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BREAKING THE SILENCE
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| | | |
|----------|------------------------------------------------------------------------------------------------------------|-----------|
| 1 | Breaking the silence | 2 |
| 2 | The scope of this report | 5 |
| 2.1 | Domestic violence | 5 |
| 2.2 | Partner or ex-partner-related violence | 6 |
| 2.3 | Children exposed to violence between parents | 7 |
| 3 | A broad perspective on justice | 8 |
| 3.1 | Need for a comprehensive approach | 8 |
| 3.2 | Rebuilding lives – empowering victims of domestic violence | 10 |
| 4 | Why silence? | 11 |
| 5 | Protection against domestic violence as a human rights concern – need for redistribution of rights? | 13 |
| 5.1 | Existing human rights protection for victims of domestic violence | 14 |
| 5.1.1 | Introduction | 14 |
| 5.1.2 | The European Convention on Human Rights and case law of The European Court of Human Rights | 15 |
| 5.1.3 | Global and regional efforts to address states’ obligation to provide protection against domestic violence | 16 |
| 5.2 | Balancing rights of the accused and the victim – are they in conflict? | 17 |
| 6 | Criminal law | 19 |
| 6.1 | Criminalisation | 19 |
| 6.2 | How to ensure an effective investigation in cases of domestic violence | 20 |
| 6.3 | Protecting victims during criminal proceedings | 22 |
| 6.4 | Dilemmas in the prosecution of domestic violence | 23 |
| 6.5 | Is restorative justice an alternative in cases of domestic violence? | 24 |
| 7 | Protective measures – hiding the victim or restricting the offender? | 26 |
| 7.1 | Protection and support to victims of domestic violence | 27 |
| 7.2 | Shifting the burden – rethinking protective measures | 27 |
| 7.2.1 | Introduction | 27 |
| 7.2.2 | Ban on contact and electronic monitoring | 28 |
| 7.2.3 | Dilemmas | 29 |
| 7.3 | Protecting lives – risk assessments | 30 |
| 7.4 | Intervention programmes and measures for offenders | 31 |
| 8 | Growing up with domestic violence | 32 |
| 8.1 | Domestic violence as a childhood condition | 33 |
| 8.2 | Taking children’s rights seriously in cases of custody and contact rights | 34 |
| 8.2.1 | Do courts and childcare authorities address exposure to violence? | 35 |
| 8.2.2 | Closing the gap | 36 |
| 8.3 | Recognising children as independent victims | 37 |
| 8.4 | Supporting children – a multidisciplinary and integrated approach | 37 |

1 Breaking the silence

“Is mummy dead now?” Many children who experience domestic violence say that silence is what they fear the most. When the screams and sounds of beating and abuse suddenly stop and are followed by silence, the children are filled with fear – is mummy dead now?



*Yes I think I'm okay
I walked into the door again
If you ask that's what I'll say
And it's not your business anyway
I guess I'd like to be alone
With nothing broken, nothing thrown*

Just don't ask me how I am

(From the song “My Name is Luca”, by Susanne Vega)

In some cases this fear becomes reality. In countries all over Europe, women are killed through domestic violence, by their partners or ex-partners. In most cases of domestic violence, the victims do not lose their lives physically, but the violence causes loss of many other aspects of lives – most fundamentally security and freedom but also serious loss of health, quality of life, self respect and possibilities for realization, and often of social networks. Domestic violence defines and invades every aspect of the lives of those who live with it and is present in all countries, in all cultures and all layers of society.

Yet, domestic violence is surrounded by silence. The violence is hidden in nature because it happens in the private sphere, and the violence silences through fear and trauma, shame and isolation, denial, manipulation and distortion of reality, emotional ties and dependencies and desperate hopes for change. Victims will not often reveal their situation. Perpetrators will not admit it. Persons close to the victims or perpetrators might suspect, but be afraid of interfering or might not be allowed to.

The silence becomes part of the violence, reinforces its harm and adds to the isolation. When nobody talks about the violence, everyone is left existentially alone. When nobody talks about it, it is as if the violence does not exist, even though it defines the reality for those who live with it.

Domestic violence has long been met with public and political silence. Occasionally it reaches the headlines, if it has led to loss of life. Such headlines are

likely to be followed by reports from the crime scene and background stories of violence, threats and harassment. But the everyday life of domestic violence rarely reaches the news or the public debates.

What would the response be if similar acts of violence took place at school or in the work place? Or in the streets? Would the response be silence? I think we all know the answer. Violence committed in the public sphere makes headlines while violence at home usually does not. The seriousness of the act cannot explain this difference. If the same acts of repeated and serious violence were to happen publicly, we would hear loud voices with demands for action – for protection, for prosecution and for preventive measures. When the victim is harmed in her own home we hear no such voices – only silence. If children were exposed to such violence within the public sphere, we surely would do our best to shield them. In their homes they are on their own.

It is a paradox that we have discussed the possible harmful effects that violent video games and movies can have on children more often than we have discussed the situation of children who are exposed to violence in the family. Yet, these children are continuously exposed to violence, fear and horror, which they cannot “turn off”.

Until recently domestic violence was barely visible in most legal systems. It was not given high priority by the police. In Norway, for example, the police used to consider reports of domestic violence as “domestic trouble” which after a turn-out was considered “settled on the spot.” It was not recognized as the serious crime that it is; punishment for domestic violence did not seem to reflect the gravity of such violence in comparison with other forms of violence. Neither was it viewed as a concern to human rights.

There still seems to be a tendency not to fully recognise domestic violence as a concern to justice policy but more as a matter of social, health or gender equality policies.

What could be a more hard core justice policy matter than providing for the safety of each and every citizen? What could be a greater responsibility for us as Ministers of Justice than to ensure everyone a life free from violence and abuse? Domestic violence is unquestionably a matter of justice.

It has been said that silence is one of the strongest social forces that can be mobilized to protect and maintain abuse of power.¹ As Ministers of Justice, as a community and as responsible fellow human beings we have to break the silence and stand united against domestic violence.

We have come some way. Domestic violence is considered a crime in most legal systems. Over the past years there have been many initiatives and campaigns against domestic violence. Several instruments and documents, both nationally and internationally, have addressed domestic violence. The possible future Council of Europe convention on preventing and combating violence against women and domestic violence, which is currently under preparation, will be both a yardstick of what has already been achieved with regard to political awareness and willingness to take political action, and a crucial building block for further action.

It is time to go beyond general calls for action and lofty promises. It is time we commit ourselves to clear, precise and comprehensive strategies and obligations to combat domestic violence.

1 NOU 2003: 31 Retten til et liv uten vold (The right to a life without violence) p. 33 with reference to Harriet Holter (1992), *Tvang til voksen seksualitet, Nytt om kvinneforskning*, nr. 4-5.

In this report I will not attempt to cover all measures needed to combat domestic violence, and I will try not to repeat all the wise thoughts and ideas that have already been expressed on this topic earlier. I have chosen to highlight some selected topics where I hope this conference can contribute to new perspectives and ideas. To effectively combat domestic violence, I believe there is a need to rethink and perhaps redefine some of our perceptions of the basic structures of our policies and legal framework. Emphasis is put on the following issues:

- The need for a broad perspective on justice - supplements to criminalization; how to empower the victims, making it possible for them to rebuild and reclaim control over their lives; the need to link different sectors of governmental responsibilities and areas of law.
- Human rights – domestic violence as a concern to human rights; how to enforce human rights for victims more effectively.
- Criminal law – how to ensure an effective investigation and prosecution in cases of domestic violence; how to protect victims during proceedings; how to resolve the pressing dilemmas which prosecuting domestic violence sometimes provokes.
- Protective measures – how to ensure support and protection to the victims; how to shift the burden from the victim to the perpetrator; how to resolve the conflict between the right of the offender to liberty and freedom of movement and the right of the victim to enjoy freedom and security.
- Children exposed to domestic violence – the consequences for children exposed to domestic violence and the need to acknowledge children as independent victims of violence between parents and as independent holders of rights; how to ensure the children's perspective and rights in cases of domestic violence; examples of dilemmas in cases of child contact regulation and child custody.



2 The scope of this report



2.1 Domestic violence

The term domestic violence can refer to several types of violence and perpetrator-victim constellations. Literally it refers to violence that happens in the home, although it is the intimate relationship between the perpetrator and the victim that is in many respects the key characteristic. In Norway we prefer the term “violence in intimate relationships”.

Domestic violence may include physical, psychological and sexual violence, most often repeated incidents of such violence. The physical violence is often severe and can consist of hitting, kicking, attempted strangling, use of weapons, destruction of objects, etc. Psychological violence can consist of intimidation, threats, verbal attacks, harassment, isolation or restrictions and control on the victim’s contact with others or with the world outside the family. Sexual violence includes non-consensual sexual acts and abuse and exploitation of children. Domestic violence can also include abuse, exploitation or neglect of children or elder relatives, genital mutilation, forced marriage and crimes committed in the name of honour.

All measures to combat domestic violence must take into account the specific characteristics of such violence and the psychological effects such violence has on the victim, the special emotional ties to the perpetrator, legal, financial or practical dependencies, responsibility for children, and of course safety questions.

Although there are many similarities between different forms of domestic violence, there are also important differences, which call for different protective, preventive and supportive measures. For the measures to be effective, they must be as targeted as possible. For our commitments and discussions to bring us further, we should try to be as specific and concrete as possible. That is why I have chosen to restrict the scope of this report to some aspects of domestic violence instead of trying to cover all of them.

In this report I primarily highlight violence between partners or ex-partners, as well as children exposed to this kind of violence. I am aware that the term

“domestic violence” is broader and also covers abuse of children and intergenerational violence. The Council of Europe has already taken several initiatives in these fields, for example the elaboration of a Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and the campaign against corporal punishment of children. New standard-setting initiatives may be launched as a result of this conference, related to an analysis of the challenges faced by vulnerable victims such as the elderly and children and proposals for targeted solutions to increase their protection and remedy their vulnerable status, as well as the need to develop common rules related to the status and the rights of victims in criminal proceedings which should be included in any relevant future Council of Europe criminal law convention. Although these issues will not be dealt with in detail in this report, several of the questions and topics discussed in this report are equally relevant to such future work.

2.2 Partner or ex-partner-related violence

By partner or ex-partner related violence I refer to violence (physical, psychological and sexual violence) perpetrated by a person with whom the victim has or has had an intimate relationship. Domestic violence does not necessarily presuppose that the perpetrator and the victim are living or have lived together, but when they are or have, this raises many additional legal and practical questions.

Both men and women can be victims of partner or ex-partner-related violence, and both men and women can be perpetrators of such violence. It can occur in mixed gender relationships and same gender relationships. However, most victims are women and most perpetrators are men. Domestic violence – as partner or ex-partner related violence – is distinctly gendered. That is why this report mainly refers to victims as women and to perpetrators as men.

There are no exact numbers or statistics on the extent of partner or ex-partner related violence. A large number of cases are never revealed. It has been estimated that about 12 to 15 % of all women have been in a relationship of domestic abuse after the age of 16.²



“Today was worse than other days...”

