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PROHIBITION ON APPROACHING A CERTAIN PLACE OR PERSON

In the Republic of Slovenia the institution of restraining orders prohibiting a certain place or person from being approached (hereinafter: restraining order) is incorporated into the Criminal Procedure Act and the Police Act.

In terms of criminal law, a restraining order is a measure whereby the court ensures that an accused person will not destroy the traces of a crime, influence witnesses, participants or accomplices, or repeat the crime, complete an attempted crime or commit a threatened crime.

The Police Act brought in an institution of the same name for the area of misdemeanours, whereby the police impose such an order on persons that have committed a misdemeanour with elements of violence, or have been apprehended in the process of committing such a misdemeanour and there remain grounds for suspicion that they will endanger the life, personal safety or liberty of a person to whom they are or have been in a close relationship. Irrespective of the fact that this is an attempt to deal with the problem of domestic violence, it should not be forgotten that through these measures police officers are intruding on the basic cell of society, the family, and on basic human rights such as the right to privacy, the right to private property and so forth.

In this paper the authors provide a comparative presentation of how this institution is regulated, they offer their opinion and highlight the unresolved issues regarding the institution of the restraining order in the area of misdemeanour law.

INTRODUCTION

Examining the relationships between the police and other subsystems of national security in their full significance is only possible where there is the rule of law. Only within such a framework can appropriate civil security relationships be established.

Modern legal, politological, sociological and other sciences define the police as an organisational and functional system. In the first sense this involves a comprehensive system of police bodies and units, and the second part involves the classic police function – maintaining public order and peace. In addition to this, in a democratic country ruled by law the police have the following main tasks: protection and respect of the individual's fundamental rights and freedoms; preventing crime and combating it; detecting criminal acts and providing assistance and security services (European Code of Police Ethics – Recommendation Rac (2001) 10).

The primary interest and common denominator of police activity is therefore security. In attempting to define this, many analysts stray towards descriptions of an idealised state of affairs. Indeed they understand security as the conscious effort of people to establish it as a civilisational and cultural category that would embrace all aspects: social, legal, economic, environmental, politological, political and other. But this definition of the concept does not describe the existing entities, so the defining elements are recognisable for their absence. Security is therefore an inherent element of society, which embraces both the state of affairs or rather the properties of the state of affairs,

and also the activity and system. Security is a societal and political value that demarcates the framework of the political, economic and social community. At the same time it enables the existence of societal reproduction, development of the social order and ensures the customary processes of differentiation and integration within a specific society and country (Anžič, 1997: 35-37).

Security is socially relevant only as a relationship between people. Since it is a benefit like any other, it must be accessible to every person, like any other benefit within the framework of the legal order.

In order to protect the public interest, in determining in principle that everyone can be involved in ensuring security, the state establishes certain conditions and restrictions. For a modern democratic society it is true that citizens provide themselves with the necessary benefits in free exchange. But the need for security grows more rapidly than the state through its method of functioning could satisfy the demand for this benefit and consequently the public interest (Bučar, 1997: 5-7).

The state is bound to defend its legal order, democratic system, protection of human rights and the other gains of the rule of law. It does so by creating through law its apparatus, a constituent part of which is the police. Through their subservient activities, these bodies and services perform the protection of these values and rights. And it can be no other way: if the state entrusted this activity to anyone outside itself, it would at the same time be denying its own existence.

The security organisation of an individual, group, society and state, in its origin and significance, is not a goal in itself. In every case it is the consequence of a response to a specific source of threat. Threat can be defined as an objective circumstance, in other words such as it is in truth, with its own internal and external influence on a specific subject and with the capacity to cause harmful consequences. In evaluating these sources of threat, the facts of objectivity of the evaluation and probability of the event are very important. Here it should be taken into account, however, that the security environment is constantly changing, and the sources of threat and their intensity are also changing. It often happens that the state does not find appropriate mechanisms of response to individual sources of threat. But it always finds an institution that should respond to these challenges, irrespective of the fact that the action of other, primary factors would be better and from the aspect of society more expected and desired. When we speak of this institution, we think of the police, but when we speak of a source of threat we think of domestic violence and the duty of the police to counter it through the institution of the restraining order. Domestic violence and the problem of family crises in general are such an important challenge that they cannot be left to the police to resolve and control. The basic cell of society is the family, so assistance in dealing with modern social problems must primarily include those institutions that are bound to provide such assistance through their ethical and professional qualifications. In any event the institution of the restraining order is an expression and consequence of a crisis in containing this problem and an emergency solution that should be ensured by the police.

