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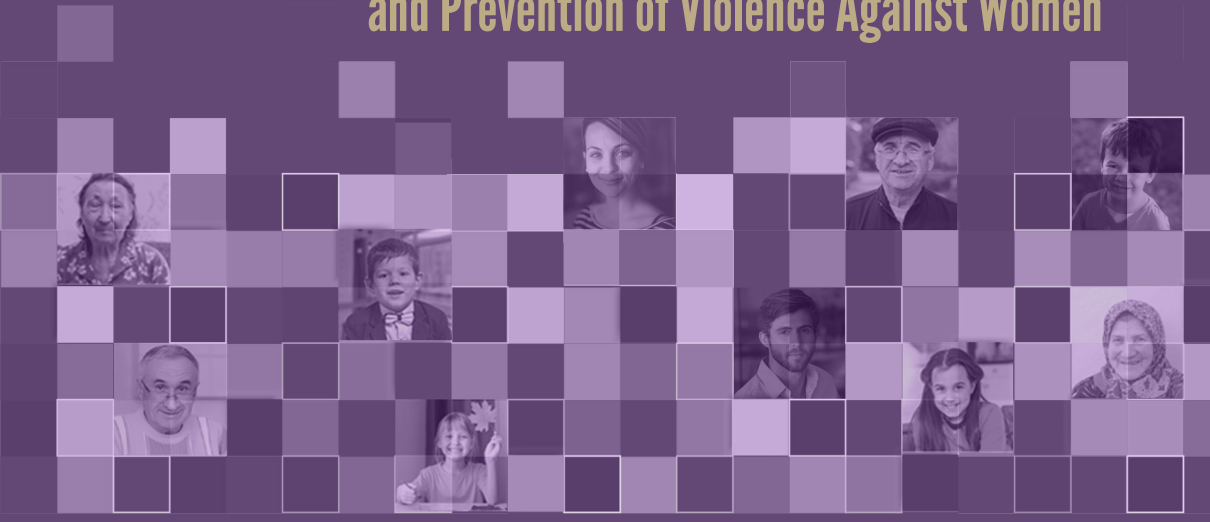
ASSESSMENT REPORT:

Improving the Implementation of the Law No 6284 on the Protection of the Family and Prevention of Violence Against Women



EUROPEAN UNION / COUNCIL OF EUROPE JOINT PROJECT ON IMPROVING THE EFFECTIVENESS OF THE FAMILY COURTS: BETTER PROTECTION OF THE RIGHTS OF FAMILY MEMBERS

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TABLE OF CONTENTS

INTRODUCTION

This report forms part of a workshop organised under the Joint EU/CoE Project *"Improving the Effectiveness of Family Courts: Better Protection of the Rights of Family Members"* which took place on 14th – 16th March 2022 and which focused on examining the shortcomings in the application of the Turkish Law No. 6284 on the Protection of Family and Prevention of Violence against Women. The focus of the workshop was twofold:

1. Strengthening the cooperation mechanisms to prevent domestic violence, and
2. Improving the case-flow and prosecution management of domestic violence cases to ensure effective remedies.

The Workshop took place with the participation of around 65 participants from various national authorities: the Department of Judicial Support and Victims' Rights, the Ministry of Health, the representatives of the Ministry of Family and Social Services, family court judges and public prosecutors in charge of family protection and violence against women investigation bureaus in domestic violence bureaus, law enforcement chief officers, lawyers, civil society organisations and representatives of ŞÖNİMs (Centres for Prevention and Monitoring of Violence).

This Assessment Report has been prepared by a team of international and national consultants and seeks to first, in Section A provide an overview of the main Council of Europe standards regarding preventative and protective measures in relation to domestic violence and European best practices on ensuring the safety and needs of victims. Second, in Section B, it will set out an overview of Council of Europe standards regarding the prosecution of domestic violence and European best practices in this area. Third, in Section C, it will provide an analysis of the main Turkish law on protective and preventative orders under the Law No. 628 before moving onto an analysis of how Turkish Civil Code operates in conjunction with the Law No. 628 and its relevance to cases involving domestic violence. In each of the aforementioned sections, concrete recommendations will be made to address the issues that were identified during the workshop in each relevant section of the analysis provided in this assessment report.

A - Council of Europe standards regarding preventive and protective measures in domestic violence

I. International and Regional Standards

International and national law set forth the duties of law enforcement and justice sector actors to promote and protect the rights of victims and to prosecute perpetrators of violence. While law enforcement, prosecutors and judges work primarily within the domestic legal system, as agents of the state, they should also be aware of and uphold the international and regional human rights standards that apply to violence against women (VAW). Knowledge of human rights principles is also an important pre - requisite to adopting a victim-centred approach. There are several crucial international and regional instruments that are relevant to combatting violence against women. For many years, violence against women, and more specifically domestic violence, was considered outside the realm of state responsibility because perpetrators are usually private persons – in many cases husbands, partners, brothers, fathers or sons – rather than actors working on behalf of the state. Since the 1990s, however, violence against women, including domestic violence, has received increasing attention by the international community and, subsequently, in international law. This surge in attention has resulted in the adoption of several crucial international and regional instruments on which the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) was drawn up. These are:

- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW hereinafter) in 1979, and the decisions and recommendations adopted by the CEDAW Committee
- the United Nations (UN) Declaration on the Elimination of Violence Against Women, 1993
- the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belem do Pará Convention), 1994; the Beijing Declaration, 1995
- the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003
- the Council of Europe Recommendation Rec (2002)5 of the Committee of Ministers to Member States on the protection of women against violence
- the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence

The first one of these standards featuring in these documents articulates the concept of due diligence in the context of violence against women. Under this standard, the public/private dichotomy that exists in international law cannot be used to justify state inaction. On the contrary, the state has an obligation to ensure that all human rights violations are treated as illegal acts, that they are investigated, and that perpetrators found guilty are punished and the damages incurred by the victims are compensated. Within the broader due diligence standard, states must ensure that women have access to justice when their rights are violated. The right of access to justice is multidimensional, and it encompasses "equitability, availability, accessibility, good-quality and accountability of justice systems and provision of remedies for victims." When speaking about cases of violence against women, the concept of "justice" includes both the criminal and civil justice systems. These legal instruments have also been essential in bringing about a change in attitudes: from regarding violence against women – and especially domestic violence against women – as a private matter committed with widespread impunity, to treating the issue as a matter of public concern. Most importantly, this growing body of international and regional standards established the prohibition of violence against women in international human rights law by focusing on, and addressing, discrimination and violence against women, and protecting the human rights of women on an equal footing with those of men. As a result of these instruments, it is clear that under international law violence against women is treated as: discrimination against women and a violation of women's human rights; torture in the private sphere and a violation of the right to life/quality of life and the right to family life.

Furthermore, the individual rights that have been held to be at stake in relation to violence against women are:

- The right to life and personal integrity.
- The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment.
- The right to equal protection according to humanitarian norms in time of international or internal armed conflict.
- The right to liberty and security of person.
- The right to due process/equal protection under the law.
- The right to equality in the family, and
- The right to the highest standard attainable of physical and mental health

II. Principles Established by The European Court of Human Rights

Parallel to such developments, jurisprudence from the European Court of Human Rights (ECtHR) has played a major role in shaping and strengthening the international framework on violence against women, by addressing the right of women not to be subjected to such abuse. Cases only reach these courts when national remedies have failed. Consequently, these cases strongly illustrate the failure of the state to respect, protect and fulfil human rights, from the point of view of the victim and their appraisal of how their human rights have been affected. Case law has also been important in revealing the need for co-ordinated and comprehensive responses and placing the responsibility on the state to effectively prevent and combat gender-based violence.

With respect to domestic violence more specifically, two landmark ECtHR cases, *Bevacqua and S. v. Bulgaria* and *Opuz v. Türkiye*, are worth mentioning here. Issued in 2008 and 2009, the ECtHR's decisions recognised and advanced the due diligence standard in the context of domestic violence, signifying a turning point in international law. In both cases, the ECtHR established that states are not only obliged to refrain from committing acts of violence themselves but are also responsible for otherwise private acts of domestic violence if they fail to fulfil their duty to prevent and punish such acts. According to the ECtHR this positive obligation arises where 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."

Furthermore, in the *Opuz v. Türkiye* judgment, the ECtHR recognised the interconnection between discrimination and violence against women and held – for the first time - that domestic violence constitutes a form of discrimination because it mainly affects women and that women are not protected by the law on an equal footing with men. The Court also held that the general and discriminatory judicial passivity and insufficient commitment on the part of authorities to take appropriate action create a climate conducive to domestic violence.

The above-mentioned developments in international standards and jurisprudence represent an important shift in how we perceive violence against women in all of its forms and have resulted in the definition of

violence against women as a human rights violation. Through violence, significant numbers of women are barred from fully enjoying their human rights, developing their full potential, and leading independent lives. Violence against women, including domestic violence, is thus a major obstacle to their full advancement.

On the other hand, increasingly, due diligence has become the prevailing standard for assessing whether authorities have taken appropriate action to address violence against women. Taking into account the case-law of the ECtHR and the findings in the recent judgment *A and B v. Georgia* (2022), especially the failure of law enforcement officials to prevent gender-based violence and the failure to investigate the passivity leads to a violation of the right to life in connection with the prohibition of discrimination. Again, in *Halime Kılıç v. Türkiye* (2016) judgment it was pointed out that the judicial authorities' failure to pay due attention to the gravity of domestic violence incidents and the special sensitivity of the victims of these acts of violence which are particularly worrying and turning a blind to the acts of violence and the repetition of death threats by the national authorities create a favourable environment for domestic violence. Similarly, in the *T.A.* judgment (2021) the General Assembly of the Turkish Constitutional Court ruled that the right to life guaranteed under Article 17 of the Constitution was violated in terms of the obligation to protect the right to life and to conduct effective investigations in relation to the process concerning public officials.

As a result, the state has been regarded as being responsible not only for the actions of its own agents – which may include law enforcement and judicial authorities – but also as having a duty of diligence to create and enforce laws and strategies that will reduce the risk of domestic violence.

III. Effective Justice Systems, Their Definition, The Role They play In Combatting Violence Against Women

Effective access to justice is an essential right enshrined in numerous instruments within the universal human rights protection system. The obligation not to discriminate against women and to achieve *de facto* equality between women and men is an essential part of these rights. The UN Committee on the Elimination of Discrimination against Women has articulated six interrelated elements of access to justice that are considered key for a justice system that is responsive to gender. These are; justiciability, availability, accessibility, good quality, accountability and the provision of

remedies for victims. In terms of violence against women, access to justice means states must implement a range of measures including:

- amending domestic law to ensure that acts of violence against women are properly defined as crimes,
- ensuring appropriate procedures for investigations and prosecutions,
- ensuring access to effective remedies and reparation.

In order to ensure that women have equal access to justice, legal practitioners should adopt a gender-sensitive approach to their work and ensure that they interpret the law in line with substantive notions of equality and international human rights. Prosecutors and judges should take a pro-active approach to ensuring that barriers that women face in accessing justice are removed in cases concerning VAW. Protection measures should be applied during the investigation and judicial proceedings, which means that law enforcement, prosecutors and judges should not only ensure that they are working in a co-ordinated and complimentary fashion, but also that at each stage of the chain of justice, the specific needs of victims are a central concern.

Effective justice systems in combatting VAW share several characteristics:

- they prioritise victim safety,
- they hold perpetrators accountable,
- they use approaches that empower victims and do not re-victimise them (victims should be informed, should feel their decisions are respected and their voices are heard),
- the constituent agencies work together in a co-ordinated and integrated manner.

Justice sector actors; prosecutors, judges, and the personnel who support them play a powerful role in combating VAW and removing barriers to justice. International research on attrition rates in cases of violence between partners reveals that a very small percentage of violent acts are ever reported to law enforcement (generally, fewer than 20% of victims report). Progressing further along the justice chain, less than 7% of all incidents result in the perpetrator being charged, and no more than 5% of cases result in a conviction.[1] All three groups of justice sector actors

1 UNODC, Handbook on effective prosecution responses to violence against women and girls, 2014, p. 28, citing the 2008 International Violence Against Women Survey.

(law enforcement, prosecutors and judges) are implicated at critical points of attrition. For example, a complaint of domestic violence may not advance through the justice system if if no detention is made or a decision of nolle prosequi is granted on the grounds that an offence has not been committed.. Attrition can also occur closer to the final stages of the process if the victim withdraws the complaint or if the court acquits the perpetrator due to lack of evidence. In order to improve the effectiveness of the justice system as a whole so that it responds effectively to domestic violence, it is usually necessary to reform the procedures and transform the organisational cultures of the law enforcement, prosecutors' offices and courts themselves. Prosecutors and judges have unique roles in dealing with domestic violence, as outlined below.

IV. The Role of Prosecutors In Combatting Violence Against Women

- As state authorities, they ensure that domestic violence cases are treated with the same seriousness as other crimes and are not diminished as "private matters."
- They conduct the rigorous investigation and case-building that acts of violence against women require.
- They provide leadership and expertise to other justice professionals, such as law enforcement officers, social workers, and probation staff.
- They promote respect for the rule of law.
- Through their actions, they send powerful messages that can deter perpetrators and can mitigate the shame and stigma that victims encounter

V. The Role of Judges In Combatting Violence Against Women

- As adjudicators, they interpret and apply the law impartially, which means imposing fair and commensurate sentences for acts of violence against women.
- They challenge the stereotypes and bias that are present in the society and uphold principles of non-discrimination.
- Through their judgements, courts send messages to the community that domestic violence will not be tolerated.
- As figures of authority, judges can provide leadership on improving the function of the justice system and creating a safe environment for victims and witnesses

VI. Protection Measures – Intervention Principles

Judicial remedies should be tailored to meet the specific human rights violation, to address the wrong and also to compensate for the harm suffered. In civil cases, this may include restitution, compensation, and measures to ensure non-repetition. Courts should also consider ordering rehabilitation (medical and psychological care and other social services) for victims. Victims may also be unaware of their entitlement to civil damages or how to seek remedies, and practitioners should provide basic information about these options along with referrals to legal aid services. Monetary sanctions against the perpetrator are often ineffective and can potentially negatively impact a woman if she is financially dependent on the husband or partner. Determining the appropriate remedies in criminal cases concerning VAW requires an understanding of the dynamics of violence and the harm that the victim has suffered. Remedies for civil damages and criminal sanctions should not be mutually exclusive, which means that victims of VAW are entitled to civil remedies (against the perpetrator of the state) in parallel with criminal sanctions. Victims should also have the right to claim compensation for the harm they have suffered.

Protective orders - are civil, administrative or even criminal remedies or injunctions that address the desire of many victims to end the violence and have protection from further acts of violence. Protective orders should be available "irrespective of, or in addition to other legal proceedings" and they may also be introduced in subsequent legal proceedings. Additionally, violators of protective orders should be subject to criminal or other legal sanctions. In summary, the following principles should be adhered to when considering protective measures:

- Measures should be based on a gender equality-oriented understanding of violence against women and domestic violence and shall focus on the human rights and safety of the victim.
- Measures should be based on an integrated approach which takes into account the relationship between victims, perpetrators, children and their wider social environment.
- Measures should aim at avoiding secondary victimisation.
- Measures should aim at the empowerment and economic independence of victims of violence.
- Measures should allow, where appropriate, for a range of protection and support services to be located on the same premises.

- Measures should address the specific needs of vulnerable persons, including child victims, and be made available to them.
- The provision of services should not depend on the victim's willingness to press charges or testify against any perpetrator. Effective decisions aimed at resolution should be made swiftly.

VII. The Best Practices On Ensuring The Needs and Safety Of The Victim

Attention to victim safety is at the heart of all domestic violence interventions. There are two facets of ensuring victim safety: working with the victim to develop a personal safety plan and undertaking risk assessments. In many instances, victims are assisted by a support worker, advocate or legal counsel to develop a detailed and personalised safety plan. Where victim services are underdeveloped or difficult to access, this may not occur. Prosecutors and judges have an independent obligation to protect high-risk victims, and this means that they should also be involved in supporting the victim to devise a safety plan and providing the required support. Risk assessment should be done jointly with the law enforcement and using a common approach. The purpose of using the same assessment criteria is to come to a uniform decision about risk and to outline the actions that need to be taken by different parties.

In this regard, both prosecutors and judicial officers should communicate with the law enforcement after they have performed a risk assessment to share information and indicate how it is relevant to any change in or increase in risk and how the risk should be managed. It is not uncommon for prosecutors or judicial authorities to ineffectively interact with the law enforcement, and this leads to discordance in views and decision-making that can compromise a victim's safety. When risk assessments are properly co-ordinated, however, the procedure can be lifesaving. Therefore, judicial authorities should not make any assumptions about safety planning. It is recommended to ask victims explicitly whether they have developed a strategy to protect themselves, their children and/or other dependents and family members. Prosecutors should be prepared to offer information and assist the victim to make a personalised safety plan and make referrals to specialised organizations that can provide additional support in this process. It is helpful to use a checklist or leaflet with the victim to talk about potential risks and plans for how they can manage them. Prosecutors should also be sure to discuss the perpetrator's possible reaction to criminal

prosecution and help identify alternatives with the victim to decrease their risk (e.g. planning for safe places to stay away from the perpetrator). It is also important that the prosecutor discuss with the victim the best way to contact them to minimise risk.

Courts that are sensitive to the needs of domestic violence victims support them in safety planning, through referrals to advocates and legal services or even by offering a room in the courthouse where local service providers can meet clients without danger. Judges can also ask the victim probing questions or for clarifications to make a decision about their safety. Judges should not solicit detailed information about safety planning from victims in open court or when the perpetrator is present, but they can verify with the prosecutor or counsel that such a plan is in place. In addition, prosecutors and judges can take steps themselves to enhance a victim's safety. For instance, in the pre-trial stage, prosecutors should discuss risk with the victim/witness and answer questions about the conditions of the perpetrator's release. Making a motion for a protection order and requesting that the court keep certain information confidential (such as the victim's address and phone number) are means to enhance victim safety.

In summary victim safety requires:

- The need to inform the victim of her rights in a language and manner that she understands,
- Good inter-agency co-operation and referrals to support services,
- Planning for victim safety e.g., judges in the United States is to require parents to file a "safety focused parenting plan" that describes how they will share responsibilities and manage visitation after divorce or separation when there is a history of domestic violence. Courts provide instructions and templates with questions for assessing safety,
- Assessing risk, dangerous behaviour and lethality,
- Effective case management to ensure that cases are dealt with quickly as possible and that the gathering of evidence is done sufficiently well and in a timely manner,
- Managing the courtroom environment to ensure that the victim does not suffer secondary traumatisation by virtue of the court process e.g., in terms of making sure that she feels safe in giving statement and when taking the statement.