The previous evening, the little girl had been sure that Mummy would be killed by Daddy. She had heard it with her own ears. Everything that had happened the previous evening bounced backwards and forwards inside her like a ball. She could imagine the ball. It was black with green spikes. Every time the ball hit the wall inside her, the words and pictures came out of the ball. She had gone to bed, but couldn't sleep because her heart was beating so fast.

She knew why.

Daddy's eyes told her that a storm or perhaps a hurricane was on the way. His voice was like razor blades and his eyes became smaller and black. When the hurricane built up inside Daddy, she knew it would come.

It was impossible to stop it.”

(Excerpt from Øivind Aschjem: “Hvor mye skal et barn tåle?” (How much does a child have to stand?) in K. Storberget et al (ed.) (2007), Bjørnen sover (The Bear Sleeps). Oslo, Aschehoug.

2.3 Children exposed to violence between parents

A large percentage of cases of partner or ex-partner-related violence involve children. The children are exposed to the violence in several ways – they may be present during the violence, they may hear the violence, they may sense or feel that the violence has happened or will happen and they may face the results of the violence. Children can also be physically involved in the violence, for example when they try to intervene or protect their mothers.

Children who are exposed to violence between parents are not mere witnesses in the sense that they are outside observers who are not affected by the violence. Many of these children live in constant fear and insecurity. They often take on the responsibility for the violence, trying to prevent new episodes of violence, and protecting, comforting and supporting their mothers. The violence becomes the centre of their lives, the defining conditions of their childhood.

We know that children who are exposed to violence between parents suffer similar health consequences to children who are directly abused.³ Children who experience their father abusing their mother run a substantial risk of negative psychological consequences such as aggression, depression and anxiety.⁴ We also know that exposure to violence may have life-long consequences. Studies show a significant correlation between being exposed to domestic violence during childhood and psychological and social problems later in life, such as depression, symptoms of trauma and abuse of alcohol and drugs.⁵ Adults who have experienced violence during childhood are also at greater risk of being exposed to violence as adults.⁶

Yet, these children have until recently been given little attention and help. We have to recognize these children as independent victims of violence.

2 Combating violence against women: Stocktaking study on the measures and actions taken in Council of Europe member states (2006), Council of Europe, Strasbourg, chapter 1.1.

3 See *inter alia* B. McAlister Groves (2001), When home isn't safe: Children and domestic violence. *Smith College Studies in Social Work*, 71(2), p. 183-207, referred to in P. Istad, (2007), Vold mot mor er vold mot barna (Violence against the mother is violence against the child). *Voksne for barns årsrapport*. The article is published on the webpage of the organisation Alternativ til vold (Alternative to violence).

4 See Istad *ibid.*, cf. S. Graham-Bermann & J. Seng (2005), Violence exposure and traumatic stress symptoms as additional predictors of health problems in high-risk children. *The Journal of Pediatrics* 146(3), p. 349-354; R.M. Johnson, J.B. Kotch, D.J. Catellier, J.R. Winsor, V. Dufort, W. Hunter & L. Amaya-Jackson (2002), Adverse behavioural and emotional outcomes from child abuse and witnessed violence. *Child Maltreatment* 7(3), p. 179-186; K.M. Kitzmann, N.K. Gaylord, A.R. Holt & E.D. Kenny (2003), Child witnesses to domestic violence: A meta-analytic review. *Journal of Consulting and Clinical Psychology* 71(2), p. 339-352.

5 See V.J. Edwards, G.W. Holden, R.F. Anda & V.J. Felitti (2003), Experiencing multiple forms of childhood maltreatment and adult mental health: Results from the Adverse Childhood Experiences (ACE) study. *American Journal of Psychiatry* 160(8), p. 1453-60; K. Henning, H. Leitenberg, P. Coffey, T. Turner & R.T. Bennett (1996), Long-Term psychological and social impact of witnessing physical conflict between parents. *Journal of Interpersonal Violence*, 11(1), p. 35-51. Referred to in Istad *loc cit* at n 3 above.

6 L.M. Renner & K.S. Slack (2006), Intimate partner violence and child maltreatment: Understanding intra- and intergenerational connections. *Child Abuse & Neglect* 30(6), p. 599-617.

3 A broad perspective on justice



3.1 Need for a comprehensive approach

Providing justice to victims of domestic violence requires a broad range of measures, not only those traditionally viewed as belonging to the sector of justice policies. An effective protection against domestic violence requires measures from all policy sectors such as health, social welfare, immigration, child welfare, family law, gender equality etc., as well as interaction between different policy sectors. It is necessary not just to recognize the wide range of measures that is needed to combat domestic violence and to protect and support the victims. We must also look at how these measures interact with each other. Measures in areas outside of the traditional sphere of justice policies might influence the effectiveness of measures within this sphere, for example the willingness to report cases to the police, participation in prosecution etc.

I wish to stress, however, that criminalization and prosecution are just as important in cases of domestic violence as in other types of crime. Through criminal law the community can communicate to offenders the censure or condemnation that they deserve for their crimes. Criminal law is also a vital expression of the core values of the community. Furthermore, we can have faith that criminalising domestic violence and imposing punishment upon the offenders of domestic violence will encourage offenders to repent their wrongs, and thus deter and suppress future violations.

Traditional forms of punishment such as imprisonment cannot however provide sufficient long-term protection to women who live their lives under continuous threat of being harmed or killed. It certainly does not bring back to life a person who has already died as a result of domestic violence, nor

can it heal the wounds or empower those who have suffered from domestic violence.

A holistic approach requires us to think beyond the traditional forms of punishment within criminal law. Efforts within criminal law need not and should not end with imprisonment or fines. Responses to domestic violence through criminal law should also involve treatment. In that regard a holistic and integrated approach is crucial. It may for example be difficult and inadequate to draw a clear and dividing line between problems related to violence and other problems which the offender may have, when treating the offender. Treatment of violent offenders should integrate the different problems in the follow up. This implies for example that physical, psychological or social problems, abuse of alcohol or drugs etc., must be addressed as part of the treatment. A special programme established in Norway for offenders who have been convicted of drug related offences is an example of such an approach.

While emphasising the importance of treatment, we should also acknowledge that in some cases even a limited sentence combined with treatment is insufficient to protect society and the victim from further and aggravated violence. In such cases preventive detention and, where appropriate, compulsory psychiatric treatment must be considered.

We must also compensate for the negative consequences which punishment may have on the offender's family. This is particularly important where the relationship between the offender and the victim continues. Treatment of the offender is particularly important in order to shield the partner and the children from a continued environment of violence. Moreover, supportive measures must be offered to the family, which can for example compensate for loss of income.

A holistic approach also requires domestic violence to be addressed in other policy sectors. Alcohol policy is one such sector. We know that violence, including partner-related violence, is in many cases interlinked with abuse of alcohol.⁷ We also know that the magnitude of alcohol abuse and problems within a population is interlinked with the total consumption of alcohol within the population. Regulations on alcohol may thus indirectly affect the fight against domestic violence.

Child contact regulation is another sector in which we must ensure that domestic violence is addressed. In many countries courts and child-care authorities seldom address whether partner violence affects the ability of the father to fulfil his responsibility as a parent.⁸ Violence towards the other parent does not necessarily imply that he cannot provide adequate care for the children. There is, however, sound reason to assess in each individual case if and to what extent the violence is relevant when assessing the violent partner's abilities as a father. Addressing domestic violence in cases of child contact may however – as I shall return to in section 8.2 – provoke some difficult dilemmas.

The law on residence permits is another area where there is a need to link different areas of law. Moving out from a violent partner might, depending on the circumstances, put into question the victim's residence permit or social or welfare benefits. If a break-up of the relationship entails the victim's loss of her residence permit, this can prevent disclosure of domestic violence and thus effective assistance to victims.

7 L.W. Tolmann & L.W. Bennett (1990), A review of quantitative research on men who batter. *Journal of Interpersonal Violence* 5, p. 87-118; W. V. Lee & S.P. Weinstein (1997), How far have we come? A critical review of research on men who batter, *Recent developments in alcoholism* 13, p. 337-356. See also P.Ø. Steinsvåg (2005), *Bulleteng 2 Voldsutøvende fedre og omsorg (Violent fathers and care)*, in the project: "Barn som lever med vold i familien" (Children who live with violence in the family). The paper is published on the webpages of the organisation Alternativ til vold (Alternative to violence) www.atv-stiftelsen.no and Senter for krisepsykologi (Centre for crisis psychology) www.krisepsyk.no.

8 See section 8.2 below.

There is a need to link and harmonize different areas of law and policies both at the general level of policy and decision-making and in individual cases. Such efforts of harmonization may raise difficult dilemmas, the solution to which requires us to choose and prioritize between the interests of those involved. This raises a more fundamental question on how to balance the rights and interests of the victim and the accused. In the following chapters I discuss several examples of this. In chapter 5 I discuss the balancing of human rights. In chapter 6 I point to questions of how to protect the victim while safeguarding the procedural guarantees of the accused. In chapter 7 I address how we can protect the victims in ways that make the perpetrators carry the burden rather than the victim. In chapter 8 I ask how we should deal with child contact and child custody regulation in cases of domestic violence.

3.2 Rebuilding lives – empowering victims of domestic violence

Victims of domestic violence are in need of different kinds of help. They might need medical assistance or treatment, emergency housing or protective measures, financial support or other social services, assistance from child welfare services or legal advice. Their needs may vary at different stages in the process and will also vary between individuals according to factors such as living conditions and personal resources in general, social network, children etc. The needs for assistance will also differ depending on whether the victim is living with the perpetrator, is in the process of breaking out of a relationship or has already broken out of one.

Victims of domestic violence are not homogenous. All measures to stop the violence and protect the victims must be adapted to the individual situation of each victim. Otherwise, the measures will not be effective and could be counterproductive or even jeopardize the safety of the victim.

Many of the victims seeking help will be in an emergency situation or in a state of immense pressure and fear. They might be overwhelmed with all the practical and legal matters they are faced with

if they want to leave the perpetrator and all the different governmental agencies they have to address for questions on protective measures, financial support, housing etc.

The main aim of all measures to help victims of domestic violence should be to stop the violence and assist the victims in establishing lives free from violence. Our job is not done when the acts of violence stop. Putting an end to the violence is only the first step. It is equally important that we take further steps to help the victims rebuild their lives and to restore their ability to control their lives.

Participation and self-empowerment are therefore important principles for all protective and supportive measures for victims.

