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## **Interventie door uithuisplaatsing**

**De juridische mogelijkheden van uithuisplaatsing  
van plegers van huiselijk geweld in Oostenrijk  
en Duitsland**

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Summary

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## Summary: The legal arrangement of eviction in cases of domestic violence

In various European countries a paradigm shift has taken place with regard to domestic violence. Violence within the family is no longer regarded as a private problem without relevance for the government, but as a social problem involving public interest. The title of a recent report by the Dutch cabinet illustrates a new perspective on this issue: *Private violence — Public matter*. The report describes the issue in powerful terms: “Domestic violence is the most common form of violence in our society. No other form of violence produces as many victims as domestic violence. Substantially reducing the amount of violence in our society is only possible if we deal forcefully with violence in the private sphere. Therefore, discussions about security in our society must confront violence in public spaces as well as violence in the private sphere.”<sup>1</sup>

The goal of this research project is to compare foreign measures against domestic violence, particularly in the area of eviction, and evaluate whether the Netherlands needs to consider additional measures in this area. The prospects for eviction, in this context, are inextricably linked to other arrangements within civil and criminal law. Thus the only way to analyse whether the Netherlands needs to adopt additional measures to protect the victims and punish the perpetrators of domestic violence, is to assess sets of interrelated measures. This research project focuses on the viability of regulations for eviction. In March 2002, prior to publication of the cabinet’s report, the Ministry of Justice received a document by the Verwey-Jonker Institute entitled *The legal arrangement of crisis intervention in cases of domestic violence*. Subsequently, in *Private violence — Public matter*, the Ministry of Justice responded positively to this document’s proposals for dealing with the eviction of perpetrators of domestic violence.

### Existing legal instruments in the Netherlands

#### *Criminal law instruments*

When caught red-handed in the act, or in case of a crime allowing for pre-trial detention, the police may arrest the perpetrator and bring him or her to the police station for further questioning and subsequent police custody (sect. 53 and 54 CCP). If there is sufficient ground, pre-trial detention may be applied (sect. 67 and 67a CCP). Where domestic violence meets the qualifications for abuse, trespassing, or destruction, the perpetrator who is not caught in the act cannot be arrested or put in pre-trial detention, because the maximum prison term for these crimes is less than four years. It is possible, however, to increase the penalty by a third in case of abuse of a (former) spouse,<sup>2</sup> child, or parent (sect. 304 PC). Since the maximum statutory penalty for abuse will soon be raised to three years imprisonment, abuse of a spouse or child will enable pre-trial detention. *Private violence — Public matter*, the report produced by the cabinet, proposes to include the term ‘life partner’<sup>3</sup> in sect. 304 PC, making pre-trial detention possible in cases of violence against (unmarried or unregistered) partners.<sup>4</sup> Furthermore, a judicial injunction to safeguard public order may also be cause for detaining the perpetrator of domestic violence (if caught in the act) in cases that otherwise would not have led to pre-trial detention. A legal prerequisite for such a situation is that the disturbance of public order must be serious and the chance of recurrence high. Generally, the minister of Justice insists on considering domestic violence a disturbance of public order.

In practice, though, domestic violence usually does not result in detention of the perpetrator and if it does, the length of deprivation of liberty is as a rule not more than three days. The severity of the committed violence - often the incident is a form of abuse and destruction - usually does

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<sup>1</sup> *Privé geweld—Publieke zaak. Een nota over de gezamenlijke aanpak van huiselijk geweld*, ministerie van Justitie, Den Haag 2001, p. 5.

<sup>2</sup> This includes registered partners (art. 90 octies PC).

<sup>3</sup> *Privé geweld — Publieke zaak*, op. cit., p. 33-34.

<sup>4</sup> *Privé geweld — Publieke zaak*, op. cit., p. 33-34.

not allow for longer-term of deprivation. Moreover, a judicial injunction to preserve public order is also rare, because the procedure is time-consuming and impractical, because the magistrate who decides on pre-trial detention as a rule is not available 24 hours a day or in the weekends.

The police regards the limited opportunities for arresting a suspect for longer periods of time as a significant problem, because detention is only possible if it is necessary in light of an investigation; the need to provide assistance is not sufficient ground for detention in the Netherlands. Currently, the period of detention is often too short to develop a plan to protect the victim's safety by making arrangements for alternative housing and assistance to the victim and perpetrator.<sup>5</sup> The victim needs a longer period of rest to recover from the violence, resume her (or his) normal life, and take measures under civil law to remain in her (or his) residence.