VIII. The Civil Justice Response

Considerations about victim security and empowerment are as critical in civil cases as they are in the criminal system. Justice sector actors in civil and criminal cases that involve domestic violence should co-ordinate as much as possible. When victims are involved in both justice systems, integrated approaches, or ideally joint case management, are crucial to victim safety and child protection.

The primary purpose of a civil protection order (e.g., barring the perpetrator from entering the shared home, ordering the perpetrator to pay alimony or to hand over children to the custodial parent) is to protect individuals from harm. In situations of immediate danger, the most effective way to guarantee victim safety by mandating that the perpetrator maintains physical distance from the victim for a certain period is granting emergency orders aimed at removing the perpetrator from the house. Protection orders are critical measures that permit women to stay in their homes. These short-term measures give victims much needed time, free from stress, to make decisions about their future lives. Protection orders, when effectively enforced, can also serve a preventive role. The protection orders also hold the perpetrator accountable for their behaviour and create consequences if they continue to be abusive in violation of the order. Practice shows that for many victims, a temporary protection order is enough to either influence the perpetrator or allow them to leave the relationship, without further legal measures needed. Because many victims who want to apply for protection orders are not prepared to press criminal charges against the perpetrator, the Council of Europe standards requires that member states make protection orders available to victims regardless of whether they have initiated other legal proceedings. Lastly, when applying for a protection order, victims gain a sense of empowerment and self-determination. Courts must recognise that for many this step may be the first time the victim has asked for assistance and began a process to leave the abuse. While maintaining neutrality in protection order trials, the judge must nevertheless be especially attentive to the dangerous nature of domestic violence and, if abuse is proven, exercise authority to protect the victim.

Children who witness domestic violence are also victims of that violence, consider this when ordering contact between the perpetrator and the child and assess if such contact is safe for the child and the victim.

Prosecutors also play a role in ensuring the effectiveness of civil protection orders. Typically, the prosecutor would become involved when the order

has failed to stop the abuse. All violations of protection orders should be treated with a heightened awareness of safety. The perpetrator should be held criminally accountable for violating the order. In addition, being exposed to violence can be a particularly traumatic time for the victim who may well have lost trust in the legal system which failed to protect them. Prosecutors should interact sensitively with the victim to ensure they are aware of their right to be a party to the criminal case and to thoroughly assess the dangerousness of the situation.

B – Effective Case Management Practices in Prosecution of Domestic Violence

I. Developing a Prosecution Strategy and Case Building

Prosecuting domestic violence cases requires special approaches at each stage of the criminal justice process, from developing a strategy to post conviction monitoring. Delays in domestic violence cases, from the time of reporting an incident to the indictment, are common, which can mean that some evidence may be lost. A critical first step, therefore, is for the prosecutor to consult with the law enforcement as early as possible to discuss tactics for thorough evidence gathering and investigation. This is also the time to review the results of a risk assessment with the law enforcement and to make a determination about the safety of the victim and their family. These cases require the following minimum standards to be followed:

- A proactive approach to evidence gathering and constructing the case. Prosecutors should consult with the law enforcement as early as possible to discuss tactics for effective evidence gathering and investigation.
- The prosecutor must prioritise those cases that demonstrate the greatest risk of harm. A review of the results of a risk assessment with the law enforcement and a determination about the safety of the victim and their family must be undertaken as a first step in the process.
- At the pre-charge phase, it is a good practice for the prosecutor to ensure that the case is properly identified and flagged as domestic violence and to develop a plan of action.
- A victim's request to withdraw the complaint in respect of offences

subject to complaint should not be used to justify inaction if there is sufficient evidence to suggest that a crime occurred. Again, in offences subject to complaint, investigations and prosecutions should not depend entirely on a report, and proceedings should continue even if the victim withdraws their statement or complaint (in absentia and ex officio).

II. Considerations During Investigation and Evidence Collection

The victim's testimony is a crucial piece of evidence, but prosecutors should also step in and that it is the state's responsibility to gather enough evidence to convict the perpetrator of domestic violence and not the victims. Investigations and prosecutions must not wholly depend on a report or complaint filed by the victim and should continue even if they withdraw their statement or complaint. Prosecutors must therefore have the knowledge and skills necessary to proceed besides the victim's testimony, which requires an evidence-based prosecution. Such cases should be constructed on corroborating evidence, such as physical evidence, medical experts and the testimony of expert witnesses. Prosecutors should be pro-active in exploring possible forms of corroborating evidence, and a checklist can also be a useful tool here. Some common types of evidence to consider include the following:

- The law enforcement officer's statement, incident scene report,
- Neighbours' statements or other witness accounts (friend, child, etc.),
- Emergency call/183 call recording, being registered in the Women's Support Programme (KADES), CCTV recordings,
- Photographs of the injury and scene (including photographs of property damage) Medical history/reports (including history of emergency treatment),
- Forensic medical certificate regarding the incident,
- History of previous incidents (e.g., criminal record of the perpetrator; exclusion/protection orders; administrative penalties),
- Previous reports on domestic violence that were not pursued,
- Letters or notes from the perpetrator, correspondence between the perpetrator and the victim,
- Evidence regarding the psychological state and bad character of the perpetrator.

III. Pre-trial Considerations

The pre-trial period represents a heightened risk for domestic violence victims, especially when perpetrators are not in custody or supervised before the trial. A number of key considerations will need to be made:

- The findings of a risk and lethality assessment are critically important to determine whether the perpetrator will be arrested or not pending trial.
- Prosecutors should request restraining orders between the perpetrator and victim taking into account the risks that may occur in moments when the perpetrator and the victim are confronted with each other, such as interrogation, testimony and trial.
- Judges should be alert and avoid poor practices such as: Lowering the charge by considering the grounds that may legitimise violence (e.g., "application of unjust provocation discount for acts that do not constitute unjust provocation "); the victim withdrawing their complaint or information about the parties' reconciliation or a request from the prosecutor to discontinue the case.
- Prosecutors should make a statement that if certain evidence, e.g. sexual history, is not relevant or necessary, it should not be taken into account by the judge. Prosecutors should also consider filing a motion to confiscate any firearms from the perpetrator.
- It should be inquired whether there are any concurrent civil proceedings and the court should be informed about any civil protection order.

IV. Trial Considerations

A distinction should be made between victims who are reluctant to lodge a complaint and those who refuse to make a statement or lodge a complaint. Prosecutors should not assume that the victim will refuse to testify; building trust and careful planning for her safety will enhance the likelihood that she will co-operate, even if reluctant at first.

Myths about domestic violence are widespread in the justice system and in the society at large, and such misconceptions "lead to a focus on the behaviour of the victim rather than the behaviour of the defendant." During trials and hearings, victims often behave in a way that is counterintuitive to what is expected. Consider expert witness testimony to explain the victim's reaction to trauma, to counteract stereotypes or even to explain some forensic evidence.

Judges should be equally mindful of the tactics that perpetrators use to manipulate the justice system and how they might appear in court (e.g., the defendant may minimise the violence, lie, externalise the responsibility by blaming alcohol or drug abuse, stress, or the victim). The court must maintain focus on the behaviour of the defendant at the time of the incident rather than the surrounding circumstances. Perpetrators also attempt to exercise control over the victim even in court, and it is critical that the judge manages courtroom safety.

C - Protective and Preventive Orders and Mechanisms under Turkish Law - An Analysis of the Protection and Preventive Orders That Can Be Granted under the Law No. 6284

I. General Information on the Mechanism of Protection and Preventive Orders That Can Be Granted under the Law No. 6284

In 2012 the Law No. 4230 on Protection of the Family was repealed and the Law No. 6284, in terms of combatting violence against women was enacted. This Law is very comprehensive in general in term of its content regarding combatting violence against women and domestic violence. The provisions of this Law are deemed to be complementary to the regulations on protective measures with regards to combatting domestic violence as per the Turkish Civil Code.

The Law No. 6284 prescribes various types of protective and preventive measures for the purposes of protection of victims of violence. Judges and administrative chiefs are authorised to grant these orders depending on the type of the measure. In cases where delay is undesirable, the chief law enforcement officer is also authorised to issue an injunction.

Preventive measures are directly aimed at the perpetrators and only judges are authorised to issue them. On the other hand, protective measures granted for the victims first and foremost aim to protect the victim from violence and to make sure that the victim lives a life free from the effects of violence.

Protective measures are directly related to the victim. They do not have a direct bearing on the rights and freedoms of the perpetrator. Therefore, some of the protective orders can also be granted by administrative chiefs and by the chief law enforcement officer in cases where delay is undesirable aside from the judges. Given the *sui generis* nature of granting protective orders which entails urgency, this practical preference is significant.

However, problems encountered in legal regulations regarding the measures and shortcomings experienced in practice stand in the way of achieving the goal that is aimed through these measures. The next section will set out the relevant legal regulations and where relevant, analyse the shortcomings and offer concrete recommendations to improve the implementation of these measures.

II. Considerations on the Process of Granting Orders

a. Jurisdictional Authority

The competent authorities to issue protection orders regulated under the Law No 6284 are judges (Art. 4) and administrative chiefs (Art. 3). The judicial authority in question lies with the family court judge (Art. 2(c)). To prevent jurisdictional disputes, application to the family court, administrative chief and law enforcement offices is permitted that can be accessed in the "fastest and easiest manner" (Art. 8(1) 2nd sentence).[2] Several issues were raised concerning the implementation of these provisions in practice and the following recommendations were made as a result.

Recommendations:

1. Taking the recommended proactive approach required by the Council of Europe standards, workshop members agreed that the applications made to the competent authorities as per law should not be rejected on the grounds of not encompassing the said residential address. It should be emphasised that as per this Law, protection should be ensured by the authorities that are accessed in the easiest and fastest manner. All

2 According to the Decision of the 1st Chamber of the Council of Judges and Prosecutors dated 27.12.2019 and numbered 1584,
1) In places where there is no family court (or where family cases are not separated); it is decided that the cases and affairs within the jurisdiction of the family court and the preventive and protective measures to be taken within the scope of the Law No. 6284 on the Protection of the Family and Prevention of Violence against Women will be handled by the following;
a) Where there is a civil court of first instance, this court
b) In places where there are two or more courts of first instance, the court of first instance numbered 2,
2) In places where there is a family court; preventive and protective injunctions to be granted within the scope of the Law No. 6284 on the Protection of the Family and Prevention of Violence against Women;
a) In places where there is a family court (or where family cases are exclusively dealt with), this court (or the judge with permanent jurisdiction exclusively dealing with family cases),
b) In places where there are less than twenty family courts, family court numbered 1,
c) In places where there are twenty or more family courts, it has been decided that family courts numbered 1 and 2 shall handle the cases.

the relevant authorities and especially law enforcement, administrative chiefs and family court judges should be informed about this issue.

2. Similarly, in the workshop, it was stated that specialised units were established under the law enforcement offices to deal with domestic violence applications in many provinces. Referral of applications made to a given law enforcement office to such specialised units does not violate Art. 8(1)(2) and that, on the contrary, it helps victims of violence access law enforcement officers specialised in this field. Nevertheless, law enforcement officers to whom the first applications are made should inform the applicants about the reasons for referral to the specialised unit and make sure that the victims access the specialised units urgently. This ensures that the Council of Europe standards are being complied with to ensure quick access to necessary and specialised support to victims.

3. Applications made to the family courts should not be rejected because there is already a divorce case between the spouses that is ongoing in another family court. In this context, it should be accepted that the jurisdictional determination in Article 7 of the Decision of the 1st Chamber of the Council of Judges and Prosecutors dated 27.12.2019 and numbered 1584 stating that "In case preventive and protective measures are requested within the scope of the Law No. 6284 together with the lawsuit filed in the family court or in connection with this lawsuit after the lawsuit is filed, the court where the lawsuit is heard on the merits shall hear this matter" does not contain an absolute obligation to be applied, especially in cases where there is a need to act urgently. This will also bring the practice in line with Council of Europe standards that require that member states make protection orders available to victims regardless of whether they have initiated other legal proceedings.

b. Non-exhaustive Nature of the Orders Listed in the Law and the Efficient Use of Judicial Discretion

The authorities that are deemed to be competent to grant injunctions are authorised to rule for "a measure, several measures of the ones specified in the provisions or similar ones." (Art. 3(1), Art 4(1)). Under Article 5 the judge can rule for similar measures that can be deemed appropriate aside from the exemplary measures comprising 11 clauses. That is to say, protective and preventive measures foreseen in the law are non-exhaustive. The

administrative chief and the judge can decide on the implementation of other measures that are deemed appropriate.

The basis for this is found in the Law's preamble which states that "given the specific conditions the people may find themselves in, the measures should be in line with the specifics of concrete cases" (Preamble Art. 3). Unfortunately, in practice it is seen that measures apart from the ones prescribed by the Law are not generally granted.[3] On the other hand, it should be noted that some of the measures envisaged by the Law, such as the restraining order are frequently applied but the measures related to applying to a healthcare institution for examination or treatment (referral for treatment) envisaged in Article 5 of the Law are not widely used, especially due to the problems encountered in the enforcement of the measure. It should be noted that the same problem is experienced in terms of the measure of monitoring with electronic bracelets. In this framework, it is necessary to increase the implementation of all the measures in the Law by evaluating them according to the conditions of the concrete case and to establish effective coordination between all the relevant institutions, including law enforcement units. In particular, since the problems experienced in the follow-up and notification of the measures harm the effectiveness of the implementation of the measures, more attention should be paid to this issue. In particular, it should be ensured that protective and preventive injunctions are notified to perpetrators of violence as soon as possible.

The meaning of the liberty and prohibition of mediation

The liberty of being able to decide on similar measures vested with the judges and administrative chiefs only encompasses the measures that are deemed to be within the scope of the objective of the Law. That is to say, liberty comes into play in terms of the type of the measures. In that sense, the judge or the administrative chief are not authorised to grant measures aimed at the reconciliation of the parties or continuity of the marital union by acting as conciliators or mediators between the victim of violence and perpetrator.[4] It should also be acknowledged that such a practice would be at odds with the objective role of the law[5] and that the Law vests the

3 **Bölükbaşı**, p. 118.

4 Öztürk, p. 19; **Karakaya**, p. 73; **Emel Badur**, "Recent Developments in the Field of Protection of the Family"", UTBA Journal, 84, 2009, p. 68; **Nuhoğlu**, p. 72, 73.

5 Öztürk, p. 19. An interim judgment delivered to that effect by the 2nd Family Court of Antalya was crit-

competent authorities with the liberty to act apart from protection of victims of violence and people who might be subject to violence and prevention of violence.

The mediation and conciliation offer ban between the victim of violence and perpetrator also features in the Regulation dated 05.01.2013 and Article 4/3/ğ entitled "*Regulation on Opening and Operation of Women's Shelters*". In this Regulation it is forbidden to offer conciliation and mediation to the victim and perpetrator of violence. However, Article 4/1-(ğ) of "*the Regulation on Violence Prevention and Monitoring Centres*" dated 2016 does not deem the mediation and conciliation ban to be definitive. In line with the said Regulation, it is specified that "*At the stage of granting and enforcing protective or preventive orders, conciliation within the scope of Penal Code or mediation for civil disputes between the victim of violence and perpetrator cannot be offered. Nevertheless, consultancy services as to dispute resolution methods can be provided.*" In practice it is reported that Violence Prevention and Monitoring Centre (ŞÖNİM) employees might attempt at mediation and force the victims to come together or reconcile with the perpetrators of violence.[6] There are findings as to the fact that similar practices exist in shelters.[7]

On the other hand, it is also asserted by some that it is not possible to prevent violence only through injunctions and that mediation should fall into the remit of ŞÖNİM.[8] However, in order to achieve the objective of the Law and not to deviate from this objective, mediation services should not be included within this process as much as possible.

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icised for similar reasons. In the Judgment it is stated that *"As per article 7 of the Law No. 4787 family is the cornerstone of the Turkish society and that by way of marriage the parties are bound by the obligation of mutual care, love, fidelity and tolerance and that if the parties have children, they should be reminded of the fact that divorce leads to negative outcomes for the future of the children and generally causes children to be part of the society as a culprit or problematic person and that marriage necessitates being together in sickness and health, in abundance and poverty and thus a warning should be made to the parties to contemplate and reconcile."* Antalya 2nd Family Court, Interim Judgment dated 07.06.2013 (2013/218 M.), (Öztürk, p. 19)

6 R.G. 05.01.2013 D., 2013/28519 N.

7 https://morcati.org.tr/wp-content/uploads/2022/01/Erkek-S%CC%A7iddetiyle-Mu%CC%88cadele-de-Koordinasyona-I%CC%87lis%CC%A7kin-I%CC%87zleme-Raporu.pdf.

8 Opuz Group Cases (no. 33401/02) Shadow Report- Purple Roof Women's Shelter Foundation, October 2020-Istanbul, https://morcati.org.tr/wp-content/uploads/2021/02/AIHM-Opuz-Grubu-Davalari-Golge-Raporu.pdf.
Mustafa Serdar Özbek, Alternative Dispute Resolution, Yetkin Publications, Ankara, 2013, p. 1027; Especially in cases that do not contain an element of physical violence, in parallel with the opinion that ŞÖNİM employees undertaking voluntary mediation based on the specifics of the concrete case might help prevent violence, Öztürk, p. 24.

In addition, article 1 of the Law No. 6325 on Mediation in Civil Disputes also provides a further basis for the position that disputes within the scope of this Law cannot be subject to mediation.[9] As per the said provision *"disputes with an element of domestic violence claims are not suitable for mediation*." Therefore, after making an application for prevention of violence, it is not possible to resolve the dispute between the spouses through mediation. It is worth noting that there is no distinction between compulsory or voluntary mediation in the said regulation. Although only compulsory mediation is forbidden through the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, within the scope of Art. 1 of the Law No. 6325 on Mediation, it can be argued that voluntary mediation cannot be used for disputes with an element of domestic violence either.

Recommendations:

1. In line with the Council of Europe standards regarding the need for specialist training on VAW and to take a proactive and individual approach to protecting the victim, it is recommended that the competent authorities should be encouraged to take alternative measures in line with the specifics of the concrete case and not limit themselves to those prescribed by the Law.
2. It has been observed in practice that the decision on the same measures is made in a collective and default manner without taking into consideration the specifics of individual concrete cases. As a result, it is recommended that the competent authorities are trained as to the fact that such practices do not serve the purpose of the Law and that protective and preventive orders should be adjudicated based on the specifics of the concrete cases.
3. Such conciliatory acts should not be undertaken based on the liberty with which the administrative chiefs and judges are vested. It is not possible to enforce Art. 7 of the Law No. 4787 on Establishment, Duties and Proceedings of Family Courts.[10] It is important to indicate that it is not possible for competent authorities which are resorted to as per law

9 *Mustafa Serdar Özbek, Alternative Dispute Resolution, Yetkin Publications, Ankara, 2013, p. 1027;* Especially in cases that do not contain an element of physical violence, in parallel with the opinion that ŞÖNİM employees undertaking voluntary mediation based on the specifics of the concrete case might help prevent violence, Öztürk, p. 24.