- **How can we ease the burden for the victims?**
- **How do we provide assistance to the victims?**
- **How do we ensure the coordination of different services and legislation in individual cases?**

4 Why silence?



I believe the silence with which domestic violence has been surrounded both within politics, in our legal system and within society at large is partly historically, sociologically and culturally contingent. Let me emphasise the most important factors, which I believe form part of this contingency. Our understanding of privacy and the private-public divide is one such factor. Since the enlightenment “privacy” or the private sphere of the lives of individuals has been protected from state intervention by granting citizens the right to privacy and the right to a family life. What takes place behind the entrance door has been considered too private and too personal to be a concern for the state – for better or for worse. To many of us these rights are interlinked with our identity and self-understanding as citizens of democratic societies – rights that are worth fighting for. Yet, our perception of the private has at the same time created a veil over the darker sides of family life. Domestic violence is hidden because it happens in a place that is usually regarded as too private and too personal for the state and other fellow citizens to look into.

The importance of the family as a unit may also partly account for the silence on domestic violence. Preserving the unity of the family is imperative in many countries throughout Europe. The interaction between the members of the family has not traditionally been regarded as the domain of the state. As a consequence, violence that is committed against persons outside the family is condemned, whereas violence committed against family members has been tolerated and sometimes condoned by the state. To illustrate, rape within marriage was not punished as rape in Norway until 1974.⁹ In other countries rape within marriage became a crime only as late as the 1990s, and some countries in Europe still do not recognise rape within marriage as a criminal offence. Further, abuse of children is still in many countries considered as a prerogative of parental responsibilities. Addressing and recognising domestic violence is difficult and sensitive because of its consequences; breaking the silence on domestic violence may also dismantle the family as a unit.

⁹ See Rt. 1974 p. 1171.

The gender dimension cannot be ignored as a crucial factor when drawing this picture. I do suspect the silence with which domestic violence is surrounded has something to do with the fact that most victims of domestic violence are women and children. The lives of women and children and the risks they face simply do not receive the same amount of attention in public life as those of men. One explanation is simply that men traditionally have been the dominating actors in all areas of public life.

The post-active approach of traditional criminal law can perhaps also partly explain the failure of criminal law to respond adequately to domestic violence. Criminal law has traditionally been post-active; it has primarily been a response to past wrongs. The purpose of traditional criminal law has thus been limited to some variant of either retribution or general deterrence. Responding to past wrongs through sanctions does not, however, sufficiently protect the victims from further abuse or against the carrying out of threats. Effective protection against domestic violence also requires a pro-active approach; the victim must be protected from possible future acts. What justifies intervention in the privacy of the offender is thus not only related to past wrongs but also to acts which he might or might not commit. Such an approach requires measures which have not formed part of the traditional approach in criminal law.

The incident-specific approach within traditional criminal law can also partly account for the inadequate response to domestic violence. Criminal law has traditionally been incident-specific in the sense that investigation and prosecution usually concern one specific incident - one assault or one incident of shoplifting. The gravity of the offence is thus very often assessed on the basis of one specific incident and the harm caused thereby. The gravity of the crime and the harm of domestic violence cannot, however, be grasped by looking at a black eye or a broken arm in isolation. The seriousness of domestic violence can only be fully grasped by taking into account the way in which domestic violence often affects the victim's security and freedom and thus affects all areas of her life and the long-term consequences of such violence. The

traditional incident-specific approach in criminal law can perhaps to some degree explain why the level of punishment has not, for example, been proportionate to the harm which domestic violence causes to the victim.

The interdependency between the victim and the offender provides another explanation to the low priority given to domestic violence. The special relationship between the offender and the victim presents some dilemmas, which may have affected efforts to investigate and prosecute domestic violence. Imprisonment has consequences not only for the offender but also for the family who may be legally, financially or practically dependent on the offender. The family income may for example be dependent on the offender's ability to work, something he cannot do while being in prison. In most countries in Europe the man has traditionally been the primary breadwinner of the family. For many families this is still the reality.

Lacking knowledge of the magnitude and the harmful consequences of domestic violence may also partly account for the silence on domestic violence. This affects the way domestic violence is treated in all sectors of the community.

Today, we may think that we have a more nuanced understanding of these structures. I think this is not necessarily the case. Although domestic violence is considered a crime in most legal systems, reporting levels are still low, the indifference by police and judicial authorities has still not entirely disappeared and the tendency to blame victims for not leaving or picking the wrong husband is still present. This suggests for example that our understanding of "privacy" still affects the way we speak about and prioritize domestic violence.¹⁰

Breaking the silence on domestic violence presupposes that we rethink and challenge the meaning of old structures, distinctions and ideas which have contributed to shielding domestic violence from public attention – the family as a sacred unit, the private, the public, power and gender. We can never let reference to tradition, culture or history legitimise violence.

10 K. A. Kelly (2003), *Domestic Violence and the Politics of Privacy*. Ithaca, NY, Cornell University Press.

5 Protection against domestic violence as a human rights concern – need for redistribution of rights?

“I am shaken by their stories, as they are shaken by mine. “How could you accept it?”, we ask each other disbelievingly as we stand side by side in the kitchen, chopping onions or sitting together in the evenings, smoking and drinking coffee. The question does not require an answer, because it is really addressed to us. How could I accept it? Why didn't I report it? The relief at having become one of them makes explanations superfluous. We know why we did not report it. Because we couldn't. Because we accepted it the first time. Because our mothers did.

Because we wanted it to be a mistake. A unique event. An exception. Even one that we had deserved.”

(Excerpt from the novel Kongemordet (Murder of a King) by Hanne-Vibeke Holst



5.1 Existing human rights protection for victims of domestic violence

5.1.1 INTRODUCTION

I think we all agree that protection of life and freedom from all forms of violence, abuse or neglect are fundamental rights for all individuals and also conditions for enjoyment of other human rights.

However, the traditional view on human rights seems to have excluded victims of domestic violence from protection. The conventional perception of human rights is that international human rights law has evolved primarily to protect individuals against excessive intervention and abuse of state power. Human rights law is thus intended to protect individuals from being beaten by the police during interrogation, but not from being beaten by their partner.

By focusing on the relationship of the individual vis à vis the state, the human rights paradigm creates a divide between the private and the public which excludes the harm often suffered by women and children. Men's lives and the risks they face within the workplace, the economy, politics and cultural life are defined as part of the public sphere and thus included in the normative framework of human rights. Women's and children's lives and the risks they face, which more often involve the private sphere of home, hearth and family, are in contrast defined as private and hence placed outside the conceptual framework of human rights. Since the most pervasive harm which women suffer tends to take place within this sphere, the consequence of the private/public divide is that the violence which women are most likely

to face is excluded from the normative framework of human rights. From the perspective of the battered wife (often referred to as the feminist perspective on human rights) or the child witnessing the violence, the human rights paradigm can be seen to reflect the experiences of men rather than those of women and children.

This perspective of human rights is visible in the vocabulary of all human rights treaties. Human rights instruments are, apart from the limited promises of formal equality between men and women, silent on the risks which women in particular face within their family. All human rights instruments focus on harm that takes place in the public sphere. This includes all general conventions on human rights such as the United Nations International Covenant on Civil and Political Rights and the European Convention on Human Rights. This approach also characterises human rights instruments that explicitly deal with women's rights as human rights. For example, the rationale of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was to ensure equality between men and women in the public sphere.

States are not only under a duty to refrain from certain actions. States also have an obligation of due diligence to take positive actions to protect the enjoyment of the rights of individuals. If an individual has been subject to torture or other forms of ill treatment the state may, for example, be obliged to conduct a public and effective investigation and to punish the perpetrator. Traditionally such obligations were limited to cases of violations by state agents, thus

mirroring the traditional public/private divide in international human rights law. This is no longer the case. We have in the course of the last two decades witnessed a most welcome shift in the practices of human rights monitoring bodies. Through practice and case law of the monitoring bodies of different human rights conventions, a doctrine of obligations for the state to protect individuals against violations and ill-treatment from other individuals acting in their private capacity has been established. I will mention some examples of this below.

5.1.2 THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Within the European context the European Court of Human Rights has established that states have a positive duty to protect the enjoyment of the right to life under Article 2, the right not to be subjected to torture and ill-treatment under Article 3 and the right to privacy and family life under Article 8. The Court has on numerous occasions explicitly expressed that the duty to protect applies also where a private individual commits the actual breach. Important cases are *X. and Y. v. the Netherlands* (no. 8978/80, judgment of 26 March 1985), *M.C. v. Bulgaria* (no. 39272/98, judgment of 4 December 2003) and *Osman v. the United Kingdom* (no. 23452/94, judgment of 28 October 1998).

The Court has, however, only recently addressed the question of the effective protection of victims of domestic violence specifically. In *Kontrova v. Slovakia* (no. 7510/04, judgment of 31 May 2007), the Court found a violation of Article 2 of the Convention when the domestic authorities failed to take appropriate action to protect the lives of the applicant's children after she had reported that her husband had threatened to kill himself and their children and that he had a shotgun.

This case has been followed by two other cases on domestic violence. In *Branko Tomasic and others v. Croatia* (no. 46598/06, judgment of 15 January 2009) the Court similarly found that the right to life was violated because the state failed to take appropriate steps to prevent the deaths of the perpetrator's partner and baby, although he had abused

and publicly threatened to kill them several times.

Finally, in the case of *Bevacqua and S. v. Bulgaria* (no. 71127/01, judgment of 12 June 2008) the Court held that there had been a violation of Article 8 due to the courts' failure to adopt interim custody measures without delay in a situation which had above all adversely affected the well-being of S., the son of Ms Bevacqua, and that insufficient measures had been taken in reaction to the behaviour of Ms Bevacqua's former husband.

These judgments not only demonstrate that the Court may find a violation against a state due to its failure to properly discharge its positive obligations, but they also identify certain measures which states are obliged to provide to protect victims of domestic violence. Some of these measures are procedural measures similar to those identified in previous cases on the states' positive obligations under the Convention. The duty to conduct an effective criminal investigation is one such measure.

It also follows from these recent cases on domestic violence that the positive obligations of states include preventive measures. A state cannot wait for the actual violation to take place; it must take measures in order to prevent its occurrence. In *Branko Tomasic and others v. Croatia* the Court explained that "[a] positive obligation will arise where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk." Such obligations may include a duty to accept and duly register the applicant's criminal complaint, keeping a proper record of the emergency calls, advising the next shift in the situation and searching for weapons if a person has threatened to kill the victim. (*Kontrova v. Slovakia* and *Branko Tomasic and others v. Croatia*)

In *Branko Tomasic and others v. Croatia* the Court further identified compulsory psychiatric treatment as a preventive measure. The Court explained that "[s]ince no adequate psychiatric treatment was provided to M.M. in the prison there was also no as-



assessment of his condition immediately prior to his release from prison with a view to assessing the risk that, once at large, he might carry out his previous threats against the lives of M.T. and V.T.” The Court therefore found “a violation of the substantive aspect of Article 2 of the Convention on account of failure of the relevant domestic authorities to take all necessary and reasonable steps in the circumstances of the present case to afford protection for the lives of M.T. and V.T.”¹¹

5.1.3 GLOBAL AND REGIONAL EFFORTS TO ADDRESS STATES’ OBLIGATION TO PROVIDE PROTECTION AGAINST DOMESTIC VIOLENCE

The jurisprudence of the European Court in this area of law is not only a phenomenon particular to the context of the European Convention on Human Rights. It is part of a broader global trend. Similar

approaches are seen in other human rights monitoring bodies both at the regional and the international level.