The proposed changes in civil law will not solve this problem, because detention is only an option if it is necessary in light of an investigation, whereas providing assistance is insufficient ground for detention. Furthermore, pre-trial detention is only a viable option if the suspect is likely to receive a penalty that in some way restricts his or her freedom (anticipatory order, art. 67a section 3 PC). Given the nature and severity of the criminal act, the term of imprisonment will usually not exceed a few days, also because longer jail terms generally do not solve the problem itself.

#### *Possibilities within civil law*

During a divorce procedure, the house may be temporarily assigned to the victim, usually the wife (with or without children), even if the perpetrator is the official owner of the house (art. 821 e.v. Civil procedure Code). This is only possible, though, if the parties have already filed for divorce. If the parties are not married, the victim may try to become the sole tenant of the residence they are renting, have the perpetrator evicted through a temporary injunction, or get a restraining order (sect. 3:296 Civil Code). The temporary injunction can be requested if the current situation requires a temporary solution (sect. 289 Civil procedure Code) and the defendant has committed an illegal act. Generally, domestic violence is considered an illegal act.<sup>6</sup> The judge can authorise means to enforce obedience of an injunction. But since disobeying a restraining order is not a criminal act, the judge cannot enforce compliance with such an order.<sup>7</sup>

Measures under Dutch civil law have several disadvantages. The judge can only order eviction as a temporary solution if the divorce procedure has been started, but not all victims of domestic violence want a divorce; they just want the violence to stop. In addition, victims who live together with a partner without being married cannot request eviction in this way. Another disadvantage is that only the victim of violence can take the initiative for eviction, even though (recurring) violence often keeps the victim from doing so. And finally, current measures under civil law do not offer solutions in times of crisis: immediate eviction after the violent incident by a public authority like the police is not allowed. Therefore the immediate safety of the victim cannot be guaranteed.

## **Lessons from abroad**

### *The "Gewaltschutzgesetz" in Austria*

The *Gewaltschutzgesetz* got effect in 1997 and was reformed in 2000. The Act is not an autonomous one, but incorporates various sections that are part of different laws. The *Gewaltschutzgesetz* not only enables the police to order temporary eviction, but also allows the victim of domestic violence to request eviction under civil law. The police is entitled to order

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<sup>5</sup> Project Voorkomen en bestrijden 'huiselijk geweld', plan van aanpak, ministerie van Justitie, Den Haag 2001, p. 8.

<sup>6</sup> K.D. Lünemann & D.J.G. Piechocki, *Seksueel geweld betaald gezet*, juridische gids civiel- en strafrechtelijke schadevergoedingsmogelijkheden, Ars Aequi Libri, Nijmegen 2001.

<sup>7</sup> This is considered one of the problems in the Aware-project. R. Römkens & S. Mastenbroek, *Dan hoor je de vissen ademen*. Over belaging en bedreiging van vrouwen door hun ex-partner en de beveiliging door het Aware-systeem, Universiteit Utrecht 1999.

eviction by article 38a *Sicherheitspolizeigesetz* (SPG, the police law); when there is sufficient ground for fearing harm to life, health, or freedom, the perpetrator may be ordered to leave the residence (*Wegweisung*) and prohibited from entering a certain area (*Betretungsverbot*). The basis for this article derives from the general function of the police in resolving conflicts (*Streitschlichtung*, art. 26 SPG). The order is communicated orally and must then be put in writing. A report must describe the circumstances that led to the order. A senior police officer (*Sicherheitsbehörde*) can test the legality of such an order within 48 hours and, if necessary, withdraw it. The maximum term of this order is 10 days.<sup>8</sup> Its purpose is to protect everyone who faces a situation in his or her house that endangers his or her life, health, or freedom. Approval by the victim is irrelevant in such situations. The police must demand an address from the evictee so that official documents can be served. The police must also check within three days whether the perpetrator is complying with the order. If not, the perpetrator is committing an offence - a *Verwaltungsübertretung* (art. 84 SPG) - for which he or she can be fined under administrative law. Upon failing to pay this fine, the perpetrator's freedom may be restrained for a maximum of 2 weeks, or he or she may be detained (art. 35 *Verwaltungsstrafgesetz*).

If the victim wants the perpetrator to leave the residence for a longer period of time and/or desires a longer-term restraining order, he or she must appeal to the civil court judge (the *Bezirksgericht*) for a temporary eviction within ten days, as stipulated in article 382b EO. Under Civil law the duration of eviction may be three months, which can be extended another three months if the victim initiates divorce procedures. This arrangement only applies if there is a family relationship between victim and perpetrator (as opposed to eviction through police order, which is applicable to everyone). One condition is that there must be concrete danger for another instance or threat of violence against the victim, although demonstrating a reasonable possibility of such danger is sufficient (sectn. 398 subsection 1 EO). Since this measure is automatically enforceable and may involve the police, the judge must inform the police about her or his decision immediately.