The institution of the restraining order is controversial from several aspects – including in the sense of the systemic nature; such a measure does not belong in the Police Act. There is also a weakness in the fact that the Austrian model has been indiscriminately adopted. Meanwhile, the Slovenian police are intensively preparing, training and gearing up for implementation of the law. After a period of six months from the imple-

mentation of this provision, the authors will draw up an analysis of all cases. This analysis will confirm or reject the anticipations and assertions of the authors.

PROHIBITION ON APPROACHING A CERTAIN PLACE OR PERSON

In the Republic of Slovenia the institution of restraining orders prohibiting a certain place or person from being approached (hereinafter: restraining order) is incorporated into the Criminal Procedure Act¹ and the Police Act.²

In terms of criminal law, a restraining order is a measure whereby the court ensures that an accused person will not destroy the traces of a crime, influence witnesses, participants or accomplices, or repeat the crime, complete an attempted crime or commit a threatened crime. The criterion is therefore a reasonable suspicion that the person has committed a specific crime, and that specific circumstances have been established so as to arouse the suspicion, in the court's assessment, that the accused person will destroy traces of the crime, influence a certain group of people or repeat, complete or commit a threatened crime.

The Police Act has brought in an institution of the same name for the area of misdemeanours, in other words for less serious breaches of the social norms. The police impose such an order on persons that have committed a misdemeanour with elements of violence, or have been apprehended in the process of committing such a misdemeanour and there remain grounds for suspicion that they will endanger the life, personal safety or liberty of a person to whom they are or have been in a close relationship. Irrespective of the fact that this is an attempt to deal with the problem of domestic violence, it should not be forgotten that through these measures police officers are intruding on the basic cell of society, the family, and on basic human rights such as the right to privacy, the right to private property and so forth.

We take the view that the detailed arrangement of restraining orders under the Police Act represents an indiscriminate transposition of the system in the Republic of Austria. As is made evident below, in Slovenia we have adopted a system very similar to that in Austria (e.g. surrendering keys and items for personal use, the imposition of fines for established violations of the decreed measure and so forth). In this, however, variances have arisen in the main segments of the measure's substance, as follows:

- The right to submit a request for entry into a residence following imposition of the measure: in Austria this is possible on the basis of a request from the offender for specially justified reasons. In Slovenia such a possibility is not envisaged.
- Determining the place that an offender may not approach; this is more narrowly defined in Austria than in Slovenia.
- The duration of the restraining order, and so forth.

Yet the major and essential difference in the regulation of restraining orders in Slovenia and Austria lies in the actual method of regulation. Austria has tackled the issue of domestic violence systematically and systemically, and the restraining order measure is merely one tiny piece in the mosaic of measures. The provision of information to offenders and victims (see information for offenders and information for victims) has also been adjusted to this arrangement. In Slovenia, however, we have incorporated this measure into the Police Act with insufficient consideration, for which reason deficiencies have arisen that open up numerous theoretical and practical issues that we set out below.

As has been said, Austria has tackled the issue of domestic violence systemically and integrally. It drew up a federal law for protection against domestic violence (BGBl no. 759/1996, of 30 December 1996, in force from 1 May 1997), and in addition the law

that governs the work of the police provided authorisation for removal and restraining orders in the event of violence in residences (pursuant to Article 38a of the SPG), which should along with the other envisaged measures temporarily resolve situations where a person is left unprotected at the mercy of another. The point is, they determined that only through joint effort and cooperation with the institutions that deal with domestic violence (family courts, the Youth Office, penal institutions, private counselling offices) can they achieve the desired goal – successful and comprehensive resolving and handling of domestic violence.

Article 38a of the SPG authorises bodies of the public security service to impose on offenders a time-restricted restraining order. Up until the entry into force of the 1999 revised SPG, on 1 January 2000, the authorisation in question was labelled under the heading "prohibition on return". In the revised law the legislator clarified certain primarily conceptual confusions. It was clearly laid down that restraining orders represented an independent police measure, and this was not directly linked to prior removal.