Although there is no provision in the United Nations Convention on the Elimination of All Forms of Discrimination against Women that explicitly deals with domestic violence, the Committee on the Elimination of Discrimination against Women has, in its 19th general recommendation, stated that gender-based violence against women may breach provisions of the Convention, regardless of whether those provisions expressly mention violence. The Committee has, furthermore, in two individual cases brought before it, found violations of the right to life and mental integrity where women have been killed by their husbands: *Sahide Goeckce v. Austria* (Communication number 5/2005) and *Fatma Yildirim v. Austria* (Communication number 6/2005). Also in the case of *Ms. A.T. v. Hungary* (Communication number 2/2003) the Committee criticised the state party for not having implemented effective measures, legal and others, that could ensure the physical and psychological integrity of the victim of domestic violence and a safe place to live.

The Council of Europe’s European Committee of Social Rights has stated that Article 16 of the European Social Charter (revised) on the right of the family to social, legal and economic protection applies to all forms of domestic violence and that state parties are obliged to adopt measures to protect women from domestic violence, both in law and in practice.¹²

The idea that states have a positive obligation to protect victims of domestic violence has been proclaimed in numerous resolutions by international organisations such as the United Nations and the Council of Europe. The duty of due diligence in relation to violence committed within the private sphere was for example proclaimed by the United Nations General Assembly in the 1993 Declaration on the Elimination of Violence Against Women. Moreover, it has been recognized by many academic scholars and endorsed by non-governmental organisations. There is thus broad consensus among actors in the international community on the idea that states have a duty to protect victims of domestic violence.

¹¹ See para. 69 and 61.

¹² European Committee of Social Rights: Conclusions 2006 – Volume 1, p. 14.

5.2 Balancing rights of the accused and the victim – are they in conflict?

As stated above, human rights instruments have traditionally focused on the protection of individuals against interference from the state. Protection of suspects and defendants is thus a significant element in important human rights instruments such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The Convention Article 6 and the Covenant Article 14 both express the defendant's right to a fair trial, a principle from which several specific rights can be drawn. As a part of the right to a fair trial the defendant is entitled to be present during the proceedings against him. The proceedings shall be public, *inter alia* to ensure the possibilities for public control over the judicial authorities. The principle of a fair trial also embraces the right for both parties to be heard, including the right to examine witnesses against the accused. Furthermore, Article 6 (2) of the Convention and Article 14 (2) of the Covenant set forth the presumption of innocence: a person charged with a criminal offence has to be presumed innocent until proved guilty according to law. This provision is also relevant to decisions after the formal determination of the charge.

The accused person also enjoys other human rights that may be relevant during legal proceedings and when assessing and implementing measures to protect victims. The Convention Article 5 and the Covenant Article 9 protect the right to liberty and security. According to the more detailed provision, Article 5 of the Convention, no one shall be deprived of his liberty save in the specifically listed cases. The freedom of movement is protected by Article 2 of Protocol No. 4 to the Convention and Article 12 of the Covenant. Article 8 of the Convention Article 17 of the Covenant on the right to respect for private and family life and home is also relevant when balancing the rights of the accused with the rights of the victim.

Balancing the offender's right to be presumed innocent with the victim's rights is put to the test in connection with compensation proceedings instituted by the victim. Article 6, first paragraph, of the Convention also implies a right of access to court for victims. The presumption of innocence thus does not bar the awarding of damages to the victim based on the same facts as the criminal charge, but subject to a less strict burden of proof. Neither does the presumption of innocence hinder proceedings for civil compensation pursued in the course of criminal proceedings. However, the grounds for granting the victim's claim for compensation must not contain statements imputing criminal liability, thus setting aside an acquittal or casting doubt on the correctness of the acquittal.¹³ Establishing protective measures that restore and secure both the security and the freedom of victims of domestic violence in an efficient manner may entail constraints upon the liberty and the privacy of the offender.

For example, protective orders that ban the aggressor from visiting the victim and/or specific areas, imply a restriction on the aggressor's freedom of movement. Restraining orders may also infringe both on the right to private and family life as well as the right to a home, dependant upon, *inter alia*, whether the aggressor is banned from visiting his home or whether his possibilities for being together with his child are jeopardized. A restraining order combined with electronic monitoring of the aggressor's movements, as described in section 7, is an even more radical encroachment on the aggressor's right to privacy.

The rights of the accused might also conflict with measures to protect the victims of domestic violence during criminal proceedings. Criminal proceedings will very often add to the burden of the victim and cause a new trauma, since the victim, typically, fears facing both the public and the defendant. Measures such as preventing eye contact between the aggressor and the victim during the proceedings, exclusion of the accused person from the courtroom during the victim's testimony, and the use of statements of victims made outside the main hearing may lift the burden from the victim, but they also raise questions as to whether the accused person's right to a fair trial is infringed.

¹³ See for instance *Ringvold v. Norway*, (Application no. 34964/97) and *Orr v. Norway*, (Application no. 31283/04).

For our discussion it should be noted that both the Convention and the Covenant allow for certain limitations of the defendant's rights. We should also keep in mind that in most situations the establishment of protective measures does not infringe upon the rights of the offender. As an example, the victim's fear of exposure to the offender during the criminal proceedings can be reduced considerably through practical measures that do not conflict with the rights of the accused.

Whether there really is a conflict between rights might in other situations be dependant upon how extensively the rights of the offender are interpreted. It might for example be argued that a restraining order jeopardizes the offender's right to privacy. This presumes, however, that we take for granted that the human rights of the offender include a right to visit someone whom this person has abused or threatened to abuse. If we extend the rights of the offender this far it may very well be claimed that human rights legitimise and excuse harm rather than protect individuals from harm.

Where rights undoubtedly do conflict we need to ensure a proper balance between the rights of the offender and the rights of the victim. The United Nations Committee on the Elimination of Discrimination against Women has stated that the perpetrator's rights cannot supersede the victim's

human right to life and to physical and mental integrity. In this context I ask whether the traditional legal assessment of the possibilities for imposing legal restrictions upon the aggressor balances the conflicting rights adequately. This is highly relevant when discussing electronic monitoring of aggressors (see section 7 below).

- **Which measures should be included under the states' duty to ensure efficient protection of the rights of victims?**
- **How can the duty to protect be transformed into concrete obligations?**
- **How do we resolve conflicts between the rights of the victim to receive protection and the rights of the offender?**

6 Criminal law



6.1 Criminalisation

Most Council of Europe member states consider domestic violence a criminal offence. It varies whether countries have established separate provisions on domestic violence or on some aspects of such violence, or if they apply general provisions on violence, sexual offences etc.

It is in my view essential that the penal provisions reflect the complexity of the abuse and violations relating to domestic violence. The provisions should not only target the incidents of physical violence, but equally important are the threats, the psychological violence, restrictions of freedom, etc.

All kinds of sexual abuse should be punishable, regardless of any relationship between the offender and the victim.

The Analytical study of the results of the second round of monitoring the implementation of Recommendation Rec (2002) 5 on the Protection of Women against Violence in Council of Europe member states shows that genital mutilation, psychological violence against partners and forced marriage are the forms of violence that are most frequently reported as not penalised. Eight member states have reported that psychological violence to partners, spouses and cohabitants is not penalised. The study assumes, however, that in some of these states, which evidently do not have specific provisions on such violence, the offence might be penalised by general provisions. This might also be the case as regards forced marriage and genital mutilation. However, the study also reports that there are still two countries that do not penalise rape within marriage. Furthermore, the study concludes that the definition of rape is very narrow in many member states, requiring proof of the use of (physical) force.



6.2 How to ensure an effective investigation in cases of domestic violence

As established in chapter 5, states have an obligation under international law to ensure an effective investigation and prosecution in cases of domestic violence. What this entails is not elaborated in detail in the case law referred to. It must at least include a thorough collection of evidence, interviews with witnesses and due priority given to the cases.

Giving due priority to the investigation of cases of domestic violence is a precondition for an effective investigation. Domestic violence should not be dismissed due to lack of resources. Within legal systems that give the prosecuting authority discretionary power to pursue or drop a case¹⁴, due priority may for instance be ensured through administrative orders within the police and prosecuting authority. Increased or redistributed funds may also contribute to, or even be a condition for, due priority. We must ensure that the investigation of cases that are more easily investigated and prosecuted, and thus leading to a court decision, is not prioritized at the expense of more complicated and time-consuming cases of domestic violence.

Prioritizing is also a question of attitudes within the police and prosecuting authority, possibly reflecting the attitudes towards different types of crime in the surrounding society. Research has found that the major determinant of an improved police response is the extent to which domestic violence is recognised as a public offence rather than a private crime.¹⁵ If the police consider domestic violence as innocent acts of crime belonging to the domestic sphere, this is likely to influence the investigative work as well. Such attitudes call for information and awareness-raising measures.

The characteristics of domestic violence also raise considerable challenges in investigating and prosecuting these cases, for example when collecting evidence. Many cases involve episodes over a long period of time. The victims will often have tried to hide their situation by covering up bruises, making

14 According to the Analytical study of the results of the second round of monitoring the implementation of Recommendation Rec (2002) 5 on the protection of women against violence in Council of Europe member states, Council of Europe, Strasbourg 2008, such discretionary power is given to the public prosecutor in most, if not all, member states.

15 Protecting women against violence. Analytical study on the effective implementation of Recommendation Rec (2002) 5 on the protection of women against violence in Council of Europe member states (2007), Strasbourg, Council of Europe, with reference to C. Humphreys, G. Hague, M. Hester, A. Mullender, H. Abrahams & P. Lowe (2000), *From good intentions to good practice: A mapping study on services working with families where there is violence*, Policy Press, Bristol.

up excuses for injuries or for absence from work, not seeking medical assistance etc. The victim might also have denied earlier inquiries on violence by the police or other authorities. The victim may be emotionally ambivalent towards the criminal case or intimidated or threatened by the perpetrator, leading to, for instance, withdrawal of consent to prosecution. Possible witnesses may have strong emotional or loyalty ties to the victim or the perpetrator. All these factors must be taken into account when investigating cases of domestic violence.

The investigative challenges presented in cases of domestic violence can be met with a variety of measures. Assuming that one of the problems is that the victim is deterred from cooperating with the police subsequent to an emergency situation or the filing of a report, it is important that available evidence is secured immediately when at hand. In Canberra, London and Yorkshire they have been speaking of the “golden hour”: the collecting of evidence in that first hour determines whether a case is prosecuted.¹⁶ Filming of the crime scene, photographing of the victim, possible medical examinations of the victim and gathering of evidence from other witnesses, for instance neighbours, are examples of investigative steps that might ensure sufficient evidence for prosecution.