10 R.G. 22.06.2012.

and especially judges to try to make the spouses reconcile with each other as per article 195(II) of the TCC.[11] In order to ensure that the state achieves its objective which is making sure that the victim can access proceedings undertaken by an impartial judge through prohibition of compulsory mediation, it is important that family court judges are informed about this issue in practice.

4. Further, the inappropriateness of mediation in cases involving VAW which has been elucidated by the Council of Europe means that the mediation ban should not only cover the individual violence cases within the scope of this Law but also other family disputes where claims as to existence of violence are put forth and there are notices to that effect and that there should be a uniformity in practice.

5. The Council of Europe standards also require that employees of ŞÖNİM and shelters and law enforcement officers should be periodically trained about the prohibition of attempts at mediation, conciliation and reconciliation between the parties.

c. Power of Ex Officio Rulings for Orders and Reporting

Protective and preventive orders can also be granted ex officio apart from being granted upon request. (Art. 2(1)(ğ)). The decision on taking the necessary measures can be made upon request of the Ministry or law enforcement officers and the public prosecutor in addition to the request made by the person in question. For example, the administrative chief or judge who is aware of an investigation or prosecution under way for crimes that need to be investigated and prosecuted as per the Turkish Penal Code is authorised to rule on the necessary measure *ex officio* even if the victim has not lodged a complaint or withdrawn the complaint.[12]

Relatedly, as per Art. 7 of the Law, in case of violence or existence of the threat of violence, everyone is authorised to report the relevant authorities

11 Through paragraph one, article 7 of the Law No. 4787 it is envisaged that based on the specifics of the concrete cases at hand family courts should resolve the disputes by way of peaceful settlement without delving into merits and should proceed with the proceedings if peaceful settlement cannot be achieved.
Through this regulation family court judges are enabled to act as "family mediators" so to say but most of the disputes in family law are related to public order and are not issues on which the parties may freely have disposal and thus the said regulation can be implemented as regards divorce cases and division of matrimonial regime, **Süha Tanrıver**, "Alternative Dispute Resolutions and Especially Mediation within the Framework of Civil Disputes", UTBA Journal, I. 64, Y. 2006, (s. 151-177), p. 173

12 See **Ebru Ceylan**, "Regulations on Domestic Violence and Violence Against Women in Turkish Law", UTBA Journal, I. 109, Y. 2013, (p. 13-54), p. 19, 20;

about this situation. It is important to note, however that it is the authority to report rather than the obligation to report that is regulated here. It should also be acknowledged that this means of reporting and complaint can also be used when there is reasonable doubt as to threat of violence, not just for acts of violence that are already perpetrated.

Regarding implementation of the Law No. 6284, law enforcement agencies should act uniformly throughout the country when initiating proceedings on notifications and complaints. In other words, complaints not only on physical violence but also on other types of violence such as psychological violence should be submitted directly to prosecutors through the online system. The online complaint referral system should be improved, accelerated and delays should be minimised. In some places, when a victim submits a complaint to law enforcement office, the law enforcement officer refers the person to the relevant domestic violence bureau. Although establishment of specialised units is a positive and good practice, remoteness of the referred unit may pose a danger for the person. Therefore, at this point it is necessary to ensure that the process is initiated by the law enforcement unit and referred to the relevant unit in a controlled manner and if necessary, an injunction can be granted ex officio. The practice in this regard is not uniform throughout the country. However, the Law No. 6284 stipulates that the victim can file a complaint to any law enforcement office in the immediate vicinity. This should be clarified in practice and the cooperation between law enforcement office and domestic violence bureaus should be strengthened. In addition, within the framework of Art. 278 of the Turkish Penal Code, where the act of violence constitutes a crime or it is still possible to contain the outcomes caused by this crime, it is an obligation for everyone to report the relevant authorities about this situation save for the exceptions provided for in Art. 278(4) of the TPC.[13] Notifications can be made in written, verbal form or any other form possible. Public officials who are thus notified of the situation are obliged to fulfil their duties of ex officio rulings without delay within the scope of this Law and notify the authorities about other measures that need to be implemented. As can be seen, interagency cooperation is important within this context. These provisions are also in line with the Council of Europe standards with regard to taking a pro-active approach and in compliance with the due diligence standards set out above.

13 Yağcıoğlu, (n 9) 950; Ercoşkun Şenol H K, 'Examination on the Law on Protection of the Family and Prevention of Violence Against Women' (2019) Court of Jurisdictional Dispute Journal (13) 423-459, 450; Mehmet Erdem, Family Law (2nd ed, Seçkin Publications 2019) 256.

Public institutions and organisations and professional organisations should also immediately inform the relevant complaint authorities after being notified of an act of violence or threat of violence.[14] However, despite this duty of notification being regulated by the criminal code, under the Law No. 6284 there is no sanction envisaged for officials who have not fulfilled this obligation. In such circumstances, it is possible that a legal liability arises due to a public official not notifying the relevant authorities about the crime (TPC Art. 279) or a healthcare practitioner not notifying the relevant authorities about the crime (TPC Art. 280).

Additional recommendations were also developed during the workshop and are set out below.

Recommendations:

1. The authorities who are informed by means of third-party reporting and by reporting by professionals should decide on the measures ex officio if necessary. In the case that the reported authorities are not authorised to decide on the measures, these authorities should inform the competent ones about the situation. In order to encourage ex officio rulings, guidelines and trainings to that effect should be offered periodically.[15]
2. Taking into consideration the fact that it has been more than 10 years since some of the trainings on awareness about gender equality and violence against women were provided[16], periodical trainings would offer efficiency and frequency to reports by professionals and thus effectuate interagency cooperation for public officers to render ex officio rulings.

d. Burden of Proof

The Law No. 6284 stipulates sui generis rules on burden of proof and submission of evidence. As per the said provision, *"In order to grant a protective order, no proof or document shall be sought for to prove perpetration of violence. Preventive order shall be issued without delay.*

14 In the provision (Art 7(2nd sentence)) on the obligation of reporting the competent authorities about the situation only 'public officials' are mentioned. Nevertheless, second phrase of Art 4(1) of the said Regulation features a more detailed regulation and imposes a notification obligation on '*public institutions and organisations and professional organisations having the characteristics of public institutions*'

15 **Nuhoğlu**, p. 71, 72; **Mahmut Koca**, "Evaluation of Istanbul Convention and the Law No. 6284, in Akın Ünal and Arif Kalkan (eds), Workshop on Determining the Violations in Family Law and Proposed Solutions, 2019, p. 27, 51.

16 **Demirkır Ünlü**, p. 90.

Issuance of this order shall not be delayed in a way to endanger achievement of the objective of this Law." (Art. 8(3)).

The Law No. 6284 states that in relation to protection orders, "no" evidence should be sought, and protection orders should be granted hastily. It should be emphasized that the Law makes a differentiation between protection and preventive orders with regards to burden of proof and the requirement of corroborative evidence submission. Under Art. 8(3) s.1, only protection orders are to be issued without the requirement of any evidence or report proving violence. As protective orders are directly linked to the victims of violence and do not prescribe any direct impact on the values included in the personal right of the perpetrator, the protective measures taken should not lead to a violation of rights or disproportionate victimisation on the part of the perpetrator of violence.

On the other hand, preventive orders are not subject to this exemption in terms of facilitation of burden of proof and should only be issued without delay to avoid jeopardizing the Law's aim and purpose (Art. 8(3) s.2 and 3).[17] Preventive orders, therefore require some form of corroborative evidence as long as it does not hinder the "urgency" ratio of the law.

In practice however, almost all judges apply the "no proof" rule that is strictly limited to granting protection orders, to preventive orders. This is one of the main criticisms of its implementation and is clearly against the Law No. 6284 as it does not prescribe a general exemption of corroborative evidence submission when granting preventive orders. Most importantly such failures in relation to preventive orders can lead to potential breaches of the alleged perpetrators rights (Art. 6, ECtHR) as it may violate the principle of proportionality by resulting in orders that are unnecessary and disproportionate.

In this context, some of the problems experienced in practice have been the subject of individual applications to the Constitutional Court. There are judgments of the Constitutional Court in which the Constitutional Court has accepted that the right to a fair trial has been violated due to the lack of a reasoned judgment.[18] However, it should be underlined that in these decisions, it was decided that the right to a fair trial was violated due to the lack of evaluation and justifications in the decision of the court, which was

17 Salih Söylemezoğlu, B. No: 2013/3758, 6/1/2016, § 34.

18 2. B., B. 2019/17533 T. 19.1.2022; 1. B., B. 2018/3789 T. 7.4.2021; 2. B., B. 2018/27304 T. 24.2.2021.

the objection authority where the objection to the injunction was heard. The aforementioned Constitutional Court judgements do not concern the decision of the family court of first instance that issued a preventive injunction without corroborating evidence.[19] As a result, the Court requires that the objection authorities evaluate the evidence submitted by both the claimant and the defendant and to reach a reasoned decision on that basis. Additionally, the Court has consistently ruled that a violation of rights has occurred with regard to the use of the word "perpetrator" in family court rulings of preventive orders.[20] In the rulings, in the judicial process of granting preventive orders while paying sole regard to the claimants statements without evaluation of any collaborative evidence, the wording used in the ruling with regards to the defendant as "perpetrator" rather than "alleged perpetrator" has been accepted as violation of personality rights in terms of honour and dignity. In cases where criminal proceedings have also been initiated, this issue has also been considered by the Constitutional Court as violation of the presumption of innocence.

It is worth mentioning that raising an objection to the preventive orders aimed at the perpetrator is also regulated as per the Law No. 6284. The court can rule for revocation or alteration of the measure as a result of the objection. In this process where an objection is raised, all the specifics of the concrete case at hand and possible pieces of evidence and counter arguments can be taken into account.

On the other hand, erroneous practices which used to feature in previous reports prepared in this field, such as the law enforcement officers seeking proof as to the existence of violence in order to rule for protective orders are less frequent but still ongoing.[21] It is seen that problems experienced in practice in terms of implementation of the Law No. 6284 with regard to proof stem from the lack of information of the competent authorities actively involved in the process of granting injunctions about the relevant provisions.

Furthermore, it should be emphasised that not requiring proof of violence does not result in an automatic ruling for the most severe measure or deciding on certain measures. When granting injunctions, the competent

19 Salih Söylemezoğlu, B. No: 2013/3758, 6/1/2016 § 41, 42.

20 2. B., B. 2017/27041 T. 11.12.2019; 1. B., B. 2018/2626 T. 14.10.2020.

21 8th Periodic Shadow Report submitted by Türkiye Executive Committee for NGO Forum for CEDAW to UN Committee on Elimination of All Forms of Discrimination Against Women, July 2021, p. 5, N.9, https://morcati.org.tr/wp-content/uploads/2022/02/CEDAW-8.-Periyodik-Donem-Golge-Raporu.pdf.

authorities should nonetheless take into account the type, frequency and rate of violence so that measures taken are in line with the individual facts of the case.[22]

Recommendations:

1. When issuing preventive orders, the authorities that are competent to rule on the measures should promote uniform practices in terms of requiring proof or documents where this is merited by the specifics of the case. For example, in cases involving severe acts or threats of violence, the judges should rule on suitable protective orders without seeking further evidence and without delay. In this respect, it will be useful to obtain a risk report quickly. The principle of proportionality should be firmly observed. Training provided to both judges, administrative authorities and law enforcement officers on this issue should be continued periodically.
2. In addition, when issuing preventive orders, instead of automatically granting copy paste orders in bulk, based on the specifics of the concrete case, granting the necessary orders that take into account the type, frequency and rate of violence and/or threat of violence should be the established manner of implementation. And for that purpose, training should be provided to ensure that the specifics of the case such as the type, frequency and rate of violence should be taken into consideration when ruling on the type and duration of the measure without prejudice to the urgency of the decision-making process.
3. The competent authorities should be trained to understand that in relation to preventive orders, the Law does not regulate the exemption of burden of proof. As such, the erroneous belief that corroborative proof will not be sought for by any means in all kinds of circumstances when issuing a preventive order should be corrected by means of guidelines and trainings.
4. Although there is no distinction between protective and preventive orders in the provision on objection, it should be acknowledged that the perpetrator of violence has the right to object only in case of preventive measures which might interfere with the rights and freedoms of the said person, and not in the case of protection orders.

22 Opuz Group Cases (no. 33401/02) Shadow Report- Purple Roof Women's Shelter Foundation, October 2020-Istanbul, p. 7, https://morcati.org.tr/wp-content/uploads/2021/02/AIHM-Opuz-Grubu-Davalari-Golge-Raporu.pdf.

5. As a matter of fact, risk analyses contribute to increasing efficiency of preventive orders. The indirect effect brought about by these analyses regarding facilitation of proof should be attached high importance. Effect of the risk analyses that are made by collecting and processing information on victims and perpetrators of violence on proving the threat of violence should be addressed. Although the objective of risk analyses is not to facilitate proving the threat of violence directly, risk analyses made by competent authorities can expedite and facilitate the process when it comes to the stage of proof. Therefore, the analysis reports to be prepared about perpetrators of violence should feature data such as previous injunctions granted, forced confinement judgments and records of violation which can be helpful for the competent authorities when ruling on available measures. It is recommended that these reports are kept in an infrastructure which can be easily accessed by relevant authorities and on the internet if possible.[24]

e. Implementation of the Confidentiality Order (Art 8(6))

Confidentiality is an important principle serving to protect the victim from acts of violence that might be perpetrated or continue to be perpetrated. As per Art. 8(6) of the Law No. 6284 "*If necessary, identity information or other information or addresses that might disclose identities of the person under protection and other information that is important in terms of ensuring efficiency of the protection shall be kept confidential in the official records. A separate address shall be identified for notifications to be made. Relevant provisions of the Turkish Penal Code No. 5237 and dated 26/9/2004 shall be applied to the person who shares such information with other people, discloses or explains such information unlawfully*".

In the said regulation a protective type of measure is envisaged.[23] Granting a confidentiality order amounts to a duty where there is a clear need. Therefore, this order can be granted ex officio without being contingent on request. In case of need, a confidentiality order can also be granted by the administrative chief aside from the judge.[24]

Serious difficulties are still encountered in the implementation of confidentiality orders issued within the scope of the Law No. 6284. It is reported that, contrary to what is stated in the report submitted by Türkiye

23 **Karakaya**, p. 26, 32, 33.

24 **Karakaya**, p. 32.

in the M.G. v. Türkiye case (646/10), risk assessments are not made and ŞÖNİMs do not follow up on implementation of confidentiality orders by the relevant institutions.[25] Similarly, a lack of interagency cooperation puts the lives of women and children at risk; uncertainties and lack of coordination seen in practice stand in the way of fundamental rights of notably women and children and even their relatives such as the right to live, education, health, shelter.[26]

In practice it is reported that men obtain school records of their children despite the necessary measures taken and continue to expose their wives and children to violence and thus difficulties are also experienced in granting injunctions with regards to keeping school records confidential.[27] Similar problems are also encountered regarding the confidentiality of Social Security Institution Records.[28]

25 Opuz Group Cases (no. 33401/02) Shadow Report- Purple Roof Women's Shelter Foundation, October 2020-Istanbul, p. 4, https://morcati.org.tr/wp-content/uploads/2021/02/AIHM-Opuz-Grubu-Davalari-Golge-Raporu.pdf.

26 Opuz Group Cases (no. 33401/02) Shadow Report - Purple Roof Women's Shelter Foundation, October 2020-Istanbul, p. 4, 5, https://morcati.org.tr/wp-content/uploads/2021/02/AIHM-Opuz-Grubu-Davalari-Golge-Raporu.pdf.

27 **Purple Roof, Monitoring Report of the Law No. 6284**, https://www.morcati.org.tr/attachments/article/255/6284_Kanun_Uygulamalari_Raporu.pdf, p. 11, 12; In the Report it is stated that: *"Women making written applications to the court to benefit from the Law No. 6284 in order to ensure their safety and live a life free from violence made a request for confidentiality order in the petition regarding keeping school records of their children, their own SSI records confidential. The court ruled mostly in favour of protective orders only and didn't rule for confidentiality orders. A woman having resorted to Purple Roof and living in a shelter with her children made a request in her application to keep school records of her children confidential. The court of competent jurisdiction didn't fulfil this request and took statement of the child. Throughout this process the children were not able to go to school as their records were not kept confidential"*, p. 11, 12.
"It is seen that men perpetrating violence can access school records of their children by making use of the vulnerabilities of the system. Although the name of the school which the child attends and its address were kept confidential, fathers were able to learn about the address of the school which their children attend by logging into the e-school system through identity number and getting hold of the information regarding the teacher. When we conveyed this problem to the authorities in the Ministry of National Education, they replied "they couldn't do anything as they were also pressurised by fathers. "Another problem is the fact that the father tried to obtain information from the school to which the child is transferred. It is seen that fathers were able to obtain information about the new school whose address is kept confidential from the administrative cadre of the former school and access the new address without much difficulty. It is observed that many of the school administrators are not knowledgeable about the function of the button added to the system to keep the records confidential by the Ministry of National Education.", p. 11.

28 *"Problems are also experienced in keeping the SSI records confidential. When women get new jobs, they are easily accessed by perpetrators of violence as their SSI records are not kept confidential. Requests made by women for confidentiality are either refused or it takes too long to issue the orders. Women striving to go on with their lives when the order was about to be granted had to work in uninsured jobs.*
When an order is granted to keep the SSI records confidential, many problems are experienced again. Many women ran the risk of being found out by perpetrators of violence as the child's SSI records cannot be kept confidential even though their own SSI records are confidential. In general, the courts of competent jurisdiction do not rule on keeping the child's records confidential. As the women live with their children, they can be easily found in the case that their child receives healthcare service. There were

A different problem experienced in practice by victims taken under protection is that they not able to receive appointments from hospitals by using the electronic system, access their own information on systems such as e-state, e-pulse, Centralised Doctor Appointment System, open bank accounts, issue identity cards due to not having an address and similar systemic problems.[29] This demonstrates that effective implementation of confidentiality orders is not undertaken by the relevant institutions of the state in a coordinated manner. The duty of coordination lies with ŞÖNİMs (ŞÖNİM Reg. Art. 25). However, it is observed that ŞÖNİMs state that it is not their duty to make sure that confidentiality orders are effectively implemented in all the relevant institutions.[30] It should not be overlooked that confidentiality orders also create problems in determining where to obtain a power of attorney for the lawyer and in determining the competent court for filing a lawsuit as the address is confidential. In order to overcome these difficulties, it is important that a common road map is drawn up by all the shelter offices in the country and that different practices are avoided.