The police law has not only enabled the police to intervene in crisis situations, but also given it the task of implementing the measure under civil law. Consequently, communication between the police and the judicial system must be effective. The power to intervene in crisis situations is regulated by administrative law (the police law), because criminal law does not allow for instant crisis intervention and because the ministry and judiciary oppose dealing with domestic violence through criminal law.

Besides legal arrangements, the creation of advisory agencies (*Interventionsstellen*) is an important prerequisite for effective implementation of the law. These advisory agencies help guarantee the safety of the victim. When the police orders an eviction, it immediately sends its official report to an advisory agency, enabling it to contact the victim. In addition to formulating a protection plan, the advisory agency offers practical as well as social and legal support. Both the support of the individual victim and cooperation between the various organisations is crucial. The advisory agencies bring the various parties together and develop a framework for intervention and cooperation. The advisory agencies also play a role in advising the ministry of domestic affairs' Prevention Council.

This legislation has been effective in practice; it gives women and children more peace of mind and security, and allows for quicker and more effective intervention. This legislation also signals to perpetrators that domestic violence is intolerable. As a result, victims of domestic violence have generally been very satisfied with the assistance and support provided by advisory agencies. Eviction actually creates room to develop a protection plan, offer help, and decide whether to request a formal eviction under civil law.

The police is also satisfied with this legal instrument and considers it effective. As a result of its power to evict, the police now plays a clear role in dealing with this issue. Although the number of evictions in Austria is growing steadily, some police officials prefer to reconcile, negotiate, or

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<sup>8</sup> The term can be extended by another ten days if the victim asks the civil judge for a temporary measure.

arbitrate conflicts instead of evicting the perpetrators, often because they still feel that violence against a partner involves both parties in a relationship, not just the perpetrator (the old paradigm). In part due to this new legislation, documentation has improved because the order to evict must be recorded in an official report. Some people, though, regard the latter primarily as bureaucratic red tape.

#### *The Gewaltschutzgesetz in Germany*

Since January 1, 2002, Germany has a *Gewaltschutzgesetz*, an autonomous piece of legislation that is part of civil law. It aims at providing protection against domestic violence and stalking (*Nachstellungen*) within criminal law. The Act does not empower the police to take action in cases of crisis intervention by the police. German State legislators, which have reformed their police laws, empower the police with measures for crisis intervention.<sup>9</sup> In Nordrhein-Westfalen, e.g. a new article 34a NW PolG was added to the police law.

Based on article 34a NW PolG, the police may order the perpetrator of danger to body, life, or freedom to leave the residence and stay away from it. This oral order must be confirmed in an explanatory written report and may be contested in an administrative court procedure. A family relationship is not required. The main requirement is that the police deems the threat of violence imminent. The victim's approval is also not necessary. The police must require the perpetrator to provide an address so that official documents can be served. The police has to check compliance with the order, preferably within the first 3 days. If the perpetrator does not comply with the order, he or she may be detained (art. 35 section 1 NW PolG) or forced to comply through administrative coercion. The order lasts ten days and, within that period, the victim must file a request for eviction under civil law at the family court (*Familiengericht*).

Criteria for adopting this civil measure include: there must be a danger for life, health, or freedom; a danger for recurrence of violence (unless the violence was extremely severe); and a communal household. There is no time frame for the temporary measure if both parties are owners, but if only the perpetrator is the owner, the term is six months with a possible extension of another six months. The temporary eviction measure is only automatically enforceable. Failing to comply with an order to evict constitutes a criminal offence with a statutory prison sentence of one-year maximum or a fine. In Germany, the police law stipulates that the police also plays an important role in crisis intervention and ensuring that temporary measures are complied with, because disobeying the measure constitutes a criminal offence.

#### *Eviction or incarceration*

Besides the usual competencies under criminal law, the police in Austria and Germany are given leeway to intervene in crisis situations, while Austrian and German civil law allows for protection of the victim (upon his or her request) and calls on the police to ensure compliance with protective measures. Failure to comply is regarded as a criminal offence in Germany. This construction is similar to Anglo-Saxon legislation: the *Order of Protection* resembles the temporary measure in Austria and Germany and, like in Germany, failure to comply with the *Order of Protection* is also considered a criminal offence.