Securing due priority to and investigation of cases of domestic violence might call for new organizational arrangements as well. As an illustration, a system of domestic violence coordinators was established in each of Norway’s 27 police districts in 2002. The coordinators’ task is to ensure that the police show understanding and insight in their encounters with victims and their next-of-kin. The first evaluation of the measure showed that the degree of priority given to domestic violence varied significantly from one police district to another, apparently independently of the geographical prevalence of this type of case. This led to a strategy for eliminating the differences between districts through further development of the system of domestic violence coordinators. From January 2008, every police district is instructed to have a domestic

violence coordinator in a full time position. The larger districts are instructed to establish domestic violence units.

Prosecution rules might influence the amount of work carried out by the police investigators in cases of domestic violence. The police might be reluctant to invest scarce resources in a case if prosecution is dependant upon a victim’s complaint that is regularly withdrawn. Council of Europe Recommendation Rec (2002) 5 on the protection of women against violence states that member states should “make provisions to ensure that criminal proceedings can be initiated by the public prosecutor.” The recommendation does not require *ex officio* prosecution, but states that such prosecution should be possible.

The abovementioned analytical study of the Recommendation (2002) 5 reveals that the conditions for prosecuting domestic violence vary.¹⁷ Whilst in a majority of states the public prosecutor can initiate prosecution in all cases of domestic violence, there are different conditions for prosecution in the remaining states. In some countries *ex officio* prosecution is only possible in the more severe cases, in others prosecution is dependant upon the victim’s complaint. Other variants exist as well. As pointed out in the study, differences in the legal systems, procedural traditions and institutional cultures may call for different prosecution rules in different countries in order to achieve the same goal: effective legal redress for victims. Yet the study concludes that implementation of the recommendation would benefit from clearer recommendations concerning prosecution. As pointed out in chapter 6.4, public prosecution also raises a number of dilemmas.

I expect that the ongoing preparations for a separate convention against domestic violence will address the matter. I also invite you to present views on the issue at the Conference of Ministers of Justice.

¹⁶ C. Humprey et al loc cit at n 15 above.

¹⁷ Id.

6.3 Protecting victims during criminal proceedings

Protection of victims must also include protective measures during the criminal proceedings. The aim of such measures is protection of life and physical and mental health in order to avoid further victimization. Many of the Council of Europe recommendations deal with issues such as physical protective measures, support and assistance during the proceedings, and the victim's right to considerate and respectful treatment. According to the Appendix of Recommendation Rec (2002) 5, member states should:

- take all necessary steps to ensure that at all stages in the proceedings, the victims' physical and psychological state is taken into account and that they may receive medical and psychological care;
- envisage the institution of special conditions for hearing victims or witnesses of violence in order to avoid the repetition of testimony and to lessen the traumatising effects of proceedings;
- ensure that rules of procedure prevent unwarranted and/or humiliating questioning for the victims or witnesses of violence, taking into due consideration the trauma that they have suffered in order to avoid further trauma; and
- ensure that measures are taken to protect victims effectively against threats and possible acts of revenge.¹⁸

A legal counsel may provide for both legal and paralegal aid for the victim and can thus help to avoid the proceedings leading to further victimisation. A legal counsel can also ensure the victim's information needs during the different stages of the proceedings. The imbalance between the offender and the victim caused by the harassment, fortified by the offender's right to a defence counsel, should to some extent be evened out. Securing legal aid to the victim will not infringe on the offender's rights.

Protection from threats and reprisals presuppose physical separation of the victim and the offender inside and outside the courtroom. If the offender is remanded in custody during the proceedings, physical separation is safeguarded. If not, measures to provide for physical protection may include guarding of the victim, separate witness rooms and physical arrangements in the courtroom. Basically, such measures will not infringe on the rights of the accused. However, if the measures are extensive and conspicuous they might be considered to run the risk of biasing the court and thus infringing the right to a fair trial, or violating the presumption of innocence.

Special conditions for hearing witnesses may include pre-trial hearings of the victim, exclusion of the accused person during the whole of or parts of the victim's testimony in court, and arrangement of the courtroom to prevent the offender from observing the witness. Hearing of the witness in camera, thus excluding the public from observing the testimony is a relevant measure as well. Such measures might conflict with various aspects of the right to a fair and public hearing such as the offender's right to be present during the trial, the right to an oral hearing and the right to be able to follow the proceedings. As for the use of evidence statements made at the pre-trial stage, the question seems to be whether, in accordance with Article 6 of the European Convention on Human Rights, the accused has been given "an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings."¹⁹ If such an opportunity is secured, pre-trial hearings of the victim do not infringe the offender's right to a fair trial and adversarial proceedings. Nor is a temporary expulsion of the offender from the courtroom likely to violate the right to be present at the trial embraced by the right to a fair trial. Such measures also contribute to the protection of the victim's right to privacy and thus balance unequal rights.

Respecting the victim's right to privacy and avoiding secondary victimization may also call for special rules on the questioning of victims, for example through limiting the type of questions that may be presented

18 Clauses 41-44.

19 *Kostovski v. the Netherlands* (no. 11454/85, judgment of 20 November 1989).



to the victim or the possibilities for calling evidence related to a victim's conduct and sexual behaviour, or through prescribing that certain inquiries shall be made and answered in writing. The victim's right to privacy may also require possibilities for prohibiting public hearings and photographing and recording of the hearings in order to prevent the publication of the victim's identity.

Most of the measures mentioned above raise questions on compatibility with the offender's rights. The answer to these questions, however, depends largely on how the regulations are formed and whether they are necessary and appropriate to meet the needs of the victim. Again, the key wording is balancing of rights, implying, however, that the victim's rights are taken into account as well.

I anticipate that the Council of Europe's Ad Hoc Committee on preventing and combating violence against women and domestic violence will address

many of the issues relating to the protection of victims during criminal proceedings. There is a need to address the status and rights of victims comprehensively, also in relation to the need for a fair trial and for a balance between the rights of the victim and the defendant in criminal proceedings, taking due account of the variety of the national legal systems and diversity of specific cases.

6.4 Dilemmas in the prosecution of domestic violence

Criminalization and criminal prosecution of domestic violence are measures that are absolutely necessary to mark the gravity of such acts. Hopefully, such measures also contribute to the prevention of such violence. During the last decades there has indeed been an increased focus on criminalization of domestic violence, which has led us to focus on legal amendments, more severe penalties and use of other legal measures. Has this diminished the

focus on measures that empower the victim? How does this focus affect the large number of women who choose to stay with the aggressor?²⁰ According to studies in Norway, only fifteen percent of the violence committed is reported. I assume Norway is not in an exceptional position.

According to the British researcher Carolyn Hoyle, the focus on criminalization has implied less emphasis on measures to build up the victim and increase her possibilities for control of her own life.²¹ Furthermore, recent research indicates that the use of criminal law does not necessarily meet the purpose of preventing domestic violence. Studies also show that women most of all want the violence to end, not to have their partner punished.

Hoyle found that there are at least three reasons why many women exposed to violence do not wish for the male partner to be punished: 1. They do not wish to split the family and end the relationship. 2. They hope that by staying and not bringing charges they can avoid the violence that is often committed when women take steps to end the relationship. 3. They consider the punishment by the legal system as inappropriate and unwanted. We may find these reasons more or less rational and sensible – in neither case can we ignore them.

Concerning the third reason, Hoyle found that some of the women were of the opinion that the criminal proceedings were not worth the outcome. These women did not consider the short and/or suspended sentences imposed to quite a few of the aggressors as punishment at all. Yet their most important objection was that they considered the punishment of little use or even meaningless. Most of the women interviewed by Hoyle claimed that both they and their aggressive partners were in need of help that was not provided for by the legal system.²²

This leaves us with several dilemmas and challenges: how do we help women who want the violence to stop but who do not want their partner to be punished? How do we help those who do not want to leave their husbands, those who have not

been exposed to serious violence, and those who consider that living with their violent husbands has benefits that outweigh the drawbacks? How do the police and the legal system deal with these women? How far should we investigate and prosecute despite the victims' withdrawal of charges? With regard to the supposed large dark figures – to what extent is focusing on legal measures a proper and adequate use of resources? How do we handle the fact that putting the father in prison implies new economic, practical and social concerns for the mother? How do we avoid that ex officio prosecution make it impossible to help women who indeed do not want their partners to be sentenced?

6.5 Is restorative justice an alternative in cases of domestic violence?

As stated above, the need for criminalising domestic violence is unquestionable, but yet insufficient. We should also consider restorative justice as an alternative. The aim of restorative justice is to restore the damage caused by the wrongdoing rather than punishing the offender. A restorative justice process aims at making the offender admit and repent his wrongdoings, and recognise the harm caused to the victim, making the victim an active part in this process and in the search for measures that can restore the harm and damages caused.

Such a process, which is based on the victim's consent, gives ownership of the conflict to the parties. It may thus empower the victim. Restorative justice may include reconciliation between the victim and the aggressor, network conciliation, conferencing and so-called sentencing circles.

Should we consider restorative justice in cases of domestic violence? Will such a process meet some of the dilemmas pointed out above? Or is the imbalance between the parties an obstacle in a process that requires the considerable involvement of the victim? Can we overcome the difficulties of using restorative approaches in order to benefit from its advantages and potential repairing outcomes?

The most likely answer to these questions is that

20 M. Hydén (1995), *Kvinnomishandel inom äktenskapet. Mellan det omöjliga och det möjliga*. Fakköping, Liber utbildning. (Violence within the marriage. Between the possible and the impossible.)

21 C. Hoyle (1998), *Negotiating Domestic Violence: Police, Criminal Justice, and Victims*. Oxford, Clarendon Press.

22 Id.

it all depends on a variety of factors, such as: the available alternatives in the traditional criminal justice system; whether the parties need to retain relations, for example due to joint parenting; the victim's health and resources; and the explanations for the offender's use of violence.

In any account, restorative justice should only be used if the following circumstances are fulfilled:

- it ensures that the victim's experiences, feelings and opinions will emerge for the affected parties more clearly than in the traditional criminal justice system
- it seeks to repair loss of trust and good relations by offering a safe environment for dialogue between victims and offenders
- it involves private and public networks around the family, when appropriate
- it prevents re-offending by building private networks
- it prevents re-offending by holding the offender accountable
- it assists the family in making an agreement that gives predictability as to how the victim and the offender should relate to each other in the future
- it involves public rehabilitation programs when needed.

- **What further legal and practical measures should be taken in order to ensure an effective investigation in cases of domestic violence and how far should we investigate and prosecute despite the victims' withdrawal of charges?**
- **Should domestic violence be subject to ex officio prosecution in all member states?**
- **Does the public interest in marking its attitude towards domestic violence through criminalisation jeopardise the women's basic interests in freedom from violence and self-control?**
- **How do we help women who want the violence to stop but who do not want their partner to be punished?**
- **How do we handle the fact that putting the father in prison implies new economic, practical and social concerns for the mother?**
- **To what extent and how could restorative justice be used as a response to domestic violence?**

7 Protective measures – hiding the victim or restricting the offender?

“Even before he has begun, he stacks up excuses like sugar lumps on a check table cloth. It is her own fault, she drives him to it, she has caused it herself. And as he takes off his jacket, loosens his tie, rolls up his shirt sleeves and feels how the liberated adrenalin stimulates his nervous system, his pulse rate quickens and his blood pressure rises, he is already transforming himself into someone quite different. Into the monster, the killing machine, the wife-beater, who he refuses to recognise. He is outside himself and far away, and he experiences what happens as if it were in a film.”