Another problem encountered in practice is related to the duration of the confidentiality order granted. This measure is granted short-term and due to the lack of interagency cooperation that is reported, the duration of the order might expire by the time the said order is started to be implemented.[31] Granting confidentiality orders for short periods of time can therefore be problematic. The main cause of this problem is the principle regulated under the Law No. 6284 regarding the duration of orders. As per Art. 8(2) of the Law No. 6284, the judge can grant an order for a maximum duration of six months, if such an order is being granted for the first time. Judges tend to

women whose whereabouts were found by the perpetrators of violence as they benefitted from hospital appointment system although the record was confidential. It is seen that the perpetrators can log into the hospital appointment system and create a new profile through identity number of the women and get a new password using their own phone number and get to learn about where the hospital is located easily and that the women cannot get back their profile. A woman living in the shelter was found by the perpetrator by using such information. Perpetrators can also call the Ministry of Health hotline 182 and learn about women's and children's hospital appointments. In a call made with call enter officials they were asked about this issue, and they said they were not informed and given any instruction about this issue.", **Purple Roof Report**, p. 12.

29 https://siginaksizbirdunya.org/en/haberler/24-kadin-siginaklari-ve-dayanisma-merkezleri-kurultayi-sonuc-bildirgesi/.

30 8th Periodic Shadow Report submitted by Türkiye Executive Committee for NGO Forum for CEDAW to UN Committee on Elimination of All Forms of Discrimination Against Women, July 2021, p. 24, N. 72, https://morcati.org.tr/wp-content/uploads/2022/02/CEDAW-8.-Periyodik-Donem-Golge-Raporu.pdf.

31 Opus Group Cases (no. 33401/02) Shadow Report- Purple Roof Women's Shelter Foundation, October 2020-Istanbul, p. 4, 5, https://morcati.org.tr/wp-content/uploads/2021/02/AIHM-Opuz-Grubu-Davalari-Golge-Raporu.pdf.

apply this six-month limit to confidentiality orders when in fact, such time limit should not apply to confidentiality orders. Bearing in mind the ratio of the six-month time limit and the purpose of confidentiality orders, longer periods for such orders should be granted if needed. Furthermore, if confidentiality orders are granted on a short-term basis, the victim will be burdened with subsequent necessary applications for renewal on their expiry. This is not only a disincentive for women but it is clear that this may put the women's safety in danger regardless of whether a reapplication is made or not. It should also be noted that each reapplication increases the risk of secondary trauma as women have to recount their stories repeatedly.[32]

Another problem that is frequently encountered is that when a confidentiality order is issued for the adult, a confidentiality order aimed at the child cannot prevent the father from exercising his right to establish visitation rights with the child.[33] Article 7 of the Regulation on the Execution of Decisions and Injunctions Regarding Child Handover and Establishment of Contact with the Child emphasises that in the event that a confidentiality order or another measure is decided, the procedures for realisation of contact or establishing contact with the child will be carried out in accordance with these decisions; the requests of the relevant parties for file review will be met by taking the necessary measures to ensure the confidentiality of the address, contact and identity information in the file and other information and documents decided to be kept confidential. However, it is clear that the establishment of contact by the perpetrator of violence with the common child would render a confidentiality order dysfunctional. In such cases, and in accordance with the Council of Europe standards, the best interests of the child should prevail. Violence and especially domestic violence should be taken into consideration when evaluating the right to custody and establishment of contact. Here priority should be given to the rights and safety of the victim of violence and their children. If there is such a risk, it should be assumed that the right to establish contact does not supersede evidence of such risk and, where the risk is too great, such demands by the person in question should be refused. In addition, the judge may refuse to grant the right to establish contact from the beginning or revoke a right

32 Opuz Group Cases (no. 33401/02) Shadow Report- Purple Roof Women's Shelter Foundation, October 2020-Istanbul, s. 4, 5, https://morcati.org.tr/wp-content/uploads/2021/02/AIHM-Opuz-Grubu-Davalari-Golge-Raporu.pdf.

33 Opuz Group Cases (no. 33401/02) Shadow Report- Purple Roof Women's Shelter Foundation, October 2020-Istanbul, s. 4, 5, https://morcati.org.tr/wp-content/uploads/2021/02/AIHM-Opuz-Grubu-Davalari-Golge-Raporu.pdf.

that is already granted. If there is already a right exercised by the person in question to establish visitation rights, a decision can be made on making sure that personal contact is supervised, does not involve direct contact or is revoked in their entirety (6284 Art. 5(ç)). As such, children could no longer be used as a means to exert violence. In such cases, it is important that ŞÖNİMs do not facilitate establishment of contact between the child and the perpetrator of violence. It should also be noted that it cannot be assumed that supervised contact in cases of domestic violence will serve the best interests of the child and that the prevention of personal contact with the child might be a more appropriate choice.

Council of Europe standards require that judge rules on the most appropriate measure taking into account the type, severity and frequency of violence and the risk of any further violence to both the child and the adult. A confidentiality order for the child should also be granted by the family court judge dealing with the divorce case when necessary. The judge should also take necessary temporary measures to ensure the care and protection of the children ex officio while the divorce proceedings are ongoing (TCC Art. 169). Within this context, the judge is authorised to rule on the measures envisaged as per the Law No. 6284 or similar measures ex officio when necessary. In cases containing an element of violence, the family court judge should rule on such measures as per Art. 169 of the TCC. As per Art. 5(3) of the Law No. 6284, not only the judge dealing with the divorce case but also the family court judge who is resorted to for prevention of violence and protection from violence are authorised to rule on custody independently of the divorce proceedings. However, pursuant to Article 7 of the Decision of the Council of Judges and Prosecutors dated 27.12.2019 and numbered 1584, a division of labour has been made so that if preventive and protective measures are requested within the scope of the Law No. 6284 together with the lawsuit filed in the family court or in connection with this lawsuit after the lawsuit is filed, the court where the case is heard on the merits will handle this matter. But, just as the judgment to be delivered in the divorce case should not be awaited when the specifics of the concrete case entail ruling on the custody with urgency.[34] The division of labour principle decision should not be applied in absolute terms in such urgent cases, and the said principle decision must be interpreted in accordance with the purpose.

34 **Cansu Kaya Kızılırmak**, "The Right to Custody and Establish Personal Contact within the Scope of Article 21 of Istanbul Convention and the Law No. 6284", Present to Prof. Dr. Sermet Akman, 2021, Istanbul, ğ. 438, 439.

Recommendations:

1. It is not always necessary to grant confidentiality orders limited to a certain period of time. It is recommended that authorities that are competent to rule on the measures are informed and trained about the fact that especially in cases where the safety of the person is put at risk, the measures can be taken indefinitely, and that trainings and guidelines feature this issue. Similarly, in the aftermath of the injunction granted indefinitely and upon elimination of the risk, it should be ensured that relevant institutions work in a coordinated manner to make sure that women can revoke this order easily and ensure efficient access to relevant records. As such, the victim should be enabled to normalise their life without facing bureaucratic obstacles. ŞÖNİMs should play an active role in fulfilling this duty.
2. It is important that training is provided regarding the problems encountered in practice when granting injunctions and implementing these injunctions effectively.[35]
3. Within the scope of the training, in order to promote issuance of confidentiality order and its efficient implementation, it should be underlined in the provision on confidentiality order that "all *the other information that is important in terms of effectiveness of the protection*" is kept confidential in all the official records.[36] In addition, within the scope of the liberty to opt for the appropriate type of measure vested with the competent authorities to ensure protection from violence, trainings should be provided regarding the fact that similar orders can be granted ex officio and upon request based on the specifics of the concrete case at hand. Attention should be paid to implementation of the measure especially during proceedings. For example, address of the victim should not be specified for exchange of official letters, original versions of the documents in the case file should be kept in the safe deposit box of the courtroom and identity and address information on

35 In a case that was the subject of an individual application made to the Constitutional Court, address information of the applicant was incorporated into the case file upon an address inquiry made by the law enforcement for a notification to be made to the applicant and as the address information of the applicant became accessible to her spouse, it was necessary to make another address change by the Governorate of Istanbul.(19.12.2017 D., 2014/546 N., OG. 28.02.2018 D., 30346 I., N. 14).

36 Within this framework reference is made to the following judgment: *"D.N who had an unwanted pregnancy made an application to the Family Court to keep identity information of her baby confidential and to make sure that the hospital where she was to deliver her baby keeps her and her baby's information confidential, the application was deemed convenient and the judge ruled on the necessary measure.",* **Aydoğan**, p. 216.

the document samples in the case should be covered in such a way as to make them hard to read.[37]

4. All the employees of the relevant institutions should be trained as to what a confidential record is and how it applies. In order to overcome the problems that are reported, coordination should be effectively undertaken by ŞÖNİMs. It is recommended that a thorough planning should be done with the Ministry of Family to make sure that duties are effectively and consistently fulfilled by ŞÖNİMs.
5. The Ministry of National Education should keep the records of the children who live in shelters with their mothers confidential and relevant institutions should be informed and trained about the fact that there is no need for a decision by the judge to do that.[38] School records of children whose mother don't live in shelters should also be kept confidential. In the trainings, it should be emphasised that such requests should not be refused, and the decision can be made ex officio if necessary.
6. In order to grant confidentiality orders for the children of the victim, the competent authorities should be trained, and guidelines should be prepared on this issue. In the trainings and guidelines, it should be emphasised that the child's right to establish visitation rights with his/her parent who is the perpetrator of violence should not undermine the terms of the confidentiality order.
7. It is necessary that implementation of the regulations contained in the Law No. 6284 on the right to establish contact with the child is disseminated and legal practitioners and members of the judiciary are trained, and protocols and guidelines are prepared on this issue.
8. In addition, not only in the proceedings conducted under the scope of the Law No. 6284 but also in other cases related to custody and the right to establish contact and especially in divorce cases, the practice regarding limitation or revocation of the right should be promoted so that the judge can make the decision ex officio.

37 **Karakaya**, p. 33, 34.

38 "Regulation on Opening and Operation of Women's Guesthouses" (RG. 5.01.2013 T., 28519 S.) as per article 22, *"The child who benefits from the services provided by guesthouses shall be registered with the school that is the closest to the guesthouse in line with the principle of confidentiality and by using the identity card provided by ŞÖNİM. The address of ŞÖNİM shall be identified as the residential address of the child unless there is a provision to the contrary"* (art 22/1) It is clearly regulated that the actions are taken in line with the principle of confidentiality. Similar problems are also encountered in practice regarding the children living in shelters, see **Sallan Gül**, p. 118.

f. Preventing the Victim's Secondary Traumatisation

In practice some procedural safeguards need to be foreseen in legislation and practice in order to avoid secondary victimisation of victims. In particular, the importance of the support of the Directorate of Judicial Support and Victim Services in criminal investigations should be emphasised. Cooperation between the Directorate of Judicial Support and Victim Services and prosecutors and courts should be strengthened. To this end, provisions stipulated by secondary legislation such as the Presidential Decree No. 63 on Supporting Victims of Crime, Circular No. 170 on Judicial Interview Rooms, Circular No. 170/1 on Investigations of Crimes Committed Against Sexual Immunity and Circular No. 154/2 on Prevention of Domestic Violence and Violence Against Women should be implemented in practice by the courts hearing domestic violence cases. The most recent development in this regard is publication of the Regulation on Judicial Support and Victim Services. As the aim is to prevent secondary victimisation, it is important to ensure that this legislation is effectively and equally implemented in practice.

In addition to the secondary legislation, Article 236(4) of the Code of Criminal Procedure provides a very important guarantee for the protection of victims of violence against women. This article relates to the supervision of the victim and the complainant and provides that statements and testimonies of children or victims deemed objectionable by the public prosecutor or the judge may be taken in private or without face-to-face contact with the suspect or suspects. In practice however, prosecutors and the court do not apply the guarantees provided for the hearing of adult victims as well as children. Awareness of this among prosecutors and judges should be raised and the implementation of Article 236(4) and secondary legislation on supervision of adult victims should be ensured. This should be ensured uniformly in every court in Türkiye.

On the other hand, there should be a transformation of mentality among members of the judiciary and the background and private life of victims of violence should not be questioned in proceedings unless it is relevant to the concrete case and the underlying reasons for withdrawal of the complaint should be investigated.

II. Visibility for the Concepts of Stalking and Dating Violence

a. Stalking:

Protective and preventive orders foreseen in the Law No. 6284 can also be granted for the victim and perpetrator of stalking. "Unilateral stalking" features in the 'aim, scope and fundamental principles' section of the article of the Law (Art. 1) but its definition is regulated in the Regulation (Art. 3(ş)). However, this definition is not clear in terms of the level of fear or anxiety caused by the act, whether it should reoccur and be subject to *dolus specialis.*[39]

The Constitutional Court's *Türkan Aydoğmuş* judgment (2022) contains important findings on psychological violence. According to this judgment, public authorities should not be content with identifying situations that constitute psychological harassment; they should quickly take effective measures to prevent or remedy such behaviour. Otherwise, it may be concluded that the positive obligations to be undertaken by public authorities within the scope of the right to protection and development of one's material and moral existence are not fulfilled.

On the other hand, stalking and digital violence are recently regulated under Art. 123/A of the Turkish Penal Code. According to this article, the perpetrator who "*persistently causes a serious disturbance to a person or causes them or one of their relatives to be concerned about their safety or the safety of one of their relatives by physically following them or trying to establish contact by using communication tools, information systems or third parties*" shall be sentenced to imprisonment from six months to two years. Article 123 of the Turkish Penal Code, to which these phrases were added, regulated the offence of disturbing the peace and tranquillity of a person. Within the scope of this offence, the perpetrator would be punished upon complaint "in case of insistently calling, making noise or engaging in any other unlawful behaviour with the sole purpose of disturbing the peace and tranquillity of a person".

However, Article 123 of the Turkish Criminal Code was a regulation that was not applied in practice, as it sought continuity in the perpetrator's acts in accordance with the type. Although it is aimed to correct this situation in practice with the offence of persistent stalking, it will be seen in the

39 **Recep Doğan**, "The Concept and Crime of Stalking as a Type of Violence Against Women", Ankara Bar Journal, 2014/2, p. 151.

future how the offence of persistent stalking will be applied in practice. The requirement of a complaint in the offence of stalking added to Article 123/A is problematic, as it may result in the inability to prosecute the offence of stalking and, in the final analysis, impunity if the complaint is withdrawn by the victim under pressure and threat. In addition, there is an ambiguity in terms of the legality element of the offence. Practice will show how to define both the concept of "insistence" and the expression "causing a serious disturbance to a person or causing them to fear for their safety or the safety of one of their relatives". Depending on how the jurisprudence will be settled in practice in terms of the persistence of the aforementioned behaviour, which is important in the definition of the crime and its effect on the victim, it will become clear whether the article will be applied or not. Major forms of the offence are also regulated and seeking a complaint in these cases also poses a problem.

As a matter of fact, these major forms are as follows:

"a) Committed against a child or against a spouse who has been granted a separation order or divorced,

b) Causing the victim to change their school, workplace, residence or to leave their school or work,

c) Committed by the perpetrator against whom a restraining order or a measure of not approaching the residence, school or workplace has been imposed", and there is an additional vulnerability. At this point, it can be evaluated that aggravation of the penalty does not have the quality of preventing deterrence and impunity.

On the other hand, behaviour included in the scope of stalking might amount to sexual harassment, intimidation, blackmailing, physical coercion or violation of under the Turkish Penal Code, if it has the legal elements. In addition, this act can be the predecessor of crimes as per the TPC such as insult, sexual harassment, injury, sexual assault and wilful murder. Especially with the new arrangements to be made in the execution system, it should be considered to create deterrence for these acts and to effectively implement these types of offences.

- Recommendations:

In order to comply with the Council of Europe standards in recognising all the varying types of violence against women and to ensure the protection of

the victims of stalking within the scope of the Law No. 6284 and prevention of such acts, all the employees of the relevant institutions should be provided with extensive training on the issue. In the trainings, the following should be underlined:

1. That the victims of stalking can also benefit from the measures envisaged as per the Law No. 6284, all kinds of behaviour that might amount to stalking and cause fear and anxiety in the victim fall under the scope of the Law No. 6284.
2. The recognition that it is not absolutely necessary for stalking to occur between opposite sexes.
3. The recognition that is not necessary that the perpetrator and the victim had a personal or emotional relationship beforehand and that in terms of people having a personal relationship, stalking has a broad scope which encompasses following the other party before dating starts, while it is ongoing or after it ends to instil a sense of unsafety and fear in the other party and engaging in menacing behaviour to that end.[40]
4. It should be aimed to remove the offence from being subject to complaint and to increase its effective implementation and deterrence through the arrangements to be made in the execution system.
5. The ambiguity in the offence of stalking should be eliminated by taking into account the legality criterion and established criteria should be developed in practice.

b. Dating Violence:

An awareness of the impact of digital violence is also required according to the Council of Europe standards. This is particularly important with regard to younger women and girls given it may be difficult for them to identify their first experience of violence and share it with their peers due to their age.[41]

Furthermore, victims themselves may also not make sense of the behaviour displayed in the relationship and consider them as acts of violence especially if they are already victims of domestic violence (even as witnesses).

40 Çörek, p. 165.

41 **Dolunay Çörek**, Gender and Dating Violence, Gender and Law, C. I, 2019, p. 164.

Recommendations:

1. Competent authorities within the scope of the Law No. 6284 and in the process of criminal proceedings should be trained on the concept, meaning and importance of dating violence.
2. Children should be trained to overcome gender biases starting from early ages.[42] It is especially important that people below a certain age are trained on this issue. In Türkiye municipalities[43] or university clubs organise informative workshops about this issue. However, it is clear that these practices will not bring about efficient benefits unless disseminated across the country and applied in a systemic manner.[44]
3. In terms of dissemination of training, gender equality should be incorporated into the curriculum of the schools starting from preschool education. As per Art. 16(6) of the Law No. 6284 it is envisaged that courses on "human rights of the women and gender equality" are included into the curriculum of primary and secondary education. It is recommended that the Ministry of National Education and NGOs and local administrations engage in cooperation with school administrators to inform them about this issue.[45]

III. Law Enforcement- The Authority to Grant Orders in Specific Circumstances and Their General Authority of Implementing Protection and Preventive Orders

In cases where delay of some of the protective orders that can be granted by administrative chiefs is deemed to be inconvenient, law enforcement chiefs are also enabled to grant these orders (Art. 3(2)). These measures are related to the provision of appropriate shelter and people under temporary protection.

The law enforcement chief should submit the relevant document regarding the action taken for the administrative chief's approval within the first working day following issuance of the order. Measures that are not approved by the administrative chief within forty-eight hours shall be cancelled automatically.

