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# Domestic Violence in the Focus of Estonian Penal Policy and Implementation of the Law in the Light of the Istanbul Convention Requirements

*Dr. iur. Silvia Kaugia*

Faculty of Law, University of Tartu  
Department of Criminal Justice  
Chair of Comparative Jurisprudence  
E-mail: *silvia.kaugia@ut.ee*

Domestic violence is a multi-faceted phenomenon, encompassing social, psychological, medical and, certainly, legal aspects. Depending on the existing legal framework, it is the lawyers who have the possibility and even the duty to assist and protect the victim and to apply various sanctions against the perpetrator. The decision on the Principles of Criminal Policy until 2030, adopted by the Estonian Parliament, formulates the goal of the penal system as supporting law-abiding lifestyles and thus ensuring that the norms based on the values of our society are implemented, violations are responded to and conflicts are resolved fairly. These are goals that, if realised, could also contribute to reducing domestic violence in society. Estonia has ratified the Istanbul Convention and has made amendments to national legislation in accordance with the requirements of the Convention. Dealing with cases of domestic violence is nevertheless relatively problematic, especially from the perspective of the victim. The predominance of the settlement procedure or the practice of out-of-court restorative justice and conciliation in domestic violence cases, in the opinion of this author, tends to support the position of the perpetrator of violence.

**Keywords:** violence, domestic violence, penal policy, implementation of the law, the Istanbul Convention.

## Contents

<i>Introduction</i> . . . . .	110
1. <i>Private law and public law measures to domestic violence in the Estonian legal system</i> . . . . .	112
1.1. <i>Private law measures</i> . . . . .	112
1.2. <i>Public law measures</i> . . . . .	116
2. <i>Penal measures and punitive alternatives in domestic violence cases applied in Estonia</i> . . . . .	119
<i>Summary</i> . . . . .	121
<i>References</i> . . . . .	122
<i>Bibliography</i> . . . . .	122
<i>Normative acts</i> . . . . .	123
<i>Case law</i> . . . . .	123
<i>Other sources</i> . . . . .	123

## Introduction

Violence against women and girls is one of the most systematic and widespread human rights violations worldwide. EU countries are no exception. Regrettably, one in three women have experienced physical or sexual violence, mostly perpetrated by intimate partners. Every second woman has experienced sexual harassment. During the COVID-19 pandemic, there was a significant increase in the number of reported cases of physical and mental violence against women. According to reports, in some countries the number of calls to domestic violence hotlines has quintupled. Likewise, cyber-violence is on the rise, particularly against young women and women in public life, such as journalists and politicians. Women also face violence in the workplace: around a third of women in the EU who have undergone sexual harassment experienced it in the workplace. The EU and its Member States are working in different areas to end gender-based violence, protect victims and punish perpetrators.<sup>1</sup>

For the purposes of this article, the meaning of domestic violence will comply with the definition contained in the Istanbul Convention<sup>2</sup> (hereinafter referred to as “the Convention”).<sup>3</sup> Domestic violence is a multi-faceted phenomenon, encompassing social, psychological, medical and certainly legal aspects. The latter has an important role to play: depending on the existing legal framework, it is the lawyers who have the possibility, and indeed the duty, to assist and protect the victim and to apply various sanctions against the perpetrator. In addition to the law, the lawyer is assisted in this task by his or her own (professional) understanding of the dangers of family violence, the effective methods of dealing with it and the effectiveness of existing legislation in addressing the problem.

Domestic violence is a human rights problem that undermines people’s right to liberty, security, dignity, mental and physical integrity and non-discrimination. Violence causes great suffering to the victim and his or her loved ones, as well as damage to society (medical costs, loss of working capacity, loss of quality of life, etc.).

Violence is often a recurring phenomenon: a violent family pattern is acquired in childhood and can be repeated from generation to generation.<sup>4</sup>

The problem of domestic violence is also acute in Estonia, being fuelled by the high level of alcoholism among the population, a relatively tolerant attitude towards violence and stereotypical attitudes and perceptions of the role of women in the family.

