed the matter with her husband and that she revoked her motion.
- 4.) The victim made a report to the police because her partner had been battering her. According to the description of facts, when the woman met the man to take their child from his place, the man attacked her, gripped her arms and hands, kicked her leg, dragged at her hair and then by a kick and shove pushed her out in the street, while she was holding the child in her arms. She had a medical evaluation taken of her injuries. In addition she said that the man harassed her over the phone on a daily basis, kept following her and had lethally threatened her several times. He took the child from the kindergarten, and wanted to change place of residence. The child was badly affected by the vent.

In the procedure held under private prosecution the court sent the documents to the prosecutor stating that there seems to be a criminal act (endangering a minor as opposed to light injury) in which the prosecutor should represent the charge.

On the same day, the prosecutor's office ordered an investigation of the criminal act of endangering a minor and for other crimes and at the same time submitted a motion to the investigating judge of the court to refuse the motion for a restraining order because its preconditions are not present. The court established that the accused had not been questioned within the investigation which had been ordered by that time, therefore he could not have been notified of the well-founded suspicion thus in absence of the legal requirements it could not decide on the restraining order.

- 5.) The victim filed her application for a restraining order at the court and informed the court that her ex-husband was violent with her when he drunk, he was drunk on a daily basis and currently, that he kept stalking her, disregarded the court decision on how their joint flat should be divided.

The investigating judge called the victim to ask her about the criminal act and the penal procedure under which she was proposing a restraining order, and after establishing that neither a publicly nor a privately prosecuted procedure against the ex-husband was in process it concluded that no such coercive measure could be taken and refused the application.

- 20.) The victim applied for a restraining order against her ex-husband. In her application, she explained that her husband kept stalking her, threatening her with beating and hired thugs. She has to ask for police protection on a daily basis and he threatens her in the presence of the police with setting her house on fire while she is at home. The prosecutor forwarded the application to the court by suggesting its refusal with respect to the fact that at the time of filing the application no criminal procedure for a criminal act against the woman had been in process at the police. The court established from the prosecutor's memo dated 14 March 2008 that the prosecutor had required an investigation on that day for attempted vigilantism by an unknown perpetrator and committed the police with that investigation ordering them to conclude the investigation by 14 May 2008. Based on that, the court concluded that since no criminal procedure for a crime against the victim was in process and the investigation was initiated against an unidentified perpetrator, the well-founded suspicion could not be communicated either, which is a precondition of being accused, and in absence of the legal preconditions it had to refuse the application.

- 21.) On 8 November 2007 the court received a motion from the prosecutor for a restraining order against the accused within a procedure in process for endangering a minor. The motion suggested to keep the accused person from his partner and two children. The motion accurately defined the institutions and the home which the accused should be kept from. As in this case the prosecutor was to make sure that the hearing can be held, the court held a hearing on 12 November 2007 and issued a restraining order against the accused in the way suggested by the prosecutor for a period of 30 days. According to the facts established by the decision, the well-founded suspicion communicated by the police was that the man had battered his partner usually in a drunken state in the presence of their two children at their home several times a week during a 5-year period before 16 August 2007, including slapping and hitting her face with a fist, squeezing her arms, strangulation, breaking furniture, shouting and threatening to kill her, and setting fire on her family's house. The accused severely endangered the emotional development of his children with these acts, who were both under the age of 12.