42 Çörek, p. 175.

43 "Youngsters become familiarised with dating violence.", http://www.gazetekadikoy.com.tr/yasam/gencler-flort-siddetini-taniyor-h12103.html,

44 Similar, Çörek, p. 175.

45 Çörek, p. 175.

Law enforcement is the first agency that women exposed to violence frequently resort to. In the roundtable meetings, it was stated that in order to prevent circumstances in which the law enforcement is not adequately knowledgeable about the Law and the obligations stemming from the Law or the law enforcement refraining from granting injunctions arbitrarily, Departments of Combatting Domestic Violence and Violence Against Women were established across the country.[46] Despite the benefits brought about by these departments and good practice examples, there are still some problems that are experienced in practice.[47]

Within this framework, domestic violence prosecutors and family court judges in particular should refrain from granting judgments that might confirm such misleading guidance and the following recommendations were made, taking into account the Council of Europe standards with regard to emergency and temporary measures.

Recommendations:

1. In cases of violation of the injunction by the perpetrator of violence, the enforcement of the injunction, particularly with imprisonment, should be assumed by family court judges and domestic violence prosecutors in cooperation.
2. It is recommended that family court judges and domestic violence prosecutors should actively be aware of misleading guidance and practices undertaken by the law enforcement in practice when managing the case file. Within this scope, it is necessary to feature good practice in such a way as to eliminate misleading information and beliefs such as; the measures being taken for a month at most, measures not to be implemented before notification of the injunction, an assault report to be sought for to render an injunction, an injunction not to be rendered without a complaint.
3. Cooperation with the law enforcement is recommended to keep a log of the statistical information on imprisonment.

46 Purple Roof Women's Shelter Foundation, Monitoring Report on Coordination in Combatting Male Violence in Turkey, 2021, p 29 et al. https://morcati.org.tr/wp-content/uploads/2022/01/Erkek-S%CC%A7iddetiyle-Mu%CC%88cadelede-Koordinasyona-I%CC%87lis%CC%A7kin-I%CC%-87zleme-Raporu.pdf.

47 Purple Roof Women's Shelter Foundation, Monitoring Report on Coordination in Combatting Male Violence in Turkey, 2021, p 29 et al. https://morcati.org.tr/wp-content/uploads/2022/01/Erkek-S%CC%A7iddetiyle-Mu%CC%88cadelede-Koordinasyona-I%CC%87lis%CC%A7kin-I%CC%-87zleme-Raporu.pdf.

IV. Protection Orders that are Granted by Administrative Authorities/Chiefs

While only judges are authorised to decide on some of the protective measures, there are other protective measures that can be taken by the administrative chief (Art. 3). In provinces, the administrative chief is the governor and in districts it is the district governor. It is understood that applications made to the governorate are processed in cooperation with the Family and Social Services Provincial Directorate under the Ministry of Family and Social Services.

Through the Law No. 6284 there are five types of measures that are envisaged to be taken by the administrative chief.[48] These are provision of appropriate shelter, temporary financial assistance, consultancy and counselling services, temporary protection and day care assistance. The family court judge is also authorised to decide on these measures.

a. Provision of appropriate accommodation (Art. 3(a))

The judge might decide on provision of appropriate shelter for "the victim and for the children accompanying them, if necessary, where they are located or in any other place" (Art. 3(1)(a)).

In the case that the shelters are not sufficient, it is also possible to provide accommodation for the person under protection and the children accompanying them in the social facilities, dormitories and similar places belonging to public institutions. Regarding the admission of women with children into women's shelters, young girls below the age of 18 can benefit from this service together with their mothers (Guesthouse Reg. Art. 13(1)(b)). On the other hand, women with male children over the age of 12 and women with disabled children will be able to benefit from this service in an independent house with their rent and catering being covered (Guesthouse Reg. Art. 13(1)(c)). There is a similar regulation regarding the fact that in districts where there is no women's shelter, houses can be rented in the same way as envisaged in this clause (Guesthouse Reg. Art. 13(1)(c)last s). Difficulties experienced in provision of shelters in practice can be overcome in light of this provision.

48 About the fact that the measures in question are not envisaged in limited numbers please see C, II, b.

The duration of stay in women's shelters is 6 months as of the date of admission to the first receiving unit. (Guesthouse Reg. Art. 14(1)). In addition, women having left women's shelters can be admitted to those shelters once and again in case of need and when appropriate (Guesthouse Reg. Art. 28(4)). On the other hand, women for whom an injunction is granted by the administrative chief or judge regarding the provision of shelter will be able to stay in women's shelters for the period of time specified in the injunction (Guesthouse Reg. Art. 14(3)). It should be acknowledged that in terms of the interpretation of the provision there is no obstacle standing in the way of the administrative chief or the judge deciding on provision of appropriate shelter for more than 6 months.

In the case of *Halime Kılıç v. Türkiye* (2016), the ECtHR also mentioned the difficulties experienced in placement in a shelter as a ground for violation in the context of the state's positive obligations. Given some of the difficulties in practice, the following recommendations were made to bring these provisions in line with the current Council of Europe standards on providing shelter and refuge to victims of domestic violence.

Recommendations:

1. While deciding on this measure, family court judges can grant a detailed injunction about provision of an alternative shelter by taking into account the capacity of the women's shelter in a given location. To that end, it is recommended that family court judges are in contact and cooperation with ŞÖNİMs in the said region or the Ministry of Family to obtain information about the number of women's shelters and their capacities. While deciding on this measure, attention should be paid to granting injunctions that are detailed enough to make sure that people with special needs can also benefit from these facilities by taking into account the problems encountered when implementing the injunctions regarding women with children over the age of 12, women with disabled children, women over the age 60, women who are alcohol and substance addicts and women with disorders.

2. Even if the measure is to be taken for the first time, its duration should be more than 6 months. To that end, Art. 8(2) s.1 of the Law No. 6284 should be interpreted in line with the Law's ratio. In addition, within the framework of the regulation featuring in the continuation of the provision, a decision should be made ex officio on the extension of the duration of the measure in the case that there is a threat of violence or perpetration of violence.

b. Temporary Financial Assistance (Art. 3(b))

As per Art. 17 of the Law featuring the implementing principles of this measure "*...For individuals over the age of sixteen, daily payment amounting to thirtieth of the monthly minimum net wage that is determined on a yearly basis shall be made*. In the case that there is more than one person under protection, additional payment amounting to twenty percent of this amount shall be made for each extra person. *However, the amount to be paid shall not exceed one and a half times the daily payment amount that is determined. In the case that the people under protection are provided with shelter, the amounts specified in this paragraph shall be enforced by being reduced by fifty percent.*" (Art. 17/1) Payments shall be made from the allowance of the budget of the Ministry and shall be collected from the perpetrator of violence (Art. 17(2)). The injunction shall be sent to ŞÖNİM to be enforced (Reg. Art. 8(2)).

In the GREVIO 2018 country report, it is stated that almost no victim benefitted from this measure in practice.[49] Family court judges might decide on this measure ex officio based on what is necessitated by the concrete case at hand.

The fact that duration of the measure is included in the scope of the injunction is important so that the measure can be implemented swiftly and effectively and violations are prevented.[50] While there is no clear time limit envisaged in the said provision, implementation of the six-month time limit prescribed in the Law (Art. 8(2) s.1) with respect to protective measures would not serve the purpose even if the said measure is to be taken for the first time. Protective measures are related to direct victims of violence and shall not interfere with the rights and freedoms of the third persons. It is necessary to enable the competent authorities to decide on temporary financial assistance for longer periods of time based on the needs in the concrete case. To bring the implementation of these provisions in line with the Council of Europe standards with regard to the financial assistance of victims of violence, the following recommendations were made.

Recommendations:

1. It is recommended that information is provided on this guidance to family court judges to encourage the use of these measures and to

49 In the report it is stated that in 2016 only 10 women benefitted from this measure. See GREVIO Report 2018, N. 160 dn. 145.

50 The Constitutional Court, 2014/546, 19.12.2017, RG 28.02.2018/30346, (N 82), A.Z.Ö application.

ensure that it is taken into consideration when deciding on applications for measures relating to domestic violence.

2. In terms of the duration of the measure, the six-month time limit in the Law should not be applied by interpreting it in accordance with the purpose (TCC Art. 1, Art. 4). Instead, it should be decided to be valid until a decision is made by the competent authority to change or revoke it. It is recommended that the relevant guidelines provide information about this issue.

c. Consultancy and Counselling Services in Psychological, Professional, Legal and Social Terms (Art. 3(c))

This measure aims to help with the psychological exhaustion the victims of violence suffer from and to help the victims maintain their lives independently through their own means.

The fact that victims of violence cannot "get to grasp or rationalise the violence they are exposed to" especially when it comes to domestic violence is one of the reasons preventing them from seeking help. In addition, traditional beliefs which involve turning a blind eye to violence result in families not offering assistance to family members about this issue and perceiving violence as something normal in terms of gender perception and the victim of violence thinking that they deserve it. In addition, social stigmatisation is also at play in not confronting domestic violence which does not differentiate in terms of education level and economic means. In order to make sure that the victim is reintegrated into the society as an individual who can confront violence once and for all, such erroneous beliefs should be eliminated. The Council of Europe standards require efforts to be made by the relevant authorities on awareness raising and understanding the interrelated needs of domestic violence victims. The following recommendations were made to ensure this.

Recommendations:

1. In order to help ŞÖNİMs overcome problems experienced in practice in implementation of this measure[51], the family court judges should make sure when deciding on the measure that the said measure is detailed.

51 Opuz Group Cases (no. 33401/02) Shadow Report- Purple Roof Women's Shelter Foundation, October 2020-Istanbul, P. 7, 8, https://morcati.org.tr/wp-content/uploads/2021/02/AIHM-Opuz-Grubu-Davalari-Golge-Raporu.pdf.

Within this framework, to effectively enforce any confidentiality order to be granted, it is recommended that ŞÖNİMs and family courts engage in cooperation.

2. The injunction might feature details about the fact that at the stage of implementation of the measure, employees of ŞÖNİM should not engage in behaviour leading to secondary victimisation for the victim of violence and children accompanying her.
3. It is recommended that to ensure efficient coordination, regular and planned meetings should take place between family court judges, domestic violence prosecutors and other units affiliated with the Ministry, healthcare institutions, institutions providing social assistance, institutions providing training services, law enforcement agencies, administrative chiefs, provincial directorates of migration management, training institutions and bars.
4. In order to determine the approach to be taken and the principles of support to be provided in the face of sexual violence and to reflect them on the injunction in detail, it is recommended that family court judges and domestic violence prosecutors receive periodical trainings on violence and sexual violence.

d. Temporary Physical Protection

This measure can be taken upon request of the relevant person or ex officio in the case that there is a life-threatening situation. It can be argued that this order is one of the most important ones that can be rendered by the administrative chief as it is easier to meet nutrition, care and housing needs of the victim and what is important is to keep the victim alive.[52]

Aside from the administrative chief, chief law enforcement officers can also grant this order in non-delayable cases (art 3(2) s.1). After the chief law enforcement officer grants the order, it should be submitted to the approval of the administrative chief within the first working day (Art. 3(2) s. 2). If the order is not approved by the administrative chief within forty-eight hours, the order shall be revoked automatically (Art. 3(2) last s.).

The Regulation shortly and discretely touches on the assessment criteria as to existence of a life-threatening situation. In line with the Regulation,

52 **Bölükbaşı**, 125.

the decision on this measure can be made based on the nature of the case, complaint and notice. (Reg. Art. 10(1))

- Implementation Principles:

Law enforcement officials located in the place of residence of the person about whom an injunction is granted are authorised to enforce the injunction (Reg. Art. 10(2)).

The type of the temporary protection measure shall be identified by the judge or administrative chief or in non-delayable cases by the law enforcement by evaluating the state of the perpetrator of violence and based on the possible threat and risk faced (Reg. Art. 10(3)).

Physical protection principles regulated by "Regulation on the Principles and Procedures regarding Witness Protection Measures to be taken by Public Prosecutor Offices and Courts" shall be taken as the basis in determining the type of protection (Reg Art. 10(3)).

Protection procedures as per article 14 of the Regulation on witness protection comprise close protection, protection in the housing, protection in the workplace, protection through motorised or foot patrol officer or protection provided upon call. It can be decided that one of these procedures or several of them are applied at the same time (Witness Protection Regulation Art. 14(3)). In order to ensure that the implementation of these measures are more successful and in line with the Council of Europe standards with regard to providing sufficient and urgent assistance to victims of domestic violence, the following recommendations were made.

Recommendations:

1. It is necessary to provide trainings to make sure that decisions are made based on the statement of the woman instead of using strict approaches when assessing the existence of a life-threatening situation.
2. In the regulation about the power to decide on the type of the measure, the public prosecutor or the judge is authorised (Witness Protection Regulation Art. 14(4)). However, as reference is made to the Regulation on witness protection only in terms of the type of the measure to be decided (Reg. Art. 10(3)), administrative chief or the judge shall be authorised to decide on the type of temporary protection measure. An important duty falls on the competent authorities so that there is no

problem or uncertainty in practice about such procedural issues. It is recommended that the competent authorities are trained, and relevant guidelines are prepared about this issue.

e. Day care assistance (Art. 3(d))

Through this measure the person under protection is provided with day care assistance for four months to support their participation in the work life. If the said person is already working, the duration of day care assistance is limited to two months. The amount of the assistance at maximum is half of the monthly net minimum wage. Payment shall be made out of the budget of the Ministry. Through the regulation made, there is not a distinction between state day care and private day care in terms of payment to be made.

The objective of the measure is to support the woman economically to enable her to start a new life with her children away from the violent environment she was in.

However, the regulation is not sufficient to provide the protection that is intended as it is. It is not easy to find a job within four months, which is the maximum period of time the assistance is provided. As a matter of fact, the woman's needs for day care will increase as of the time she starts working.

On the other hand, if the person in question is working, she will be able to benefit from this measure only for two months. However, it is not in line with reality to think that the woman to start a new life will be able to maintain her life in economic terms in such a way as to cover day care expenses within two months.

Additionally, the amount that is specified as day care assistance is quite low.

It is understood that day care payment is to be made by the directorate to the day care centre itself but that this payment is to be made on a monthly basis after the relevant documents regarding registration with the day care centre and continued attendance are submitted to the Directorate, in other words after the service is provided (Reg. Art. 11(2,3)). It is clear that making the payment after the service is provided by the day care centre aims to prevent abuse. However, given the fact that the payments are made to the day care centres in cash at the beginning of each month in practice, it is not fair to make the woman wait for a whole month to be reimbursed. On the other

hand, in big cities most of the day care centres receive the annual payment in advance before the education period starts. Furthermore, this measure is almost never taken in practice.[53] In themselves, these measures appear to be in line with the Council of Europe standards with regard to providing practical assistance and support to victims of domestic violence and adequate financial assistance where needed. However, the problem appears to be in terms of inadequate implementation. The following recommendations were made to ensure that this occurs.

Recommendations:

1. It is recommended that the duration and amount of the measure are increased.
2. This measure which is almost never used in practice should be used more frequently. In case of need, family court judges should be encouraged to rule on this measure albeit ex officio through trainings and guidelines.
3. Instead of identifying a time limit, it is necessary to vest the administrative chief or the judge with the power to determine the duration and amount in line with the specifics of the concrete case.[54] There is a need for revision of legal regulations about this issue.
4. As such it will be possible for the competent authorities to make the assessment by taking into account personal features of the woman to be provided with the assistance such as education level, work experience, health condition, age and the specifics of her day care needs (whether there is a relative to take care of the child, the number of day care centres where the woman is to lead her life, working hours of the day care centre and average payments made).
5. When determining the amount of assistance to be provided, average payments made to the day care centres located in the region where the

53 GREVIO Report 2018, p. 59, N. 162.

54 Regarding the fact that the duration should be determined based on the income of the woman and that continuity of female employment can be ensured by making sure that women earning minimum wage benefit from this opportunity in an unlimited way, **Hayrunnisa Özdemir**, 'Evaluation of the Law No. 6284 on Protection of the Family and Prevention of Violence Against Women' (2013) 1 (1) Nişantaşı University Social Sciences Journal p. 45, 54; In order to ensure continuity of female employment it is necessary that the duration of day care assistance should be determined based on the needs of the woman depending on her income and that women earning minimum wage should benefit from day care assistance by the time her children reach school age see **Bölükbaşı**, p. 190; **Seval**, p. 123.

victim lives and additional payment to be made for catering if any and also payment made for transportation, if necessary, should be taken into account and the decision made based on the concrete case should lie with the judge or the administrative chief. There is a need for revision in the legal regulations to that effect.

6. Similarly, it would be convenient that the competent authorities that are to decide on the measure through the revision are authorised to decide that the day care centres that are in close proximity to the residential or workplace address of the woman in question give priority to her child. In that sense, it is necessary to undertake detailed regulations that will enable the authorities to decide that requests for registration with the day care centre in question are not turned down due to being in the middle of the semester or quota.

7. It is recommended that through trainings and guidelines family court judges are encouraged to raise awareness about implementation of the regulation on allocation of quota free of charge, which is envisaged through Art. 50 of the "Regulation on Establishment and Operation Principles of Private Day care Centres and Nurseries and Private Child Clubs" and to decide on this measure to that end. Accordingly, three percent of the capacity of day care centres should be allocated for children to be determined by the provincial directorate so that they can attend these centres free of charge (Art. 50/1).[55] As admission into the day care centre is an obligation within the scope of this quota, the family court judge should underline this obligation in the decision made and should be able to make a request about admission of the child free of charge and remind the relevant institutions of this request.

V. Protective Orders to be Granted by the Judge (Art. 4)

Protective orders to be granted by the judge as per article 4 of the Law No. 6284 are as follows: Changing the workplace of the victim, issuing a new residential address apart from the joint matrimonial residence for married victims, registering a matrimonial residence notice with the land registry, change of identity and other relevant information and documents of the victim. Problems encountered in the process of issuing and implementing these orders stand in the way of ensuring protection and prevention aimed through the Law.

55 **Uçan et al.**, p. 41.

Protective orders that can be rendered by administrative chiefs can also be granted by judges (Reg. Art 12(1)), but it is not possible to issue these orders the other way around.

a. Changing the Workplace of the Victim (Art. 4(a))

This measure is aimed at preventing the perpetrator of violence from accessing the victim. The objective here is to cease the communication between the perpetrator and the victim once and for all.