*Excerpt from the novel Kongemordet (Murder of a King)
by Hanne-Vibeke Holst*



7.1 Protection and support to victims of domestic violence

Stories of women who live with a violent partner often provoke intuitive and tactless remarks such as: "How is it that she does not leave? Surely we would." Such responses reflect two common presumptions. The first is that it is very easy to leave a violent partner. The second is that walking out the door puts an end to the violence. I suspect that neither of these presumptions is very sensitive to the experiences of women who have suffered from domestic violence.

Many women do attempt to escape a life of violence by leaving their partner. Yet, for many of these women the violence does not end with the relationship. On the contrary, research shows that violence seems to escalate during the break up phase rather than stop.²³ A study by Hart found that victims of domestic violence are exposed to fourteen times more violence during a break up phase than women who still live with a violent partner.²⁴ For many of these women the threats and the fear of repeated violence never end.

And how easy it is for us to be on the outside and say: "she could just leave". The lightness of this presumption is contrary to the experiences of many women. For many and for complex reasons the experience of women who have tried to leave or who have left abusive partners is that it is not an easy task. They may not have a place to live, they may be unemployed or lack working experience, they may fear what will happen to them and their children, they may live in hope that things will get better or they may think that violence is part of any relationship.

Victims of domestic violence are in need of a wide range of supportive and protective measures. Supportive measures are essential in order to empower the victim and enable her to build a future without violence. Such measures may include women's shelter, temporary housing, financial support, psychological support and medical services. It is crucial that such measures are designed also to include women who still live with a violent part-

ner. Empowering these women may put them in a position in which the choice between staying and leaving is real. We also have to acknowledge that some women wish to continue the relationship despite the violence. These situations also call for supportive measures such as therapy programs for the offender and restorative justice.

Protective safety measures are essential to ensure security and safety to victims of domestic violence. Examples of such measures are barring and go-orders and other forms of protection or restraining orders and electronic monitoring.

7.2 Shifting the burden – rethinking protective measures

7.2.1 INTRODUCTION

Many of the traditional protective measures have been framed in ways which entail primarily the victim having to take the consequences of the violence.

Radical measures such as relocation and fictitious identity may in some cases be required in order to shield the victim from the offender. A change in identity has detrimental psychosocial consequences for the victim. The victim has to start her life all over again and be constantly on the alert in order to avoid revealing her previous life to new friends and acquaintances. Thus, these measures may provide protection but they do not preserve the victim's freedom.

Less restrictive measures such as temporary shelter also put much of the burden on the victim. A shelter offers a place for the woman to seek refuge from the offender. Yet, it requires that the victim leaves her home.

Mobile violence alarms are another example of a measure which places the burden on the woman. A mobile violence alarm carried by the victim implies that the victim is the one who continually has to watch out for the violent offender and make sure that the alarm is at hand and in working order.

23 L. Brancoft & J.G. Silverman (2002), *The Batterer as a Parent*. Thousand Oaks, Sage Publications; J.B. Hart (1990), Gentle jeopardy: The further endangerment of battered women and children in custody mediation. *Mediation Quarterly* 7, p. 317-30. Referred to in Steinsvåg loc cit at n 7 above.

24 Hart loc cit at n 23, referred to in Steinsvåg loc cit at n 7 above.

It is indeed a paradox that the person who is threatened is the one who carries the heaviest load. Why is it worse for the perpetrator to be “locked out” from certain areas than it is for the victim to be “locked in”? Why should the victims have to seek refuge – why should the perpetrator not be the one to have to find temporary housing and be restricted from entering the house? Why does it seem more important to preserve the freedom of the offender than to preserve the freedom of the victim?

I suspect that this way of framing protective measures reveals a specific presumption on the relationship between the state and the individual. The presumption is that it is worse for the state to actively restrain the freedom of one individual in order to preserve the freedom of another than it is for the state not to intervene to protect those whose freedom is restrained by other individuals. I think it is time to challenge this way of thinking.

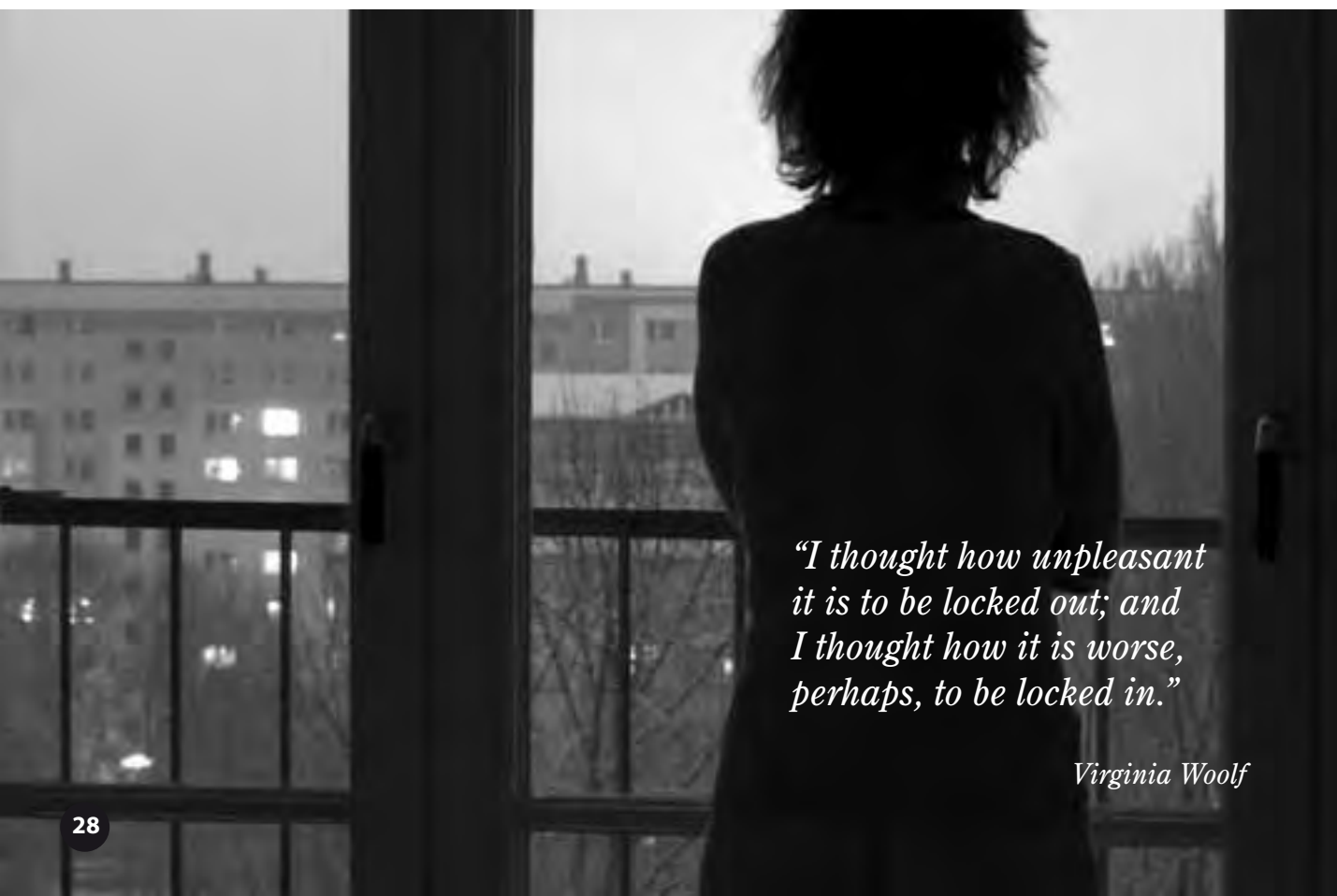
Our future efforts to empower victims of domestic violence should therefore be directed at measures which shift the burden from the victim to the offender. Further steps in this direction, however, require us to discuss how to strike a balance between the rights of the offender and the irrefutable right of the victim to enjoy a life free from violence.

7.2.2 BAN ON CONTACT AND ELECTRONIC MONITORING

One way to ensure that the burden is placed on the offender rather than the victim is to impose measures such as bans on contact or visits on a partner that poses a threat to the woman. By prohibiting the alleged offender from entering into specific geographical areas rather than relocating the victim, the victim may be able to maintain her job, pick up the children at school, visit friends and relatives and enjoy social and recreational activities. Such measures may be imposed both prior to and following conviction.

The victim’s burden may be lifted furthermore by applying measures such as electronic monitoring and other surveillance techniques (radio frequency, voice verification and satellite tracking technologies) to monitor a ban on contact or visits.

The basic idea with electronic monitoring of a ban on contact or visits is to let the offender wear a foot strap that enables the police to actively monitor whether he complies with the ban. The advantage of such monitoring compared with, for example, mobile violence alarms carried by the victim, is that it gives the victim and the police time to intervene



“I thought how unpleasant it is to be locked out; and I thought how it is worse, perhaps, to be locked in.”

Virginia Woolf

or take precautions before the offender reaches the victim. Additionally, it enables the victim to move freely within these predefined zones without being constantly on the alert. Electronic monitoring also enables the police to secure evidence in cases where the offender does not comply with the ban.

Some countries have already taken steps to implement electronic monitoring in their legal framework. In Spain electronic monitoring of aggressors has since 2006 been the backbone of a domestic violence deterrent program operated by the community of Madrid and the Balears. Here, a system was designed creating a virtual protective zone around victims, warning of potential encounters between aggressors and victims in order to support the enforcement of restraining orders issued by the police and the courts.²⁵ To my knowledge, a follow up evaluation of the measure is under way.

The Norwegian government recently proposed a legal amendment that will authorise the use of electronic monitoring of a ban on contact or visits.²⁶ At this point we have only proposed to allow for the use of electronic monitoring of offenders as part of a sentence.

A Swedish report takes a step further, suggesting a new act on bans on contact orders that allows for electronic monitoring prior to conviction.²⁷ This is an avenue that merits further consideration and discussions. The pre-conviction phase is a time during which the victim is particularly vulnerable. We know for example that aggravated violence is higher shortly after the breaking up of the relationship between the aggressor and the victim. Efficient protection is thus particularly valuable during this phase. Yet, electronic monitoring of an individual who has not been convicted for a crime provokes special dilemmas and may, as I shall discuss in more depth below in Section 7.2.3, pose particular challenges with regard to the European Convention on Human Rights.