The question arose whether it is possible to issue a restraining order without prior removal. It appears that the presence of the endangered person at the scene of the event (a residence and its immediate vicinity) is an essential presumption for issuing a non-return order and a restraining order, which is not true, however. We may imagine, and in practice there have also been cases where the endangered person was not in the residence, but there nevertheless existed the possibility of anticipating dangerous assaults on life, health or liberty, i.e. actual danger (e.g. preliminary detention for a previously apprehended offender has been cancelled, or the person has stated specifically in a bar that they would be violent when they got home).

In issuing restraining orders, explicit emphasis is placed in Austria on the proportionality of measures. They are convinced that it is not a good thing for an offender to be completely prevented from having access (read: entry) to a residence as an "exclusion zone". They assert with justification that if the decreed restraining order prevented the offender from returning to their own residence, this would represent a forcible encroachment on the constitutionally guaranteed basic rights pursuant to Article 8 of the MRK (residence and the private sphere) and Article 5 of the StGG (property), as well as on the basic rights to professional work (Article 6 of the StGG). The principle of proportionality is also emphasised in the enforcement of the restraining order, and in Austria it is laid down that such orders may not be imposed by force (Article 38a, paragraph two). The SPG authorises the bodies of execution to enforce the measure by force only "if nothing else is provided". If in spite of the restraining order, the offender returns to the determined place, this behaviour/action is sanctioned with administrative penalties.

Article 38a of the SPG thus provides that in cases where on the basis of specific facts, especially involving a previous dangerous assault, it may be suspected that there exists the threat of an assault on a person's life, health or liberty, the public security service bodies may remove the offender from the home of the endangered person (victim) and from that person's immediate vicinity. They familiarise the perpetrator with the area covered by the removal order. This area is determined in line with the requirement for effective preventive protection.

The public security service bodies are therefore empowered to prevent a person's access to a given area, but it is not permissible to use force to impose a restraining order. In the prohibition on returning to one's own residence, special attention must be

paid to ensuring that this encroachment on the private life of the offender maintains proportionality. The public security service bodies allow the offender to take the keys to the residence and any essential items for personal hygiene. They inform the offender where he may stay during this time. If the need arises for the offender to go to the residence from which he has been excluded, he may do so in the presence of public security service bodies.

All of the above is explained to the offender upon the actual issuing of the restraining order, with the information to the offender being given as follows:

"Until further notice you may not enter the residence and the vicinity as indicated to you by the police official:

Detailed description of the place/area: _____
otherwise you will face penalties (administrative fine of up to 360 euros, and in the event of non-payment up to 2 weeks imprisonment).

You may object to this decision at the duty police service
fax no., or lodge a written appeal at the independent administrative
panel, (address)

If it is essential for you to enter the residence – to take any essential items – you may do so in the presence of a police official.

You must indicate where we should deliver to you the police or court documents. If you have still not done this/informed the intervening police official, do this as soon as possible at the duty police service. Until you do this, documents will be delivered to you by authority of the court order (Protection Authority, court office).

In the event that you require information and support, you may approach,
which operates at the address, and is obtainable on tel. no. "

In the case of a restraining order, the public security service bodies are bound to require from the offender that he informs them of an address for the purpose of delivering notification of cessation of the restraining order or that he requests a temporary decision pursuant to Article 382b of the EO, which allows the court to extend the restraining order on the proposal of the victim.

The public security service bodies are also bound to acquaint the victim with the possibility of a temporary decision pursuant to Article 382b of the EO and with the relevant institutions for protection of victims.

The police give the victim the following information:

"The police have prohibited the person that endangered you (e.g. your husband or partner) from entering your residence and its immediate vicinity. In this way your physical safety in your residence should be ensured.

This restraining order is valid initially for 10 days, and is binding on you to the extent that you are not permitted to let the offender into your residence. The enforcing authority will verify whether you are adhering to the restraining order.

If the person to whom the restraining order has been issued is a member of your immediate family (family member, partner) you may request a temporary order at the Local Civil Law Court, ... (address). Only if you lodge such a petition, the restraining order will be extended to 20 days. Within this time the court will decide on your petition.