This measure shall be enforced by the competent authorities as per the relevant legal provisions which the victim is subject to (Art. 10(7)). The provision that contains detailed regulation regarding implementation of the measure (Reg. Art. 13) is ambiguous. As per the said provision, the notification about the order is sent to the workplace of the person under protection and it shall be undertaken by ensuring the most appropriate conditions for the sake of the person under protection. The said provision also stipulates that the order shall be enforced by the competent authority or person. However, it can be said that this provision can provide for a reasonable practice at best only in case of changing the workplace of a civil servant. The content of the regulation does not entail all kinds of sectors. Given the fact that a dominant percentage of the country works in the private sector, it is ambiguous and uncertain by whom the order shall be enforced and how unjust treatments (severance pay, annual leave, corporate seniority etc.) shall be prevented. Implementation problems remain with regard to harmonisation with Council of Europe standards on the protection of victims of domestic violence. The following recommendation was made to improve the situation.

- Recommendation:

It can be argued that uncertainties in terms of implementation regarding this measure can be overcome by way of detailing the said measure to be rendered by the judge. However, it is clear that a private sector organisation cannot be ordered to employ a person about whom a protection order is issued. Therefore, it is necessary to include detailed legal regulations on issues such as the reservation of the victim's right to reinstatement following the execution and expiry of the measure and the employer's inability to refuse the reinstatement request.

b. Issuing a New Residential Address Apart from the Joint Matrimonial Residence (Art. 4(b))

Through this measure a new residential address apart from the joint matrimonial residence is determined for the married victim. As a matter of fact, when the decision is made regarding the confidentiality order mentioned in the relevant chapter,[56] a different address is identified for the notifications to be made to the victim (Art. 8(6) s. 2). Therefore, it is seen that the measure envisaged through Art. 4(b) is complementary to the measure envisaged through Art. 8(6) s.2.

It can be said that the objective of this measure is in parallel to the principle of requirement of residential address. Through implementation of this measure, legal needs of the victim of violence having deserted the joint matrimonial residence will be met and as such sending the notifications to the nominal residential address (TCC Art. 20) of the person shall be prevented. In that sense, it can be argued that this measure is aimed at meeting certain practical needs.

The aim of this measure is also to overcome the spousal duty of cohabitation as per Art. 185(3) of the TCC. Following issuance of this order, the spousal duty of cohabitation will be judicially lifted, and the victim who deserts the residence is protected from possible claims of divorce based on desertion (TCC Art. 164). In addition, proving that separation has a valid ground will also be facilitated.[57] Given this measure's potential to comply with Council of Europe's standards on the removal of discrimination towards victims of domestic abuse the following recommendation was made.

Recommendation:

Information can be provided in the relevant guidelines on promoting the use of this measure which is rarely used in practice in case of need.

c. Registering a Matrimonial Residence Notice with the Land Registry (Art 4(c))

Matrimonial residence notice is a protective measure envisaged as per Art. 194(3) of the TCC. As a matter of fact, spouses' powers of disposition regarding certain acts of disposal on the matrimonial residence is limited as per law even though this annotation does not exist. Accordingly, without the

56 see. 2(f).

57 **Karakaya**, p. 38, 38.

informed consent of the other spouse rental agreement of the matrimonial residence cannot be terminated and the matrimonial residence cannot be alienated or the rights on the matrimonial residence cannot be restricted. However, in the case that such acts of disposal are undertaken without the consent of the other spouse, in order to prevent well-intentioned third parties from gaining a right (and as such to protect of the interests of the said spouse); as per Art. 194(3) of the TCC, the spouse who is not in possession of the immovable property allocated as matrimonial residence is entitled to make a request from the land registry to put an annotation on the residence as matrimonial residence. It can be said that through the Law No. 6284, the means that is already provided through Article 194 of the TCC is reiterated.

Normally as per Article 194 of the TCC in order to register a matrimonial residence notice, it is necessary to make an application to the land registry along with certain documents. The fact that the Law No. 6284 also includes this protective measure can be considered to help the victim of violence have this annotation put on the residence without going to the directorate of land registry in person. Obviously, it seems to be the only practical benefit of this measure featuring within the scope of the Law No. 6284 again.

In addition, as per Article 194 of the TCC in order to register such a notice with the land registry there are certain documents that need to be submitted such as the extract of civil registry, an official letter written by the competent authority attesting the fact that the residence is a matrimonial residence. Given the fact that the victim of violence having to collect such documents may put the victim's safety in danger, it can be considered that the lawmaker facilitated registering the annotation through the judge's order. Given this measure's potential to comply with Council of Europe's standards on the protection of the victims' rights, the following recommendation was made.

Recommendation:

In order for the judge to rule on this measure, he/she must evaluate the conditions foreseen as per Art. 194 of the TCC and determine whether the residence is a matrimonial residence or not. In such cases, it is recommended that the judge should rule for the other measures that need to be taken in line with the spirit of the Law No. 6284 and should continue to examine the case in terms of notice of matrimonial residence.[58]

58 **Karakaya**, p. 58.

d. Change of Identity and Relevant Information and Documents (Art. 4(ç))

This measure can be taken only in case of a life-threatening situation. In addition, to take this measure it is necessary to conclude that other measures will not be sufficient to prevent this danger. It is also necessary to obtain the informed consent of the relevant people.

The measure is implemented as per the provisions of the Witness Protection Law No. 5726. In order to decide on this measure an assessment as to the existence of a life-threatening situation is important. As the number of severe cases of violence is on the increase in the society, the need to resort to this measure in an efficient manner in practice has also increased.

Assessment as to existence of a life-threatening situation:

The legal and institutional structure that is necessary to assess the risk of a life-threatening situation, gravity of the situation and the risk of recurrence of violence is not included in the Law. This situation may lead to uncertainty and arbitrariness on the part of the competent authorities.[59] In order to ensure that the implementation of these measures is more successful and in line with the Council of Europe standards with regard to providing sufficient and urgent assistance to victims of domestic violence, the following recommendations were made.

Recommendations:

1. Risk assessment regarding the safety of the victim should be made in each concrete case not only by law enforcement but also by all the relevant institutions. The risk of recurrence of violence and existence of a life-threatening situation should be evaluated within the scope of the risk assessment and management. In addition, gravity of the situation should also be taken into account adequately.
2. It is recommended that an interagency network of professionals is established to protect the victims in life-threatening situations. A security plan that will provide the victim with safety and necessary support during the risk assessment and implementation of the measure

59 **Feridun Yenisey**, 'Assessment of the 'Risk of Violence' Against Women in the International Convention and Turkish Law' 2012/8 (97-98) Bahçeşehir University Faculty of Law Kazancı Peer-Reviewed Law Journal p. 10,11-12; **Ebru Ceylan**, 'Regulations on Domestic Violence and Violence Against Women in Turkish Law', 2013/109 UTBA Journal p. 13, 51; **Bölükbaşı**, p. 40; **Kaya Kızılırmak**, PPIL, p. 647.

should be drawn up and this plan should be conducted in a coordinated manner.

3. In order to acknowledge the existence of a life-threatening situation, it is not necessary that a severe act of violence has occurred. This measure is not aimed at prevention of the risk of recurrence of severe acts of violence only. Even if an act of violence has not occurred yet, foreseeing that the perpetrator may resort to violence in such a way as to create a life-threatening situation within the scope of the concrete case might make it necessary to decide on the measure. That is to say, a threat posed to the life of the person under protection without an act of violence taking place might be sufficient within the scope of the circumstances of the concrete case.
4. Additionally, in cases where there is a risk of safety albeit not to the extent of a life-threatening situation, the judges should be encouraged to rule on preventive measures regarding handover of the guns as per Art. 5(g), (ğ) of the Law No. 6284.

Duration:

It is clear that the six-month time limit is not of any use in terms of some of the protective measures as with the measures regarding change of identity and relevant information and documents. It is also evident that the victims being obliged to resort to the court every six months due to the short duration of some of the protective measures might lead to problems. The scope of the provision on duration should be addressed with respect to preventive orders aimed at the perpetrator. What is important here is to ensure protection of the victim in a life-threatening situation in the most extensive manner possible.

Recommendations:

1. It is regulated that this measure shall be taken as per the provisions of the Witness Protection Law. However, this reference should be considered to be a procedural guidance regarding implementation of the measure within the scope of the relevant issues. *Sui generis* regulations of the Law No. 6284 should apply to other issues apart from the ones mentioned above. For example, the rules on the duration, modification or lifting of the one-year witness protection measure stipulated by the Witness Protection Law cannot be applied here. Therefore, the victim of

violence should not be exposed to evaluations as to change, revocation or continuation of the duration and form of this measure at yearly intervals at the latest.

2. Similarly, if it is the first time that the measure is taken, provision of Art. 8(2) s. 1) of the Law No. 6284 as to specifying the duration of the measures as six months at most should not be applied to this measure by interpreting it in accordance with the purpose either.

3. Article 6(2) of the Witness Protection Law features the rule that temporary physical protection shall be ensured until this decision is made. However, the said temporary protection order should be granted in such a way as to be valid until protection is ensured after a decision is made on changing identity information and the necessary changes are made regarding these documents and the residential address. Only after this step does the need for protection end.

The principle of urgency and the obligation of interagency cooperation:

In order to achieve the purpose of the Law, implementation of the measures without delay is as important as deciding on those measures. Each day that identity and other relevant information of the person in a life-threatening situation who gives consent to such a measure that will also lead to big changes in her own life is not changed, the said life threat will continue to linger about. Therefore, implementation of this injunction in the fastest way and free from all the bureaucratic obstacles is as important as ruling on the said injunction. In a case that was subject to individual application[60], the Constitutional Court held that changing identity information of the applicant and her young son lasted for about a year and that this delay was due to administrative shortcomings in the process and was not reasonable and that the right to protection of physical and moral existence was violated.[61]

60 About the judgments delivered by the Constitutional Court on violence against women see Dündar Sezer (n 7) 257 ff.

61 The Constitutional Court, 2014/546, 19.12.2017, RG 28.02.2018/30346, A.Z.Ö application. The address and workplace of the applicant were changed many times to protect her from her husband who exerts violence, and her residential address was kept confidential. The applicant said that after finalisation of divorce, her current address was also found out by her former spouse but that her request for change of address again was refused. Upon an objection raised to the refusal of the request made to change the identity information of the applicant and her young son on 06.07.2012, on 05.09.2012 it was decided that change of identity and other relevant documents of the applicant and her son was added to the preventive measures already taken. New identity cards of the applicant and her son were received on 25.07.2013. In summary, the applicant said that she had to leave her job due to the fear she experienced upon refusal of her requests and that due to the financial difficulty she was in and the fear of violence she experienced, she was confined to the house and thus both her

As per Art. 16 of the Law titled "Interagency coordination and training", it is stipulated that interagency coordination shall be undertaken by the Ministry (Art. 16(1)). The Regulation also specifies that coordination with the NGOs shall also be undertaken by the Ministry (Reg. Art 40(1)). In this respect, public institutions and organisations and other legal and natural persons are obliged to engage in cooperation and provide assistance about issues that fall into their remit regarding implementation of the Law No. 6284 and implement the injunction urgently (Art 16(2) s.1). In addition, it is also envisaged that personnel of the public institutions and organisations help Ministry officials with their duties (Art. 16(4)).[62] In order to ensure that the implementation of these measures is more successful and in line with Council of Europe standards with regard to providing sufficient and urgent assistance to victims of domestic violence, the following recommendations were made.

Recommendations:

1. The obligation to engage in cooperation and provide assistance is very important in terms of urgent implementation of this measure which is taken to ensure protection of the person in a life-threatening situation. It should be kept in mind that delays, shortcomings, neglects or procedural uncertainties seen in implementation of this measure might lead to loss of life.

and her child's psychology were impaired and that her elder son born in 1992 who had cerebral palsy succumbed to depression during this process and committed suicide as a result of this depression and that is why the applicant made an individual application to the Constitutional Court. The judgment rendered held that "It is seen that the decision made to change the identity information of the applicant and her son was enforced in about ten months. The said delay stems from the fact that the Regulation had not come into effect when the decision was made and from lack of organisation and coordination between judicial and administrative authorities. (N. 81)", (see N 31-33). "As per clause (b), paragraph (2), article 1 of the Law No. 6284, it is necessary to pursue a swift procedure in provision of support and services to be given within the scope of the said Law (see N 43). In this case, it is also important that the relevant decisions are made within a reasonable period of time. It is concluded that the ten-month and nine-month delays respectively in implementation of the measures taken by the competent authorities stemmed from shortcomings in the judicial and administrative process and that the said delay was not reasonable.(N 83) "As a result it is concluded that the public authorities didn't show due diligence and act swiftly regarding implementation of the measures taken to protect physical and moral integrity of the applicant and her sons and to make sure they sustain themselves economically and that positive obligations of the State were not duly fulfilled within the scope of the right to protect physical and moral existence of the person (N 84)".

62 As per article 12 entitled "Cooperation and actions to be taken together with other institutions and organisation" of the Witness Protection Law; "(1) Public institutions and organisations and other legal and natural persons shall be obliged to engage in cooperation and provide assistance about issues that fall into their remit. (2) Injunctions granted as per this Law shall be enforced by public institutions and organisations without delay." Article 21 of the "Regulation on Principles and Procedures regarding Witness Protection Measures to be taken by Public Prosecution Offices and Courts".

2. Therefore, an important duty falls on all public institutions and organisations and legal and natural persons that are active in implementation of this measure. In that respect, it will be beneficial that officials in charge of implementation of the measure are specifically informed about their obligation to comply with the principle of urgency and cooperation through directives or circulars and be subject to in-service training if necessary that legal regulations emphasising the fact that they are evidently liable to that end are included in the process.[63]

VI. The Judicial Application and Implementation about Prevention Orders as per Art. 5 under the Law No. 6284

a. General Information on Preventive Measures

The Law No. 6284 on Protection of the Family and Prevention of Violence Against Women is a law that is enacted to protect women, children, family members who are victims of violence or who run the risk of being victims of violence and victims of stalking and contains procedures and principles regarding the measures to be taken in order to prevent violence against these people.

Preventive measures deemed to be exemplary by the lawmakers as per Art. 5 are aimed at protecting the victim of violence in an individual case from potential acts of violence. These are: "The perpetrator is not to engage in degrading behaviour or insult or threat of violence against the victim" (Art. 5(1)(a)), "The perpetrator is to be immediately restrained from matrimonial home and the matrimonial home is to be allocated to the person under protection" (Art. 5(1)(b)), "The perpetrator is not to approach the person under protection, their residence, school and workplace" (Art. 5(1)(c)), "If there is already a decision made to establish visitation rights with the child, making sure that personal contact is established in company with an

63 "GREVIO recommends competent authorities in Turkey to improve risk assessment and risk management practices for all types of violence against women including domestic violence in line with the following issues: a. While continuing to keep all the records on violence in a systemic manner to assess the risk of recurrence and surge of violence, making sure that the principle of protection of personal data is respected b. Especially in high risk cases development of a risk assessment system that entails a multi-institutional intervention and involves the victim in the process to strengthen her c. Assessing and managing the risks by examining the risk factors on the basis of cases and aiming to respect the right to safety and human rights of each victim by adopting measures that are adapted to the individual cases of the victims d. The efforts to take steps to train all the legal institutions working with potential victims in the risk assessment, risk management and the need to support these processes through multi-institutional work e. Maintaining efforts to improve risk management" GREVIO (n 49) N 292.

attendant, limited or revoked in their entirety" (Art. 5(1)(ç)), "If necessary, the perpetrator is not to approach the relatives and children of the person under protection even if they are not subject to violence and without prejudice to the right to visitation with the child" (Art. 5(1)(d)), "The perpetrator is not to damage personal belongings and household goods of the person under protection" (Art. 5(1)(e)), "The perpetrator is not to disturb the person under protection through means of communication or any other way" (Art. 5(1)(f)), "The perpetrator is to hand over guns that are permitted under law to the police" (Art. 5(1)(g)), "Even if the perpetrator performs a public duty which necessitates carrying guns, it is still necessary to hand over the guns to the institution they work for (Art. 5(1)(ğ))". Clauses (h) and (ı) of the provision mention examination and treatment measures that are different from the other ones as they are aimed at elimination of factors leading to violence. The lawmakers have regulated treatment given for alcohol, drug and substance addicts in clause (h) and clause (ı) features treatment measure in general terms. In that sense, the treatment measure is particularly important as it aims at elimination of violent behaviour displayed by the perpetrator in its entirety.

Identifying the general principles with regards to preventive measures entails specifying the most important difference of preventive measures from protective ones. Preventive measures affect the rights and freedoms of the perpetrator of violence. As a result of implementation of preventive measures, the perpetrator of violence has to bear with limitation of their rights and freedoms against their will.

In this respect, preventive measures are subject to different principles compared to protective measures. The first one of these principles is that as a rule, preventive orders can be granted by judges (Art. 5). The lawmakers allow for issuance of some of the orders by the law enforcement to keep the perpetrator of the violence at bay and prevent the perpetrator from exerting violence only in non-delayable cases (measures contained in clauses (a), (b), (c) and (d), Art. 5 of the Law No. 6284). However, orders to be granted by the law enforcement should be approved by the judge within 24 hours. Orders that are not approved within this period of time shall be revoked automatically. (Art. 5(2)).

Law enforcement officers are also authorised to take some of the measures regulated in Art. 5 of the Law No. 6284. Accordingly, the law enforcement officers can grant the orders regarding the following "The perpetrator is not

to engage in degrading behaviour or insult or threat of violence against the victim", "The perpetrator is to be immediately restrained from matrimonial home and the matrimonial home is to be allocated to the person under protection", The perpetrator is not to approach the person under protection, their residence, school and workplace" and "If necessary, the perpetrator is not to approach the relatives and children of the person under protection even if they are not subject to violence and without prejudice to the visitation rights with the child" on the condition that the order is submitted to the approval of the judge within the first working day at the latest after it is rendered. However, in practice it is seen that the law enforcement officers fall short of even informing the victims of violence and that they force the relevant people to submit evidence and don't record the complaints from time to time.[64]

Article 5 of the Law No. 6284 forms the legal basis of limitation of the rights and freedoms of the perpetrator of violence for the purposes of prevention of violence. The said legal basis enables the judge to limit the rights and freedoms of the perpetrator of violence against their will in the case that the conditions mentioned in the provision exist. The limit as to limitation of the rights and freedoms of the perpetrator of violence is determined by the principle of proportionality.

b. The Relationship Between Preventive Measures and Protective Measures:

The purpose of the Law No. 6284 is to protect the victim from violence and prevent violence. In that respect, the first issue to consider with regards to determination of the first measure to be taken is which types of measures are available to protect from and prevent violence. However, if in an individual case preventive measures and protective measures aimed at protecting the victim of violence are equally suitable, it is important that preventive measures are opted for.