One difference with the Anglo-Saxon system is the way that the police engage in crisis intervention. In Austria and Germany this is based on police law, while the Anglo-Saxon system calls for mandatory arrest, which obliges the police to arrest a suspect of domestic violence immediately and bring him or her to the police station. The positive aspect of mandatory arrest is that the police arrests the suspect instantly and restores peace in the short term. In the long-term, however, the effects of such a measure are less uniform.<sup>10</sup> A significant disadvantage is that criminal procedures may ignore the needs of victims of domestic violence. Particularly for socially and economically underprivileged groups, mandatory arrest usually produces more harm

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<sup>9</sup> To prevent danger, the police can order someone, including a resident, to leave the premises (Platzverweis), but the time frame of this measure is very limited.

<sup>10</sup> L.W. Sherman, *Policing Domestic Violence*, The Free Press 1992.

than security.<sup>11</sup> Arrests prevent immediate recurrence of violence, but also have a stigmatising effect.

In Austria, the negative aspects of a criminal law approach led to a search for another foundation for crisis intervention by the police. A positive effect of eviction based on the police law is that the perpetrator is removed from the residence and confronted with a restraining order immediately, allowing the victim to calm down and take time to make her (or his) own arrangements. The infringement on the perpetrators' freedom is minimal and he (or she) can continue to go to work or visit friends. He (or she) is not stigmatised by arrest under criminal law.

### **Eviction as a topic of discussion**

The way that eviction of domestic violence offenders is organised in Austria and Germany could serve as an example for Dutch legislation in this area. Moreover, the legislative trajectory followed by these two countries indicates which aspects need to be discussed before drafting legislative proposals. Three themes are particularly important as subjects of discussion: protection of victims, child-related aspects, and technical issues.

The following questions arise in relation to the protection of victims: Should the victim be involved in the decision to evict in a crisis situation? How should the notion 'danger to body, life, or freedom' be defined? And, what role should advisory agencies and support agencies for perpetrators play in the eviction trajectory? Victims of domestic violence are often in shock after a violent incident and, therefore, not in a position to decide whether eviction is necessary. An order to evict indicates that the government disapproves of violence, also when it occurs behind closed doors, and assigns more value to the victim's right to bodily integrity than the perpetrators' right to his or her residence. In Austria and Germany, consequently, the police now has the right to give an order to evict without the victim's consent, but only the police in Austria sends its official report of the eviction to the advisory agency without prior approval from the victim. The assumption in Austria is that the female victim is isolated and that the advisory agency may contact her to find out whether she requires assistance. In Germany, this is considered an overly invasive breach of privacy. An order to evict is only possible in case of a danger to body, life, and freedom. In Austria, eviction usually only occurs in cases of physical violence, rarely in cases of sexual and psychological violence, because the former is easier to prove. It is easier to get approval for eviction under civil law with an official police report of eviction during a crisis, because this is an important piece of evidence and reduces the relevance of the perpetrator's testimony.

The protection of victims of domestic violence can only be achieved if advisory agencies offer the victim social and legal support and if the perpetrators are supported in changing their violent habits and behaviours. In Austria, advisory agencies and support agencies for perpetrators collaborate. In Germany, the infrastructure in this respect has not yet been well developed.

Child-related aspects include the child as victim and the problems concerning interaction between the child and the evicted parent. The most important questions in this area are: To what extent eviction of the perpetrator of child molestation must be possible? Should eviction only be possible in crisis situations or also under civil law? And, should the arrangements for contact with the evicted person be cancelled during eviction in crisis situations as well as under civil law?

Both in Austria and Germany, the parent who abuses his or her child may be evicted on the basis of a police order, as a form of crisis intervention. By the way, eviction in crisis situations is rare in Austria, especially if the offending parent is also the caring parent. But in Austria children may request the eviction of the offending parent in case of eviction under civil law, while a Council for Child Protection (*Jugendwohlfahrtsträger*) may request a temporary solution if the child appears to be growing up in a violent environment. In Germany, eviction of the perpetrator

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<sup>11</sup> D.L. Martin & J.E. Mosher, Unkept Promise: Experiences of immigrant women with the neo-criminalization of wife abuse, *Canadian Journal of Women and Law* 1995, p. 3-44.



under civil law is impossible because the Child Protection law has precedence. The arrangements for eviction of the perpetrator of child abuse differ from those for domestic violence against adults. At this time, in the Netherlands, only a child who is victim of parental violence can be taken from his or her home (art. 1:254 e.v. Civil Code).