The police will otherwise inform the place of intervention. This is a private institution paid by the federal state to offer you accommodation and support.

..... the police shall verify the need for further enforcement of the restraining order within a period of 48 hours. If you wish, the day after the issuing of the restraining order you will be invited to appear at o'clock for an interview at the duty service of the police, and we would ask you in the event of being unable to attend to call tel. no. for further advice you may approach the following institutions:"

The issuing of the restraining order is immediately reported to the security authority, and is verified within 48 hours. In this the security bodies may involve all institutions and locations that might contribute to determining the decisive actual state. Local administrative bodies and also the security bodies may also involve duty physicians. If the security body determines that the conditions for a restraining order do not exist, the measure against the offender is immediately revoked. The victim is immediately informed that the restraining order has been revoked. With the revocation of the restraining order, confiscated keys are returned to the offender, and in the event of a request for a temporary decision pursuant to Article 382b of the EO they are picked up at the court.

Adherence to the restraining order is verified at least once in the first 3 days, with such verification performed by the public security services bodies. The restraining order expires 10 days after the issuing of the order, but in the case of a lodged petition for the issuing of a temporary decision pursuant to Article 382b of the EO, with delivery of the court's decision to the other side, it expires no later than 20 days from the issuing of the restraining order. Upon receipt of a petition for the issuing of a temporary decision pursuant to Article 382b of the EO, the court must inform the security bodies without delay.

Attention must also be drawn to the determination of the "exclusion zone". Police officers in Slovenia may determine the place where the victim lives, works, is educated, is in protection or frequents on a daily basis, as the place which the offender may not approach. The prohibition on approaching a certain place or person also embraces an order for non-molestation via means of communication, something of which the offender is specifically apprised.

In contrast to the above, in Austria only the residence and its immediate vicinity may be determined as the exclusion zone. Areas such as the victim's work place and other areas (school/kindergarten, shops which the victim constantly frequents) may only be determined as "exclusion zones" by the local civil law court in what is termed a temporary decision.

The "golden rules" for determining exclusion zones in Austria are as follows:

- a) in apartment buildings: the victim's apartment in the block, but in no case parts of the adjacent buildings on either side or the victim's work place.
- b) family houses: here the exclusion zone may also include the land, but in no case does the exclusion zone include parts of adjacent houses on either side of the street or the work place of the endangered person.

At the same time, in Austria offenders are allowed in urgent cases to enter the "exclusion zone", but the "urgency" of the case must be justified in detail (e.g. the offender has gained employment and in training for some occupation must be appropriately/smarty dressed. For this reason he requires his clothing). In the event of an

urgent need to enter the area from which he has been excluded under a restraining order, upon obtaining consent, an agreement is reached with the user of the premises for the offender to enter the "exclusion zone". Here it must be ensured that there is no removal of items which could later lead to an escalation.

THEORETICAL AND PRACTICAL ASPECTS OF CARRYING OUT RESTRAINING ORDERS

Through the measure as laid down contextually in the Police Act, the Slovenian legislator is attempting to combat domestic violence, which is in its nature a complex and multifaceted phenomenon. Numerous social, economic and psychological factors are interwoven. The idea that we can deal with it or reduce it through the introduction of a new police power is simply naive (Šugman, Filipčič: 2003).

Restraining orders under the Police Act are exceptionally significant in terms of their power, since they encroach upon at least three basic human rights, these being the right to freedom of movement³, the right to a private and family life⁴ and the right to private property.⁵

In studying the procedure for issuing restraining orders, it must be stated that in the actual wording of the law the legal terminology and institutions of criminal legislation and misdemeanours law are interwoven:

- "Grounds for suspicion" and "reasonable suspicion", which are used in the Police Act, are concepts of criminal procedure and not misdemeanours procedures – to which such concepts are terminologically alien. In Slovenia's legal system we speak of grounds for suspicion in the framework of the preliminary criminal procedure, and they represent the standard of sufficiency for initiating the use of police powers in investigating crimes, while the standard of proof "reasonable suspicion" is needed to initiate an investigation or bring charges.
- Decisions to impose restraining orders are sent ex officio to the investigating judge, as the judicial branch of power, for adjudication. Given the ready availability of investigating judges, this system is understandable, but from several aspects illogical. The investigating judge is a subject of criminal procedure, in which he becomes involved upon attainment of the "reasonable suspicion" standard of proof. In misdemeanours procedures and in the issuing of orders upon the existence of "grounds for suspicion", investigating judges have thus far had no authority. So for the moment it is still not entirely clear under what procedure this assessment will take place.
- Another unusual practice is that a *lex specialis* such as the Police Act should lay down the tasks of criminal law subjects, i.e. the judicial branch of power – not just for the investigating judge to adjudicate over the decision, but also in setting out the jurisdiction of the non-trial panel of the district court (deciding on appeals against decisions of the investigating judges). We believe that the procedure for assessing decisions and appeals against investigating judge decisions should be regulated in detail by a law (such as the Criminal Procedure Act, and under no circumstance the Police Act). Currently this procedure remains insufficiently defined.

Here we have highlighted just some of the most striking theoretical problems. In addition to this, mention must of course be made of the continuing nomotechnical inappropriateness of the legal wording (the article is much too broad) and the indeterminate nature of numerous terms as used in Article 39a of the Police Act (maltreatment, misdemeanours with elements of violence, endanger a person's liberty and so forth), which will present police officers in practice with numerous problems and awkward situations.

Finally we should also highlight the fact that the legal text did not envisage juvenile offenders, and if it did, then the provisions are entirely counter to the currently valid regulations. Both the Criminal Procedure Act and the Misdemeanours Act prohibit the delivery of written notices to minors by means of posting them on the court notice board, but the Police Act makes no exception in laying down that decisions are deemed delivered to the offender by being posted on the police station notice board, if it was not possible to deliver them personally. Delivery of decisions to minors via their legitimate representatives (parents) must of course be discounted here. We believe that the only sensible solution would be for the minor in such cases to be appointed a "special guardian", through whom notices would be delivered to the minor, while at the same time such guardian would be entrusted with addressing the social, psychological and other problems that the minor would encounter on being given a restraining order. Unfortunately this proposal cannot be realised without appropriate amendment of legislation in the area of family relations. We may conclude that in the area of juvenile offenders we are up a blind alley in relation to restraining orders.

CONCLUDING THOUGHTS

Owing to their indeterminate nature and partial regulation, restraining orders, whereby the legislator wished to improve the existing state of affairs in the area of domestic violence, represent a step backwards in combating domestic violence. Through these orders, police officers will be encroaching on the most sensitive area of human life – privacy and the right to personal property.

We believe that of all the deficiencies described in this paper, the legal provision is unsuitable for practical implementation. For this reason we propose that the existing legal wording be deleted from the Police Act, and that the area of domestic violence be regulated comprehensively in a special law, with all relevant laws being supplemented at the same time: arrangements must be laid down for the area of the judiciary (jurisdiction of investigating judges and non-trial panel, priority hearing of cases, decision-making process), social care centres and so forth. Only in this way will we be able to achieve the desired goal: preventing and eliminating domestic violence. Indeed we should not forget that in families where violence arises, the very foundations of family values – mutual respect, understanding and help – have been poisoned.

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ENDNOTES

- 1 Criminal Procedure Act (Zakon o kazenskem postopku), Official Journal of the Republic of Slovenia – Uradni list RS – no. 64/94.
- 2 Police Act (Zakon o policiji), Uradni list RS, no. 49/98.
- 3 Article 32, paragraph one of the Slovenian Constitution: "Everyone has the right to freedom of movement, to choose his place of residence, to leave the country and to return at any time. This right may be limited by law, but only where this is necessary to ensure the course of criminal proceedings, to prevent the spread of infectious diseases, to protect public order or if the defence of the state so demands.
Entry into the country by aliens, and the duration of their stay in the country, may be limited on the basis of law."

- 4 Article 53, paragraph three of the Slovenian Constitution: "The state shall protect the family, motherhood, fatherhood, children and young people and shall create the necessary conditions for such protection."
- 5 Article 33 of the Slovenian Constitution: "The right to private property and inheritance shall be guaranteed."

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