When determining whether preventive or protective measures are to be taken, the rights and freedoms of the victim and the rights and freedoms of the perpetrator may potentially conflict. The legal order should first identify which of the above-mentioned measures is to provide more effective

64 8th Periodic Shadow Report submitted by Turkey Executive Committee for NGO Forum for CEDAW to UN Committee on Elimination of All Forms of Discrimination Against Women, July 2021, p. 24, N. 69, https://morcati.org.tr/wp-content/uploads/2022/02/CEDAW-8.-Periyodik-Donem-Golge-Raporu.pdf.

protection. If it is concluded that both types of measures are to provide the same levels of protection, at this point physical and mental integrity of the victim should prevail over the rights and freedoms of the perpetrator (There are judgments of the ECtHR and CEDAW Committee to that effect). In addition, limiting the rights and freedoms of the perpetrator of violence instead of the victim not only serves protection of the psychological integrity of the victim but it also helps the victim live their life by being less affected by the violence and thus provides more effective protection.

At this point it cannot be always stated easily that in terms of the types of preventive orders granted, the measures taken are efficient. In other words, the protection of the victim without resorting to protective measures necessitates adjudication of efficient preventive measures by the judge. The law enforcement getting into contact with the perpetrator at certain intervals or monitoring their whereabouts through e-handcuff or any other way is one of the measures to be resorted to for this purpose.

c. Issues Concerning the Determination of the Preventive Injunction to be Rendered

1. The problem of ruling for the same measures in practice irrespective of the specifics of the concrete case

The reason why the lawmakers have not adopted the principle of limited number in terms of preventive measures in Art. 5 of the Law No. 6284 is that the judge is able to resort to the most appropriate measure to prevent violence within the scope of the specifics of the concrete case at hand. However, in general it is seen that the judges decide on moving the perpetrator of violence away from the living and working environment rather than exploring the most effective preventive measure. In addition, it should be stated that the law enforcement does not effectively resort to measures such as getting into contact with the perpetrator at certain hours of the day or monitoring the perpetrator through systems such as e-handcuffs. It is clear that preventive measures are not tapped into sufficiently as it seems.

Another measure that is not resorted to effectively despite the difference it could make in combatting violence against women, is treatment. The importance of getting rid of violent behaviour by providing the perpetrator with treatment is not adequately understood in our country. It is observed

that the examination and treatment measure is not decided except for cases of addiction. Another reason for this is that opportunities offered in our country about such treatment programmes are not sufficient.

In addition, it should not be thought that the perpetrator of violence exerts violence only due to addiction or psychological or psychiatric disorders. The factor that causes the perpetrator of violence to resort to violence is most of the time the fact that within the scope of gender roles they are entitled to exert violence. Therefore, besides the examination and treatment measure it is also important to resort to the training measure to change this erroneous belief instilled in the perpetrator. Although the lawmakers do not deem the training measure to be exemplary within the scope of Art. 5, it is possible to rule on the training measure as preventive measures are not regulated to be limited in number. As a result, the importance of the training measure should be specifically underlined, and the authorities should be encouraged to draw up programmes to that end. As a matter of fact, preparation of such programmes is deemed to be among the duties of ŞÖNİM as per Art. 15(3) of the Law No. 6284. As per the first article of clause (c) of the said provision: "Anger management, coping with stress, engaging in activities that will encourage the perpetrator to participate in training and rehabilitation programmes that aim to change their attitudes and behaviour by raising awareness about prevention of violence" are among the duties of ŞÖNİM.

However, when we look at the content of the intervention programmes, we see that the focus is more on anger management and self-control principles. When it comes to sexual violence cases, drug therapy could be administered to reduce sexual urge. Bringing about the benefits expected through such programmes necessitates that the perpetrator changes their beliefs and attitudes towards women by questioning them. It should also be ensured that through such programmes the perpetrators assume responsibility for the acts they commit. To that end, violent behaviour should be addressed as behaviour amounting to crime rather than disorder. After determining the content of the said programmes to prevent violence, such programmes should include social workers rather than or aside from the healthcare personnel. In practice it is seen that treatment or training centres experience difficulties in coping with perpetrators of violence as they don't employ the correct type of personnel.

2. The Principle of Proportionality

Through the Law No. 6284 the judge is vested with broad discretionary power in terms of the type of the preventive measure to be decided. The only limit to the discretionary power is the principle of proportionality. The principle of proportionality also constitutes a guarantee for the fundamental rights and freedoms of the perpetrator of violence.

First and foremost, the principle of proportionality points to the fact that the judge should resort to a measure that is proportional to the type and intensity of violence that is intended to be prevented. Within the scope of the said principle the judge shall be obliged to take the lightest measure that is convenient to prevent violence.[65] In the case that moving the perpetrator away from the house is enough to prevent potential acts of violence, the judge ruling on a measure that limits the rights and freedoms of the perpetrator more than the restraining order might lead to violation of the principle of proportionality.

This principle is closely related to the duration of the measure. As per Art. 8(2) of the Law No. 6284, when granting an order for the first time the judge can rule for the duration of such order for a maximum of six months. In that case, it should be indicated that discretionary power of the judge is limited to six months for a violence case about which an injunction is to be granted for the first time.

In addition, the judge can determine the duration of the measures as he/she likes on the condition that when the injunction is to be granted for the first time, he/she is bound by the six-month period. Here again the principle of proportionality is at play. When the judge is to determine the duration of the preventive measure to be decided, he/she should first establish the duration of the protection to be decided and use his/her discretionary power accordingly. Therefore, severity of the threat of violence, insistence of the perpetrator in engaging in violent behaviour, injunctions if any that were rendered regarding the perpetrator before the date of the verdict, specifics of the concrete case such as violent acts that the perpetrator was engaged in should be absolutely heeded by the judge. On the other hand, the judge is not limited by an upper time limit in terms of the injunctions to be rendered after the first injunction. This issue can be clearly understood in paragraph two, Art. 8 of the Law No. 6284. However, the judge is still bound by the

65 Bölükbaşı (n 8) 135.

principle of proportionality when determining the duration of injunctions to be rendered after the first injunction.

In practice, it is observed that the specifics of the concrete case are not always taken into account when it comes to limitation of the injunctions in terms of their duration. It is established that preventive injunctions can be rendered with their durations being limited to one to three months. In addition, it is observed that rejection decisions can be made for reapplications.[66] Especially in the case that physical integrity of the woman is violated by stabbing or other types of bodily injury, keeping the durations short even if bodily harm is done with an intent to kill reduces effectiveness of preventive measures.

Recommendation:

It is necessary to raise awareness in practice about the fact that the level of protection that is expected of this measure is put at risk when the duration is not in line with the objective. This can be ensured through trainings and written material that is used to provide information.

3. Why preventive measures are subject to a time limit and whether the time limit introduced in the Law No. 6284 is valid for all measures

There is no distinction made between protective and preventive measures regarding the six-month time limit prescribed by the Law No. 6284. However, as protective measures directly impact on the rights and freedoms of the perpetrator of violence, it has not been fit for purpose that an upper time limit has been introduced for all the protective measures.

For example, in terms of the measure regarding provision of a shelter for the victim and the accompanying children, if necessary, the fact that this injunction can only be rendered for a period of six months especially in the case that the victim of violence gives consent is not in line with the objective.

The principle of proportionality can be sufficient in and of itself in terms of determining the duration of the protective measures. On the other hand, as preventive measures impact on the rights and freedoms of the perpetrator

66 8th Periodic Shadow Report submitted by Türkiye Executive Committee for NGO Forum for CEDAW to UN Committee on Elimination of All Forms of Discrimination Against Women, (to be presented in session 132 of CEDAW July 2021), p. 24, N. 71.

of violence, the fact that they are subject to an upper time limit can be explained by the intention to guarantee the rights and freedoms of the perpetrator of violence.

Some preventive measures are aimed at a particular outcome. For example, the injunction on treatment or training of the perpetrator of violence is aimed at elimination of factors that cause the perpetrator to engage in violent behaviour. As this is the case, the said injunctions should be in place until the desired outcomes are achieved. Therefore, the fact that the lawmakers have introduced an upper time limit for all preventive orders has not been correct. Regarding the limitation of freedom for the purposes of protection, which is regulated through Art. 432 of the TCC, there is no limitative regulation on the duration. The discretionary power of the judge on this issue is limited by the principle of proportionality.

4. The Effectiveness of Forced Confinement in Implementation of Preventive Measures

The injunction shall be pronounced or notified to the person under protection and the perpetrator of violence. In cases where delay is deemed to be inconvenient, the perpetrator of violence shall be notified of the injunction by the law enforcement through a written report (Art. 8(4)).

In the actions taken regarding pronouncement or notification of the judgment it is necessary to give warning that forced confinement is the sanction imposed as a result of violation of the preventive injunction (Art. 8(5)). The protective and preventive injunction not being announced or notified to the relevant people does not constitute an obstacle in terms of enforcement of the injunction (Art. 10(5)). It is reported that in practice, injunctions with a limited time frame cannot be notified to the relevant people by the law enforcement urgently and that the injunctions become dysfunctional.[67]

Lawmakers impose sanctions through Art. 13 of the Law No. 6284 in case of violation of the injunction. As per the first paragraph of the provision: "As per the provisions of this Law, in the case that the perpetrator of violence acts in contravention of the injunction, the perpetrator of violence about whom an injunction is granted shall be subject to forced confinement of

67 8th Periodic Shadow Report submitted by Türkiye Executive Committee for NGO Forum for CEDAW to UN Committee on Elimination of All Forms of Discrimination Against Women, (to be presented in session 132 of CEDAW July 2021), s. 24, N. 71.

three to ten days through judicial decision based on the severity of the violation and the type of the injunction violated even if it constitutes an actual crime." So, in order for the sanction called forced confinement to be imposed, violation of the injunction is sufficient. It is not necessary that this act constitutes a crime separately. In the case that violation of the injunction constitutes a crime separately, the perpetrator of violence shall also be subject to the sanction corresponding to the crime as well. In the second paragraph, the legal consequences of violating the requirements of the injunction are regulated. Accordingly, in each repetition of the violation of the injunction, the duration of forced confinement is from fifteen days to thirty days, depending on the nature of the violated measure and the severity of the violation. However, the total duration of forced confinement cannot exceed six months.

Forced confinement is characterised as disciplinary confinement.[68] Through forced confinement the lawmakers aim to force the perpetrator into fulfilling the obligations that are stipulated in the injunctions.[69] In paragraph (1), Art. 2 of the Code of Criminal Procedure No. 5271 disciplinary confinement is used to express "(...) confinement that is decided due to an act which is subject to sanctions to protect a partial order, that cannot be turned into substitute sanctions, for which no advance payment is made, which does not form a basis for repetition, for which provisions of probation do not apply, which cannot be postponed and registered in criminal records." In case of a violation of protective and preventive measures, as per clause (1) Art.2 of the Code of Criminal Procedure No. 5271 forced confinement to be enforced is disciplinary confinement, which can also be understood in the text of the draft law concerning the Law No. 6284.[70]

It should be underlined that the judge is obliged to rule for forced confinement in the case that the perpetrator of violence violates the injunctions and does not have any discretionary power regarding this issue. In the case that the perpetrator of violence violates the injunction for the first time, the judge can rule for forced confinement of three to ten days. Each time that the injunction is violated, the judge can rule for forced confinement of 15 to 30 days based on the type of the injunction violated and severity of the

68 **İzzet Özgenç**, 'Making the perpetrator of violence subject to Forced Confinement' (2012) VIII (97-98) Kazancı Peer-Reviewed Law Journal 59, 59; **Bölükbaşı**, p. 68.

69 **Bölükbaşı**, p.168.

70 Draft Law No. 6284, for the rational of the article see. GNAT, Justice Commission Report (24th Legislative Year, 2nd. Legislative Year, No: 181), https://www.tbmmgov.tr/sirasayi/donem24/yil01/ss181.pdf.

violation. However, the total time of forced confinement shall not exceed six months (Art. 13(2)). As per the last paragraph of Art. 13 of the Law No. 6284: "Decisions on forced confinement shall be enforced by the chief of public prosecutor's office. Relevant provincial and district directorates of the Ministry shall be notified of this decision."

Deterrence ensured by forced confinement and its function with regards to combatting violence against women should be explored in detail. With reference to the number of days to be determined, it doesn't seem to be possible that forced confinement has an important effect in terms of prevention of the threat of violence and deterring the perpetrator of violence. In addition, depriving the perpetrator of violence of their freedom only, not providing them with any training or not encouraging them to engage in informative activities about the outcomes of violence is an important shortcoming to be addressed.

VII. An Analysis of the Turkish Civil Code Operating in Conjunction with the Law No. 6284

a. Injunctions on Children

1. The child as A Victim of Violence:

The effects of violence in the home environment or the threat of being affected by such violence is enough to qualify the child as victim of violence (The Law No. 6284 Art. 2(e)). Thus, for the child to be victim of violence it is not necessary that violent behaviour is directly aimed at the child. Witnessing violence is enough to qualify the child as victim of violence and where violence is not directly aimed at the child, it should be kept in mind that children can be deemed to be victims of violence if they witness violence and may need protection.[71] [1]. However, children can be treated as invisible victims of violence in combatting violence[72][2]. That is to say, the child only indirectly benefits from the injunction rendered in favour of the woman and the protection needs of the child are not taken into consideration separately. For example, when a confidentiality order is granted in favour of the woman,

71 The Report on "The Effects of Male Violence and The Mechanisms of Combatting Male Violence on Children's Rights" to be submitted by Purple Roof Women's Shelter Foundation to the United Nations Committee on the Rights of the Child dated 28 December 2021, p. 12 et al.

72 The Report on "The Effects of Male Violence and The Mechanisms of Combatting Male Violence on Children's Rights" to be submitted by Purple Roof Women's Shelter Foundation to the United Nations Committee on the Rights of the Child dated 28 December 2021, p. 12; about the fact that children are only visible when they are victims of sexual violence see p. 14 et al.

information is not provided as to the fact that the same order should also be issued for the child separately. This can lead to victims of violence being easily located by the perpetrator of violence.[73][3]

The fact that specific trainings should be provided to the experts that are in charge in the public sector to raise awareness about violence against children is emphasised by the UN Committee on the Rights of the Child. However, it has been observed that trainings on the Law No. 6284 are provided to a small number of family courts assigned by the CJP to deal with preventive and protective injunctions issued under the Law No. 6284. However, other family courts except for the ones that are assigned the duty of taking measures as per the Law No. 6284 render injunctions within the scope of divorce cases. In addition, in places where there is no family court, judges of the civil court of first instance are also in a position to grant injunctions. Such trainings should not be limited only to judges and every officer from different ranks that performs public duty in violence cases should be adequately trained about implementation of the Law No. 6284.[74][4] In order to ensure that the implementation of these measures is more successful and in line with the Council of Europe standards with regard to protecting child victims of domestic violence, the following recommendation was made.

Recommendation:

Making sure that these trainings are effectively provided to public officers that are assigned the duty of granting injunctions and by developing a system that is effective.

As per the Turkish Civil Code it is possible for a 16-year-old child to get married through judicial decision and for a 17-year-old through parental permission. However, as per clause (a), Art. 3 of the Juvenile Protection Law No. 5395 child is a term that is used to define "the person who has not turned eighteen even if they have got mature earlier." In this case, the child who reaches legal majority through marriage is also considered as a child under the Child Protection Law and benefits from the protection within this scope.

73 The Report on "The Effects of Male Violence and The Mechanisms of Combatting Male Violence on Children's Rights" to be submitted by Purple Roof Women's Shelter Foundation to the United Nations Committee on the Rights of the Child dated 28 December 2021, p. 13.

74 The Report on "The Effects of Male Violence and The Mechanisms of Combatting Male Violence on Children's Rights" to be submitted by Purple Roof Women's Shelter Foundation to the United Nations Committee on the Rights of the Child dated 28 December 2021, p. 10.

In the cases filed for the authorisation of marriage in accordance with the Turkish Civil Code, the procedure is kept limited to the investigation of whether the child has reached the maturity required for marriage, and is therefore not conducted primarily to determine whether the child has been forced to marry at an early age. On the other hand, in the Joint General Comment of the Committee on the Rights of the Child and Committee of the Elimination of Discrimination Against Women all marriages below the age of 18 are identified as "child marriage". In that case, every marriage that is not based on full, free and informed consent of the child is deemed to be "forced marriage."[75][5] The fact that the application to obtain permission for a marriage is made by the parents rather than the child himself/herself, the child not being heard before a decision is made, referring to traditional values and not taking the statements of the child as the basis and the child not being represented by an expert or a lawyer in the lawsuit undermines the protection of the child at this stage. In full conformity with international norms, it is recommended that the age of marriage be raised to the age of 18.

2. Injunctions that can be granted as per Art. 346 et al. of the TCC within the scope of Article 5(3) of the Law No. 6284

If the child qualifies as victim of violence, the judge can rule for protective and preventive measures featuring within the scope of the Law No. 6284. In addition, as per article 5 of the Law No. 6284, measures regulated under Art. 346 of the TCC and the provisions that follow can also be granted. The judge shall be obliged to resort to the necessary measures to ensure protection of the child. As per Art. 4(b)(1) of the Law on Establishment, Duties and Proceedings of Family Courts, the courts of competent jurisdiction to take the necessary measures as per Art. 326 et al. of the TCC are Family Courts.[76] As a matter of fact, the court of competent jurisdiction in application of Law No. 6284 is also Family Courts (Art. 2(c)).

These orders aim to protect the child. However, the said measures are preventive in nature as per the Law No. 6284 as they affect the parental rights of the perpetrator of violence. Therefore, specific mention is regulated under Art. 5 on preventive measures of the Law No. 6284 granting authority to the judge to grant for the measures regulated under Art. 346 et al. of the TCC.

75 Committee on the Rights of the Child and CEDAW Committee Joint General Comment No. 18 (CEDAW No. 31), parag. 20.

76 **Gülçin Elçin Grassinger**, Measures to be Taken to Protect Personality of the Minor (Istanbul, 2009) 94.

As per the said Art. 5(3); *"The judge shall be authorised to rule on protective and preventive measures featuring in the Juvenile Protection Law No. 5395 and dated 3/7/2005 and also on custody, curatorship, alimony and establishment of visitation rights as per the Law No. 4721."*

The aim of these regulations is to ensure the protection of the child by vesting the judge with the power of taking measures ex officio. However, these measures can be effective only if they are taken immediately and without delay. This issue is also emphasised by Art. 7 of the European Convention on the Exercise of Children's Rights. As per the said regulation, "In proceedings affecting a child, the judicial authority shall act speedily to avoid any unnecessary delay and procedures shall be available to ensure that its decisions are rapidly enforced. In urgent cases the judicial authority shall have the power, where appropriate, to take decisions which are immediately enforceable."

As is seen, the injunction should be granted before the child incurs any harm. The fact that it is foreseeable that there is a serious threat of a certain gravity aimed at the personality of the child is sufficient to take the necessary measures.[77] If the judge can foresee that a threat might come true and the child's interests might be impaired if the necessary measures are not taken in a concrete case, the necessary measures should be taken immediately.