25 Referred to in SOU 2008:81 *Stalking – ett allvarlig brott* (Stalking, a serious crime), chapter 7.

26 Ot.prp. nr. 25 (2008-2009) *Om lov om endringer i straffeloven og straffeprosessloven (kontaktforbud med elektronisk kontroll, endring av saksbehandlingsreglene ved besøksforbud mv.)* (Proposal on amendments to the General Civil Penal Code and the Criminal Procedure Act on contact ban, electronic monitoring etc.).

7.2.3 DILEMMAS

Although a shift in the burden may enhance the freedom and security of the victim it may restrain the freedom and liberty of the alleged offender more excessively than traditional protective safety measures. To illustrate, electronic monitoring of contact orders requires the offender to wear a foot strap at all times. He has to recharge it and he has to be available for the police to call him at all times. It also enables limited surveillance in case the offender enters into protected areas. In addition, effective protection requires the offender to be banned from a considerable area in order to give the police sufficient time to take precautions after being alerted to prevent the offender from reaching the victim. This may potentially and depending on the circumstances, such as where he lives and works, restrict his life considerably.

Imposing measures which put the burden on the offender, therefore raises the question of whether such measures may interfere with the right to liberty under Article 5 and the right to freedom of movement under Article 2 of Protocol No. 4 to the European Convention on Human Rights.

While electronic monitoring following conviction raises no particular concern in relation to the Convention, it is not readily apparent whether electronic monitoring prior to conviction, typically as part of a type of criminal procedural restraining order implying a ban on visits is compatible with the Convention.

The answer to this question may depend in part on whether electronic monitoring is viewed as a deprivation of liberty under Article 5 or merely as a restriction of the right to freedom of movement under Article 2 of Protocol No. 4.²⁸

27 SOU 2008:81 loc cit at n 25 above, chapter 7.

28 The Norwegian proposal on electronic monitoring takes the view that electronic monitoring prior to conviction may raise concerns in relation to Article 5 of the Convention. See Ot.prp. nr. 25 (2008-2009) loc cit at n 26 above, section 3.6.4. A recent Swedish report on the other hand argues that electronic monitoring prior to conviction does not necessarily fall within the ambit of Article 5 and that in any case it may be justified according to Article 5 (b) or 5 (c). See SOU 2008:81 loc cit at n 25 above.

Interference with the right to liberty under Article 5 is prohibited unless it can be justified on one of the grounds listed in the article. The threshold under Article 2 of Protocol No. 4, on the other hand, is more flexible. Interference with the right to freedom of movement may be justified when considered necessary in a democratic society for any of the purposes listed in Article 2.

The European Court of Human Rights has held that the distinction between restrictions upon freedom of movement which is serious enough to fall within the scope of Article 5 and others which fall within Article 2 of Protocol No. 4 is one of "degree and intensity".²⁹ Factors which must be taken into account include 'type, duration, effects and manner of implementation of the measure in question'.³⁰ Considerations such as social isolation are also relevant where the physical constraints are not as heavy as in a prison cell.

The Strasbourg Court has held that a limitation upon freedom of movement by which Greek Cypriots could not leave a village was not subject to Article 5.³¹ Similarly, the Commission dismissed a case by an individual who had applied for asylum in Sweden (Dec Adm Com Ap 13344/87). The applicant had been restricted from leaving two specific counties in Sweden. He also had to report to the police three times each week. The Commission held that this measure could not be viewed as a deprivation of the applicant's liberty under Article 5. The Commission argued that he was able to move freely within two large counties and travel between the counties.

Even if electronic monitoring is considered to fall within the ambit of Article 5 it may be possible to justify such measures prior to conviction on the grounds listed in Article 5. Electronic monitoring imposed on the condition that the offender has already violated a ban on contact may be justified pursuant to paragraph b. Electronic monitoring prior to conviction may further be justified according to paragraph c if the offender is suspected of

having committed a criminal offence. This last alternative may be particularly relevant if the person is charged with acts of domestic violence and there is a risk of him reoffending.

Given the conflicting interests involved, electronic monitoring requires the establishment of appropriate rules and professional ethics for the efficient use of these surveillance means in full respect of human rights. This is an area where further discussions and exchange of views is needed. Experience with electronic monitoring will also put us in a better position to determine its effects on the offender and the benefits for the victim, thus enabling us to strike a proper balance between these concerns.

We also need to develop safeguards regarding its use and standards on how to keep the right balance between the protection of public order and the interests of victims and the need for assistance and treatment of the offender, in order not to lower but to raise his chances of social reintegration and his prospects of living a law-abiding life.

7.3 Protecting lives – risk assessment

In several cases where women have been killed by their partners, the authorities have known of previous incidents of violence, and the victim might have received assistance by the police due to the situation.

To provide effective protective measures for the victims we must be able to accurately assess the level of risk in each situation. This requires information on general and case specific risk factors. One important measure to gain information about general risk factors can be to study cases of murder and manslaughter where the perpetrator was the partner of the victim.

²⁹ See *inter alia* *Guzzardi v. Italy* (no. 7367/76, judgment of 6 November 1980), para. 93.

³⁰ *Id.* para. 92.

³¹ *Cyprus v. Turkey* (first and second applications) Nos 6780/74 and 69/50, 4 EHRR 482, p. 524.

The Spousal Assault Risk Assessment Guide (SARA) is a set of structured professional guidelines for assessing the risk of spousal violence. Criminal justice professionals, including the police, have used the instrument in Canada for many years. The system comprises 20 risk factors that reflect various aspects of criminal history, social functioning and mental health. The risk factors were selected based on a comprehensive review of professional and scientific literature.


When assessing the risk in an individual case, due account must be given to the knowledge the victim herself possesses about the perpetrator's behavioural patterns, triggering factors etc.

7.4 Intervention programmes and measures for offenders

Perpetrators of domestic violence should have access to effective intervention programmes and measures in order to prevent and minimise the risk of repeated offending. Such an access should be ensured throughout the whole criminal justice process, while in custody, as well as in the community in such a way that the presumption of innocence and the due judicial process are not affected by the fact that the perpetrator has accepted to take part in these programmes and measures. Programmes addressing both the individual factors

for domestic violence (aggression management, substance abuse, etc.) as well as its community aspects should be developed in a balanced way in order to deal comprehensively with the problem and effectively reduce the risk of re-offending. The issue of intervention programmes and measures would merit further consideration by the Council of Europe with a view to developing guidelines where necessary.

- **Which measures are needed to protect victims from being abused?**
- **How can we provide security to the victim and yet, ensure the freedom of the victim?**
- **When and on what conditions can electronic developments be used to protect victims of domestic violence?**



“But the life that no longer trusts another human being and no longer forms ties to the political community is not a human life any longer.”

Martha Nussbaum

8 Growing up with domestic violence

“When I am in bed, I always listen to what happens in the living room. I’ve got my shoes in my room at night. Maybe Mum and I have to go to the shelter later.”

Emma, 11 years old.³²



³² Id.

8.1 Domestic violence as a childhood condition

Children have an irrefutable right not to be subject to or exposed to violence. Children also have a right to be cared for. These rights, which are enshrined in the United Nations Convention on the Rights of the Child, are essential preconditions for enjoying the right to life and for protecting children's integrity and dignity. State authorities are on the other hand obliged to protect children from being exposed to domestic violence and to ensure they receive adequate care.

Yet, many children grow up with domestic violence as part of their childhood. Children who are exposed to violence in their own home are particularly vulnerable. They have no means to avoid the violence on their own and they have no place to hide and no place to go unless somebody outside the family intervenes.

We know that children suffer severely from witnessing their mother being abused by their father. The children suffer here and now and for many the violence and the memories affect their adult lives as well, including their relationships with their own partner and children.

Domestic violence affects the childhood conditions of children not only because of the detrimental consequences of the violence itself, but also because it may affect the parent's ability to provide adequate care for the child. There is for example sound reason to question the parenting skills of a parent who is violent towards the other parent. Being abused may also temporarily affect the victim's ability to take care of the child and to ensure that the child feels safe and secure.

In addition, children who are exposed to domestic violence are particularly vulnerable because domestic violence often goes hand in hand with other social problems such as abuse of alcohol or drugs, unemployment and poverty.

The most important way we can help children is to put an end to the violence or to ensure that they are no longer exposed to it. It is thus essential that

we find ways to protect victims of domestic violence from being abused. By protecting the mother we also protect the child.

It is equally important that we spread knowledge about domestic violence. As the title of this report stresses, domestic violence is hidden in nature. It is one of the taboos of modern societies and it often remains a secret from those who come in contact with children. During the last two decades we have gained increasing knowledge of the detrimental consequences exposure to domestic violence has on children. We need to make sure that child care authorities, child psychiatrists, the police, prosecutors, judges, the school staff, medical personnel and others who come into contact with children and their parents have this knowledge. There are two inherent forces of knowledge. The one force of knowledge is that it commits us; once we know, we can no longer ignore children who are exposed to domestic violence. The second force of knowledge is that it creates a basis for improvement. Knowledge of children and exposure to violence, of the signs of exposure to violence and of the consequences it has, gives us a better basis for developing adequate therapy and for initiating other measures which can be of help to children who have suffered or who are suffering from domestic violence.³³

We also need to develop and provide supportive measures to children who have been or still are exposed to domestic violence. Children who have been exposed to domestic violence may be in need of a wide range of supportive measures. They may need therapy and the abused parent may need assistance in order to take care of the children. Cases of domestic violence may further lead to criminal proceedings against the offender in which the child may have to be a witness. Domestic violence may also result in a break-up of the relationship between the parents, which raises the question of custody and contact rights.


In the following I will address three aspects of protection of children who have witnessed domestic violence. First I shall look at the manner in which courts address domestic violence in proceedings on

³³ M. Raundalen (2004), *Bulleteng 1 Nyhetsbrev*, in the project: "Barn som lever med vold i familien" (Children who live with violence in their family). The paper is published on the webpages of the organisation Alternativ til Vold (Alternative to violence) www.atv-stiftelsen.no and Senter for krisepsykologi (Centre for crisis psychology) www.krisepsyk.no.

custody and child contact. Second, I will emphasise the importance of recognising children who witness violence as independent victims when exposed to domestic violence. Children who have been exposed to domestic violence often come into contact with many different institutions and authorities. Adequate

support therefore requires a multidisciplinary and integrated approach.

Third and last I will stress the importance of a holistic and integrated approach in providing support to children who have been exposed to domestic violence.



“I fear when my dad comes out of prison. I am afraid that a judge will decide that I have to spend time with my dad. I am afraid that my dad will kill my mother.”

Isra, 10 years old.

8.2 Taking children’s rights seriously in cases of custody and contact rights

“Kristian” was 17 when we met for consultation. He had committed many acts of violence at this point. He had among other things cut another boy in the throat with a broken bottle (of beer) with life-threatening consequences. He was 9 years old when his parents divorced. By that time he had witnessed his father hitting his mother over many years. At that point his father had never beaten Kristian. The break up was followed by trial proceedings concerning custody and the court appointed an expert. The result was that Kristian lived with his father while his two younger siblings lived with their mother. The children saw the other parent once every week and every second weekend. Kristian was often beaten by his

father after the break up, on average twice a week until he was 16 years old, approximately 700 times in total. His siblings were not beaten during visits to their father. His father cried and was sad each time he beat Kristian, and he promised it would never happen again. Kristian’s mother told in a joint consultation with Kristian that she was terrified of his father during the break up phase and she had partly agreed that Kristian should stay with his father.