In addition, the arrangements for contact with the children are often cause for conflict in cases of violence between partners. In Germany, much of the discussion during the legislative process concerned the preservation or suspension of the right to contact, because contact between children and the evicted parent frequently leads to tension and violent incidents. In Germany, the judge informs the Council for Child Protection of the eviction, enabling intervention where necessary. In the Netherlands, the Council for Child Protection does not have an official function in guiding contacts involving the evicted parent. The question is whether the Council for Child Protection should take on this preventative role, or whether the right to contact should be suspended in cases of eviction.

The most important technical aspects concern the time frame for police eviction orders and evictions under civil law; which legal guarantees are required for crisis eviction and eviction under civil law; which role the police should play if eviction occurs under civil law; and whether disobeying an eviction ruling and a restraining order under civil law should be made punishable under criminal law. The time frame of eviction in crisis situations needs to be short, but not too short; the victim needs time to take the necessary steps required for longer-term eviction. And there must be enough time to develop a safety plan and arrange support. Experiences in Austria show that the time frame should be at least ten days, with an option of extension if a civil order to evict is initiated. The time frame for eviction under civil law is more complicated. In Austria, it is three months with a possible extension of another three months; in Germany, depending on the ownership situation, there is either no maximum term or the maximum term is six months. In Austria, the duration of eviction is usually only six weeks. A longer term of six months primarily applies to older women who are financially dependent and do not want a divorce, or to female immigrants who do not have their own residence permit.

An eviction order represents a breach of the right to residence, personal freedom, and family (art. 8 ECHR). A law authorising the police to evict needs to account for such a breach. The police in Austria and Germany is responsible for follow-up after evictions in crisis situations as well as under civil law. In Germany, failing to comply with orders under civil law is a crime, allowing for the application of coercive means under criminal law. A clear sanction against failing to comply with a police order to evict, or with eviction as a temporary measure, is an essential prerequisite for effective protection of domestic violence victims. These topics of discussion will need to be dealt with during the Dutch legislative process in order to enable adaptation to existing legislation and adaptation to the Dutch infrastructure for handling domestic violence.

### **Adapting Dutch legislation**

Research on the possibilities for eviction abroad demonstrates that there are three complementary paths toward protecting victims of domestic violence:

1. Providing the police with power to evict or restrain the perpetrator as a form of crisis intervention.
2. Increasing the possibilities for eviction and restraining orders under civil law.
3. Combating domestic violence through criminal law.

This means that crisis intervention by the police must gain legal footing in the Netherlands, that the possibilities for eviction under civil law need to be expanded, and that the parameters for eviction under criminal law - the last and most invasive option - must be clarified.

Given the positive developments in Austria, more studies need to investigate whether reforming the Dutch police law can give the police more power to intervene in crises that involve danger to body, health, or freedom. The general role of the police in maintaining legal order and providing assistance (sect. 2 Police Act) could serve as a basis for such power, which could be stipulated in a new article. The Anglo-Saxon version of mandatory arrest should not be followed, because

it does not allow for reactions to specific circumstances and because it is more likely to lead to stigmatisation of the perpetrator. If the power to evict does not fit within the Police Act, then perhaps a measure under criminal law should be considered, as legal experts are currently doing in Norway and Denmark.

The possibilities under civil law should be adapted in such a way that allows the victims of domestic violence to get an eviction or restraining order quickly and easily. Moreover, studies should evaluate whether failing to comply with a temporary measure can be punishable as a criminal offence, which would allow the police to use its competencies for upholding criminal law. Special attention should go to under-aged children as victims of domestic violence or as witnesses of violence between parents.

The final option of criminal proceedings will be strengthened by the addition of the term 'life partner' to article 304 Sr, the increase in the length of punishment in article 300 SR to 3 years, and the Council of Attorneys General's reference to domestic violence.<sup>12</sup> It is essential to carefully deliberate on the criminal law route in dealing with (extremely) serious cases of violence against the partner or children, and to evaluate whether the present set of instruments is sufficient or requires fine-tuning. A discussion should be started about the question whether we need a better system of law enforcement to deal with disobedience of a conviction.

Achieving better implementation of the law may necessitate a separate police department dealing exclusively with domestic violence and a family court for handling all procedures related to domestic violence (involving procedures under family, civil, criminal, and, if necessary, administrative law). Deciding on this matter will require further research. But improving the protection of victims of domestic violence and embedding clear legislation within a strong infrastructure should be the primary goals. This requires support for the victims, assistance for perpetrators to prevent recurrence of violence, effective regional cooperation structures, and appropriate education for the professional groups involved, especially within the police and the judiciary.

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<sup>12</sup> *Privé geweld-Publieke Zaak*, op. cit., p. 33-34.