The most important principle to be observed in taking protective measures is the principle of the best interests of the child. As per this principle, the measures that are envisaged to ensure protection of the child can only be taken if necessitated by the interests of the child. These measures cannot be taken to punish the parents.[78]

The principle of the best interests of the child requires the opinion of the child to be taken at the stage of granting injunctions, provided that the child is at the age of cognisance. However, if the best interests of the child requires a different application, the judge may not rely on the opinion of the child when making a decision. The Court of Cassation has also ruled that the opinions of the child are not binding if they contradict the best interests of the child.[79]

77 **Bilge Öztan**, Family Law, 6. Bs., 2015, p. 1137; **Elçin Grassinger**, p. 67 et al.

78 Elçin Grassinger, p. 98 et al. Öztan, p. 1137.

79 General Assembly of Civil Chamber of the Court of Cassation, 27.06.2018 D, 2017/3117 P., 2018/1278 D., (For the decision please see https://cocukhaklari.barobirlik.org.tr/dokuman/cocukhaklariykcilt2.pdf).

As with the other measures featuring under the scope of the Law No. 6284, the judge should observe the principle of proportionality when ruling on the measures featuring within the scope of Art. 346 et al. of the TCC. Accordingly, the judge should rule for the ones from among the measures featuring within the scope of Art. 346 of the TCC that will affect the rights of the parents and the family structure the least. The said measures should be proportionate to the child's need for protection.[80]

In order for the judge to rule for the measures in favour of the child, it is necessary that the parents are not able to eliminate the threat aimed at the child. This issue can be expressed through the principle of subsidiarity. In line with this principle, the intervention of the judge can only be possible if the parents do not take the necessary measures to protect the interests of the child or if the measures taken are useless.[81] It can be said that the principle of subsidiarity is a necessity of the principle of proportionality.[82]

Measures contained within Art. 346 et al. of the Turkish Civil Code are of a complementary nature. What is aimed by taking the said measures is to make up for the shortcomings of the parents in terms of protecting the interests of the child. Unless necessitated by the interests of the child, the parents should be enabled to fulfil their duties stemming from parental rights and the measures decided should not rule out this opportunity provided to parents.[83]

b. Injunctions that can be rendered as per Art. 346 of the TCC and Their Outcomes

Article 346 of the Turkish Civil Code regulates "protective measures" in general. In the case that the development and interests of the child are at stake and on the condition that the parents cannot redress this situation or cannot afford to do so, the judge shall be obliged to take the appropriate measures to ensure protection of the child.

In order to rule for the said measures, the finding of specific parental deficiencies is not necessary. The fact that the child needs protection is sufficient to take the necessary measures. The parents' attitudes are important in determining the types of the measures to be decided.[84]

80 Elçin Grassinger, p. 79; Öztan, s. 113.

81 Elçin Grassinger, p. 100; Öztan, p. 1138.

82 Elçin Grassinger, p. 100.

83 Elçin Grassinger, p. 102 et al.; Öztan, p. 1138.

84 Elçin Grassinger, p. 96.

The measures to be taken should serve to protect the child. What is aimed through the measures is not punishment of the parents.[85] To illustrate the circumstances in which the development and the interests of the child are at stake, the following can be mentioned: not being able to meet nutrition, healthcare and education needs of the child, the child being exposed to mistreatment, the child being forced to engage in inappropriate behaviour.[86]

The parents being faulty is not stipulated as a condition, but it might affect the types of the measures to be taken.[87] The lawmakers refrained from enumerating the measures that can be taken within the scope of Article 346 of the TCC. The judge should take the measures that are necessary to protect the interests of the child by taking into account his/her own discretionary power, the specifics of the concrete case and the needs of the child.

In the third paragraph of Article 307 of the Swiss Civil Code, the measures that the judge may take within this scope are listed by way of example. Article 346 of the Turkish Civil Code does not follow this enumeration method. The examples that can be given as to the measures to be taken as per Article 346 of the TCC by looking at the exemplary measures are as follows: The judge giving advice to the parties and warning the parents in particular, the judge giving instructions to the child and parent, the judge appointing a consultant or supervisor to make sure the warnings or instructions given are heeded.[88]

c. The injunction that can be rendered regarding "placement of the child" as per Article 347 of the TCC and its outcomes

The lawmakers regulate placement of the child with a family or in an institution in Article 347 of the TCC. If the measures taken as per Art. 346 of the TCC are not sufficient or if it is understood beforehand that these measures are to be insufficient for a child exposed to domestic violence or witnessing domestic violence and thus having incurred damage, it might be possible to resort to placement of the child.

85 Elçin Grassinger, p. 96.

86 Dural, Öğüz and Gümüş, N 1732.

87 Dural, Öğüz and Gümüş, N 1732; Elçin Grassinger, 48 et al.

88 Elçin Grassinger, p.115 et al.; Öztan, p. 1140 et al.; Art. 308 of SCC clearly mentions and regulates appointment of a curator among the measures to be taken by the judge to ensure protection of the child. However, Art. 346 of the TCC also regulates a measure to this end. About the fact that it should be acknowledged that there is a legal gap to that effect see. Öztan, p. 1145; About the fact that appointment of a curator is excluded by the lawmaker on purpose and thus a legal gap cannot be mentioned here see Elçin Grassinger, p. 136 et al.

In order to resort to this measure, it is necessary that physical and mental development of the child is at stake, or the child is morally abandoned (TCC Art. 347/I). To acknowledge the fact that the child is morally abandoned, it is necessary that the parents have not been able to provide the child with the protection that is necessary to protect him/her from the threats aimed at the psychological and physical development of the child. In order to take measures concerning the child as per Art. 347 of the TCC, the undesirable situation the child is in should be continuous. If the other measures that can be taken as per Art. 346 of the TCC are sufficient, it is contrary to law to resort to placement of the child in line with the principles of proportionality.[89]

Another situation which might necessitate resorting to placement of the child is that the child's existence within the family impairs the peace of the family in a way that cannot be expected of the family to bear with this situation. In this case, if the child lives with the family, the peace of the family should be impaired in a way that cannot be expected of the family to bear with this situation. On the condition that any other solution to redress this situation is not found, it is possible to undertake placement of the child outside of the family upon request of the parents or the child (TCC Art. 347/2).

In order for the judge to resort to placement of the child, it is not necessary that the threat has transpired. It is enough to foresee that the personality right of the child is under grave danger.[90] If the person having assumed caring for the mother or the child is able to fulfil the duty of protecting the child against the violence, the said measure may not be deemed necessary. The expenses that are incurred due to placement of the child with another family or in an institution shall be paid by the parents if they can afford to do so and if not by the state (TCC Art. 347/3). In this case, the alimony obligation of the parents shall be ongoing. (TCC Art. 347/4).

d. The injunction on "revocation of custody" that can be rendered as per Art. 348 of the TCC and its outcomes

If taking measures to ensure protection of the child as per Art. 346 of the TCC or ensuring placement of the child as per Art. 347 is not sufficient, the judge may rule for revocation of custody in the case that the terms of Art. 348 of the TCC so require. In other words, the injunction as to revocation

89 Dural, Öğüz and Gümüş, p. N 1734.

90 Elçin Grassinger, p. 141.

of custody is the gravest order that can be rendered to ensure protection of the child.[91]

The circumstances that might lead to revocation of custody are regulated in two separate clauses in paragraph one of the articles by the lawmakers. In clause one of the provisions, some of the circumstances that stand in the way of fulfilling the duty of custody are cited as examples and it is stipulated that custody can be revoked in the said circumstances or in cases similar to the ones mentioned. Among the circumstances that are cited as examples is the parents not being able to fulfil the duty of custody due to inexperience, a disease, being disabled or being located elsewhere. As such, the judge is vested by the lawmakers by regulating the grounds for revocation of custody in general with a discretionary power which is broad in scope, and which is to be used based on the specifics of the concrete case.[92] The parental right holder is not faulty for the duty of custody not being duly fulfilled in circumstances enumerated within clause one.[93]

The circumstance mentioned in clause two of the provision is the parents not showing adequate affection towards the child or seriously neglecting their obligations towards the child. It should be indicated that in terms of children who are victims of violence, the terms mentioned in clause two, Article 348 of the TCC shall be valid. In order for the parents not showing adequate affection towards the child or seriously neglecting their obligations towards the child to lead to revocation of custody, they should be continuous.[94] Parental right holder might be faulty in circumstances enumerated within the said clause.[95] The judge should inquire into whether the perpetrator of violence is fit to show adequate affection towards the child and whether obligations towards the child are seriously neglected by the perpetrator of violence. As the revocation of custody is a severe measure, development of the child should be seriously and permanently affected. In addition, it should be kept in mind that even a one-time negative behaviour might adversely affect the child. It should also be acknowledged that in cases where the negative effect on the child is continuous, parental right could be revoked.[96]

91 Elçin Grassinger, p. 163.

92 Elçin Grassinger, p. 169.

93 Elçin Grassinger, p. 169.

94 Öztan, p. 1154; Elçin Grassinger, p. 169.

95 Elçin Grassinger, p. 181.

96 Elçin Grassinger, p. 179.

As per Art. 348 of the TCC, the judge is able to revoke parental right of the father perpetrating violence. However, if the mother does not engage in behaviour that is necessary to protect the child from negative effects of violence, it might lead to her being relieved of her parental right as well.[97] If both parents are relieved of custody, it is necessary to appoint a guardian for the child. The decision to revoke parental right shall be valid for all the children to be borne aside from the existing ones. However, the judge might decide to the contrary as per Art. 348(3) of the TCC. Revocation of custody shall not terminate the parents' obligations to meet care and education expenses of children. However, if the parents and the child cannot afford to cover these expenses, they shall be paid by the State (TCC Art. 350).

In practice, temporary parental right applications made within the scope of requests based on the Law No. 6284 might be refused on the unlawful grounds that it is the subject of a divorce case. It might happen that judges may prioritise the concept of "integrity of the family" over combatting violence. This issue is related to the fact that importance of combatting violence and the objective of the Law No. 6284 are not understood adequately.[98]

Recommendation: Provision of efficient training to the judges and all the civil servants in charge about the fact that right to life and other personality rights of the woman and the child should prevail over integrity of the family and parental right of the father.

e. The injunction on limitation of the right to establish visitation rights

As per article 5(3) of the Law No. 6284 the judge shall be authorised to decide on establishment of visitation rights between the child and the parents. In order for the judge to decide on establishment of visitation rights as per the Law No. 6284, the child should be in need of protection against violence and the right should be affected to ensure such protection.

The right to establish visitation is regulated in Art. 323 of the TCC. In line with the said provision, each one of the parents has the right to request establishment of visitation with the child who is not under custody of him/her or who is not left with him/her". The right to establish visitation can be defined as the right of the mother or father to request establishment

97 Elçin Grassinger, p. 181.

98 The Report on "The Effects of Male Violence and The Mechanisms of Combatting Male Violence on Children's Rights" to be submitted by Purple Roof Women's Shelter Foundation to the United Nations Committee on the Rights of the Child dated 28 December 2021, p. 14.

of visitation with the child who is not under custody of him/her or who is not left with him/her. The lawmakers require that "interests of the child especially in terms of healthcare, education and morals" are taken as the basis in establishment of personal contact (TCC Art. 182(2) s.1).

As per Art. 324(1) of the TCC, the lawmakers impose an obligation on each of the parents to refrain from damaging the other's personal relationship with the child and preventing education and upbringing of the child. Art. 324 of the TCC regulates limitation of the right to establish visitation with the child. In case of existence of the conditions mentioned in the provision, the judge may limit the right to establish visitation and is also authorised to revoke it once and for all. As per the said provision, if the peace of the child is at stake due to establishment of contact or the mother and father use their rights in defiance of their obligations stipulated in paragraph one of the relevant article or if the parents don't take care of the child duly or there are other important reasons, the right to establish visitation might be restricted.

The lawmakers do not deem the conditions sought for limitation of the right to establish visitation to be limited. Through the phrase "other important reasons" featuring in the provision, each situation that is deemed to be contrary to the best interests of the child is included within this scope.

The fact that the judges are authorised to render injunction on parental right and the right to establish visitation through the Law No. 6284 in addition to all the other protective and preventive measures was received favourably by the GREVIO report. The fact that these powers are conferred is considered to be an indication of the fact that the lawmakers are aware of the importance of these decisions. Nevertheless, in the report it is underlined that these powers are rarely used.[99] As a matter of fact, it is evaluated that in practice protection of the personal bond between the child and the father is prioritised over protection of the child and the women from violence and that as such effective protection from violence cannot

99 Turkey Report Annex-1, in line with the data in Table 3; in 2014, 2015 and 2016 in 773, 457 and 208 cases respectively judgments on parental right and the right to establish personal contact with the child were delivered. In 2014, 2015 and 2016 there were 267, 111 and 235 cases respectively in which an existing judgment on custody was interfered with. On the other hand, in the same years 52.043, 58.927 and 60.934 injunctions were rendered respectively on the perpetrator not approaching the children and relatives of the victim (even if they are not victims of violence per se) as per Art. 4/1/d of the Law No. 6284 without the courts interfering with the right to establish personal contact between the perpetrator and the child. See GREVIO, N. 210, dn. 196;

be ensured.[100] As is stated by the NGOs in the report, this shortcoming seen in practice is related to lack of knowledge about the legal regulations featuring the said powers. Recent legislation of the Regulation on Handover of the Child and Implementation of Visitation Rights, dated 04.08.2022, regulates domestic violence specific rules on implementation of visitation rights. The Regulation specifically acknowledges the superiority of the best interest of the child principle in matters of conflict of interests between the child and both parents (Art. 6(6)). Furthermore Art. 7(1) of the Regulation clearly regulates that implementation of visitation rights should be handled by taking into account any type of orders that have been granted as per Law No. 6284, including confidentiality orders. Proper sensitive approach seems to have started to take its place in the relevant legislation, yet to achieve duly implementation the burden falls upon the family court judges and the Legal Aid and Victim Services Offices of MoJ.

In addition, the tendency of the courts to think that undertaking such regulations is only related to divorce cases is shown as a reason for why the said measures are not resorted to. It is also stated in the report that issuance of an injunction as per the power vested through the Law No. 6284 might stand in the way of different decisions being taken regardless of the effects of violence on the victim in divorce and similar cases to be handled by the family court in the future.[101]

In order to ensure that the implementation of these measures are more successful and in line with the Council of Europe standards with regard to providing sufficient protection of the child victims interests, the following recommendations were made.

Recommendations:

1. Acts and threats of violence should be taken into consideration when determining visitation rights. Understanding among judges of the harm born by children in witnessing domestic violence should be initiated. Accordingly, the notion of 'reducing the risk of a child to suffer violence or to witness violence inflicted upon people close to them' when considering the best interest of the child should be promoted.

100 The Report on "The Effects of Male Violence and The Mechanisms of Combatting Male Violence on Children's Rights" to be submitted by Purple Roof Women's Shelter Foundation to the United Nations Committee on the Rights of the Child dated 28 December 2021, p. 13.

101 GREVIO Baseline Evaluation Report, Turkey, 2018, Paragraph N. 210.

The superiority of the best interests of the child principle in matters of conflict of interests between the child and both parents should also be emphasised. Emphasis should also be made on the urgency of such decisions and thus the matter of termination or limitation of visitation rights should be dealt with primarily in the proceedings. In that regard distribution of guidelines and periodical trainings for family court judges are recommended.

2. In determining the visitation rights of the father, where violence/abuse is proven, the emphasis should be shifted from the father's right to establish contact with his child to the protecting the life and safety of both the child and the other spouse, depending upon the gravity of the concrete case of violence. To that extent, guidelines and periodical trainings for family court judges are recommended.
3. The gravity of the acts or threats of violence should be taken into account in terms of the implementation of termination or limitation of visitation rights. Such orders terminating or limiting visitation rights by the family court judge as per the Law no. 6284 should be taken into account in relevant proceedings of especially divorce cases. For the purposes of widespread implementation, guidelines and periodical trainings are recommended.

CONCLUSION

As can be seen from the extensive details set out above, a substantial overview has been provided by international and national experts of international and Council of Europe standards within the area of violence against women. In addition, a substantial and detailed assessment has also been made of the current application of the Turkish Law No. 6284 on the Protection of Family and Prevention of Violence against Women. This was based on detailed discussions by national experts with the 65 participants of the workshop and as can be seen has provided many detailed and relevant recommendations in each section of this assessment report. In summary, it is clear that there are a number of very good legal and policy provisions in existence and that are in compliance with the Council of Europe standards. The majority of the issues identified relate to problems around the knowledge of such measures amongst legal actors, their implementation and training. This has highlighted the need to ensure the following:

1. Regular training amongst law enforcement officers, prosecutors and judges within the criminal and family law systems on the various measures available to combat violence against women.
2. The provision of a detailed handbook/guidelines which provides an overview of the available measures for cases involving domestic violence to law enforcement officers, prosecutors and judges which should be regularly updated and issued.
3. The need for a more co-ordinated approach with the criminal, family and child protection systems and the need to ensure constant communication between them, where relevant, in cases concerning victims of domestic violence.
4. A holistic approach needed to combat negative stereotypes and patriarchal attitudes towards domestic violence which still exist in the society. This should be a key feature amongst training of the relevant legal actors.
5. The need to ensure a trauma informed response to victims of domestic violence from the beginning of the case when it is reported and all the way through their journey through the legal system.

6. The need to ensure that risk assessment is a key and continuing part of the legal process, whether that is in the civil or criminal system where domestic violence is involved. This is to ensure that the safety of the victim is the utmost priority of the court and to ensure that the Council of Europe standards with regard to the protection of the victim are maintained.
7. The recognition of the impact upon children of both witnessing and experiencing domestic violence and the need to ensure that the risk to their safety and that of their carers is undertaken when making orders for custody and access.

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This Evaluation Report, prepared within the framework of the Joint Project on " Improving the Effectiveness of Family Courts: Better Protection of the Rights of Family Members" co-funded by the European Union and the Council of Europe, represents an important work on the prevention of violence against women and domestic violence and the protection of victims. The report, which was part of a workshop focusing on the challenges faced in the implementation of Law No. 6284 on the Protection of the Family and Prevention of Violence against Women, focuses on strengthening cooperation mechanisms to prevent violence against women and domestic violence and improving case management to ensure effective remedies. The report provides the reader with an overview of preventive and protective measures in relation to violence against women and domestic violence in comparison with the Council of Europe standards and best practices in Europe. An analysis of the main Turkish legislation on preventive and protective measures that can be issued under Law No. 6284 on the Protection of the Family and Prevention of Violence against Women is also included. This study serves as an important resource on the subject by shedding light on how a more effective approach can be adopted in the field of prevention of domestic violence. and protection of victims.

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