Kristian was already at the time of the break up strongly affected by the violence he had witnessed. After the break up his father started to abuse him. Yet, none of the actors in the trial proceedings on custody and visitation rights questioned his father’s ability to take care of his children, not even his mother.³⁴

8.2.1 DO COURTS AND CHILDCARE AUTHORITIES ADDRESS EXPOSURE TO VIOLENCE?

Regrettably, the story of “Kristian” is not exceptional. Recent studies indicate that courts and childcare authorities do not always see violence between the parents as a relevant factor when assessing the violent partner’s ability as a parent when deciding on contact rights.

Maria Erikson asserts in a Swedish study that domestic violence rarely becomes a relevant issue in court proceedings on child custody and contact rights. She also found that the social workers who prepared the cases did not see any correlation between violence against the mother and violence against the children. A common presumption among social workers was that a man could be “a bad partner” and yet be a good father.³⁵

A study by Kristin Skjørten supports these findings.³⁶ Skjørten found that Norwegian courts, in cases where allegations of domestic violence had been made, very rarely questioned the alleged abusive father’s capacities as a father on this ground. The study included every appeal court judgment on custody and contact rights over a period of three years (129 in total). Allegations of violence had been made in 30 of these cases. Violence was profoundly documented in 14 of the cases, but only three of the judgments gave weight to the violence. One important reason seems to be that the court considered that violence was no longer a pressing concern since the relationship between the parents had come to an end.

There is however sound reason to ask whether a father who is violent toward the mother is able to be a good father.

In the first place, as already emphasised above in section 7.1, partner related violence often continues after the break up, contrary to what was presumed in some of the judgments referred to in Skjørten’s study. Very often the child is likely to witness this

violence because it is committed when the child is delivered or picked up in connection with visitation. The father may also be abusive towards a new partner, thus exposing the child to violence if he has the custody or during visits. Sometimes the violence may be transferred to the child after the break up as was the case in Kristian’s story.

Second, abusive behaviour towards the child’s mother may in some cases imply that the father is unable to be a good father. It should be stressed that it is difficult to draw any general conclusions on this issue. Decisions must be made on a case-by-case basis. Some fathers who have been violent towards the child’s mother may indeed provide a safe environment for the children despite the violence.³⁷ Nevertheless, in many cases there may be sound reason to raise concern over the father’s ability to provide adequate care for the child for the reason that he has been abusive towards the mother. Although studies on domestic violence have rarely looked directly at violent partners’ abilities as a parent, research on domestic violence implies that partner violence poses a risk of other forms of destructive behaviour towards the children such as sexual violence, abuse of drugs or alcohol and psychological problems.

Some of the fathers concerned also have a history of excessive and aggravated violence towards the mother. In some cases protective measures such as ban on contact have been issued. Yet, even in some of these cases the father may be granted visitation rights.³⁸ This may not only jeopardize the security of the mother, it may also be contrary to what is in the best interests of the child.

The studies referred to therefore suggest that there is a gap between the law as it is envisaged in the United Nations Convention on the Rights of the Child and the law as it is applied. Taking the right of the child not to be exposed to violence and the right to be cared for seriously entails that decision-makers address the possible linkage between a parent’s abusive behaviour towards the other parent and his

35 M. Erikson (2003), *I Skuggan av pappa. Familjerätten och hanteringen av fädrens våld*. Stehag, Forlag AB Gondolin. Referred to in Steinsvåg loc cit at n 7 above.

36 See K. Skjørten (2004), *Samlevsbrudd og barnefordeling*. Oslo, Gyldendal Akademisk. Referred to in Steinsvåg loc cit at n 7 above and I. Eriksen & P.Ø. Steinsvåg (2005) *Bulleteng 2, om sikkerhet*, in the project: “Barn som lever med vold i familien”. (Children who live with violence in their family). The paper is published on the webpages of the organisation Alternativ til vold (Alternative to violence) www.atv-stiftelsen.no and Senter for krisepsykologi (Centre for crisis psychology) www.krisepsyk.no.

37 Steinsvåg loc cit at n 7 above.

38 Id.; Stocktaking Study loc cit at n 2 above.

capacity as a parent. Moreover, the principle of the best interests of the child requires as a minimum that decision-makers address and consider factors which may affect the interests of the child. The father's ability to provide care for the child and the security of the child certainly are such factors.

We have to acknowledge however that addressing domestic violence in cases of contact and custody rights may inevitably give rise to difficult dilemmas.

In the first place, courts and decision-makers are put in a difficult position when allegations of domestic violence are made, and there is no safe side to fall on. In a criminal case we can all agree that it is better to acquit ten guilty individuals than to punish one innocent. This principle has no value when allegations of domestic violence are made in cases on custody and contacts right. If the court wrongly takes into account that the father has been violent to the mother and thus as a consequence denies contact rights or custody, irreversible harm is done to the child. Yet, if the court does not take into account such allegations when they are in fact true, there is a risk that the decision may have detrimental consequences for the child.

Giving weight to alleged domestic violence might also put into question the right of the offender to be presumed innocent until proven guilty. This dilemma is particularly evident if the parent who is alleged to be violent has been acquitted of charges of domestic violence or criminal investigations or proceedings have been dismissed or have not been initiated.

The evidentiary situation is also difficult. Decision-makers might suspect that the allegations are false and that they are intended to harm the father. Yet, while the court, in some cases rightly so, may suspect that allegations of violence are false, very often perpetrators will not admit their wrongs. In fact, research indicates that only 5 % of all allegations of domestic violence in cases on custody and contact rights are false.³⁹

The right not to be exposed to violence may also be viewed as contradictory to the right of the child to have contact with both parents. The conflict

between the right of the child to have contact with both parents must, however, be resolved in light of what is in the best interests of the child. The principle of the best interests of the child is the overriding principle in determining issues which concern children. Sometimes it may be in the best interest of the child not to have contact with a violent parent.

8.2.2 CLOSING THE GAP

Both courts and other decision-makers should be compelled to make inquiries into allegations on domestic violence and to assess on a case-by-case basis whether and to what extent partner violence affects the violent partner's ability as a parent. I believe this already follows from *inter alia* the principle of the best interests of the child – a principle enshrined in the United Nations Convention on the Rights of the Child which underpins legislation on children in a considerable number of countries worldwide.⁴⁰

Closing the gap requires perhaps first and foremost awareness raising. Judges and other decision-makers must receive adequate training on the consequences that exposure to domestic violence may have on children, how it may affect the ability of the violent partner as a parent, as well as training on how to assess the risk of further exposure to violence.

I also suspect that legal amendments might be needed in order to compel decision-makers to properly address domestic violence in cases on custody and contact rights. Such amendments may also increase awareness on these issues.

Several countries have already taken steps which may provide a source of inspiration for our future efforts to close this gap. The Spanish law on "Integrated Protection Measures against Gender Violence" provides that a violent parent "when the Judge or Court deems it to be in the interest of the minor or incapacitated person, (can be) disqualified from the exercise of parental authority, guardianship, custody or foster care for a period of six months to three years."⁴¹ The Stocktaking study also refers to a decision by a High Court in Germany in which the

39 N. Thoennes & O. Tjaden (1990), A review of quantitative research on men who batter. *Journal of Interpersonal Violence* 5, p. 87-118; C.S. Bruch (2001), Parental alienation syndrome and parental alienation: Getting it wrong in child custody cases, *Family Law Quarterly* 35, p. 527-552. Referred to in Steinsvåg loc cit at n 7 above.

40 See *inter alia* P. Alston (ed.) (1994), *The best interest of the child*. Oxford, Clarendon Press, p. 1-25.

41 See Steinsvåg loc cit at n 7 above.

court stressed the importance of child welfare over contact with the violent father. In Norway, section 48 of the Children Act explicitly states that decisions concerning child contact shall take into account that the child shall not be exposed to violence.

In comparison, New Zealand has taken a step further. The general rule in New Zealand is that in cases where one of the parents has been violent towards the other parent, the latter is automatically granted custody. The violent partner may furthermore only have supervised contact with the child.⁴²

8.3 Recognising children as independent victims

Due to both lack of knowledge as well as acknowledgement of the harm caused to children exposed to domestic violence, criminal law, criminal procedural law and restorative justice measures have traditionally been aimed at the adult female victim. Based on the knowledge we have gained, it is time to consider if different types of measures should be altered or adjusted in order to recognise children as independent victims.

If the mother is harmed, the child exposed to the act is also harmed. In my view, compensation schemes awarding compensation to the mother should thus also award compensation to the child exposed to the domestic violence. Providing for criminal injury compensation to the child is an acknowledgement of the injustice caused to the child. Furthermore, such an arrangement underlines the fact that domestic violence affects not only the life of the mother, but the life of the child as well.

Recognising children as independent victims also implies that we must acknowledge their exceptional position as victims. Children have limited possibilities, both factual and legal, to protect their own interests. They are thus dependent on a representative exercising their legal rights. Providing for legal counsel for the exposed children during criminal proceedings in cases of domestic violence is necessary in order to give full recognition to children as independent victims.

8.4 Supporting children – a multidisciplinary and integrated approach

Many victims of domestic violence, in addition to the traumatic experience the violence in itself represents, afterwards have to go through a process which can also be traumatic for them.

Testifying in court may for example be particularly painful to a child. It is important that the process for questioning children is sensitive to their special needs. Children should not be questioned in the same way as adults. Many countries have adopted special procedures for conducting interviews with children. In Norway children under the age of 14 are, for example, questioned by a judge outside regular court proceedings.⁴³

It is also important to spare the child from testifying several times as this may add to the trauma.



42 Id.

43 Forskrift 2. oktober 1998 om dommeravhør og observasjon, § 1 (Regulation of 2. October 1998 on questioning of children and observation, section 1)

Support and assistance to children who have been exposed to violence involves a number of different institutions and authorities. I therefore wish to stress the importance of a multidisciplinary and integrated approach to providing support to children in order to ease the burden. The Children's Advocacy Centres, which have been established in Iceland, Sweden, the United States, Norway and in some other countries, represent models of such an approach.

One of the purposes of these centres is to ease some of the burden for children who are victims of domestic violence or sexual exploitation. Interviews with the children and medical examinations take place at these centres and the children receive help, care and treatment. By establishing these Children's Advocacy Centres the victims of domestic violence will not be sent from one place to another. I believe this approach supports the victims and allows the process after the exploitation to be less distressing.

- **How can we raise awareness of the consequences that exposure to domestic violence has on children among authorities, institutions and individuals who come into contact with children?**
- **How can we ensure that children who are exposed to violence are recognised as independent victims?**
- **How can we ensure support and protection to children who are exposed to domestic violence?**







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