According to the Ministry of Justice, the number of domestic violence crimes registered in Estonia has fallen in the last three years. See Table 1.

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<sup>1</sup> ELi meetmed naistevastase vägivalda lõpetamiseks [EU action to end violence against women]. Available: <https://www.consilium.europa.eu/et/policies/eu-measures-end-violence-against-women/#directive> [last viewed 23.01.2024].

<sup>2</sup> Naistevastase vägivalda ja perevägivalda ennetamise ja tõkestamise Euroopa Nõukogu konventsioon [Council of Europe Convention on preventing and combating violence against women and domestic violence]. RT II, 26.09.2017, 1.

<sup>3</sup> Domestic violence (also called intimate partner violence) includes all acts of physical, sexual, psychological and economic violence that occur within the family, in the home, or between current or former spouses or partners, regardless of whether the perpetrator lives or has lived in the same living space as the victim. Council of Europe Convention on preventing and combating violence against women and domestic violence Art. 3. Istanbul, 11V.2011. Available: [https://www.coe.int/t/DGHL/STANDARDSETTING/EQUALITY/03<sup>th</sup>emes/violence-against-women/Conv\\_VAW\\_en.pdf](https://www.coe.int/t/DGHL/STANDARDSETTING/EQUALITY/03<sup>th</sup>emes/violence-against-women/Conv_VAW_en.pdf) [last viewed 23.01.2024].

<sup>4</sup> *Gustafsson, M. et al.* Intimate Partner Violence and Children’s Memory. *Journal of Family Psychology*, (27) 6, lk 937, 2013.

Table 1. Registered domestic violence crimes 2017–2022<sup>5</sup>

2017	2018	2019	2020	2021	2022
2632	3607	4119	3987	3760	3244

Source: Crime in Estonia 2022.

Domestic violence was the most common form of domestic violence. The typical perpetrator of domestic violence is a man in his 40s. The youngest perpetrator of domestic violence in 2022 was a 13-year-old boy and the oldest was an 84-year-old man. The vast majority of violence was committed against women and girls. In domestic violence cases involving minors, 74% of victims were girls and 26% boys. In domestic violence crimes committed as a parent, 68% were committed by fathers and 32% by mothers, whereas 45% by boys and 55% by girls. The number of homicides and attempted homicides related to domestic violence increased by four, with seven cases recorded in 2022. It is noteworthy that while domestic violence crimes accounted for 13% of all crimes, domestic violence crimes accounted for 46% of violent crimes in 2022.<sup>6</sup>

More important than dealing with the consequences of violence, including domestic violence, is the prevention and deterrence of all violence.

In Estonia, a resolution of the *Riigikogu* has been adopted, entitled “Basic principles of criminal policy until 2030”.<sup>7</sup> Paragraph 3 of this document states that “criminal policy shall aim to prevent, respond to and reduce the harm caused by crime, in partnership with education, health, social, cultural, sporting and financial sectors, and with communities, local authorities, the voluntary and private sectors. The purpose of the system of sanctions is to support law-abiding lifestyles and thereby ensure that the values-based norms of our society are enforced, violations are dealt with and conflicts are resolved fairly”.

Placing this decision of the *Riigikogu* in the context of domestic violence, it is inevitable to point out the objectives of the Convention formulated in Article 1 of the Convention: to prevent violence against women and domestic violence, to develop a comprehensive framework, policies and measures to protect and assist all victims of violence against women and domestic violence, and to support and assist organisations and law enforcement agencies to cooperate effectively and adopt a holistic approach to eradicating violence against women and domestic violence. Chapter 5 of the Convention is devoted to substantive law. It includes an injunction to Contracting Parties to take the necessary legislative or other measures to provide victims with adequate civil remedies against the perpetrators of the offence. Acts that should be criminalised are also mentioned. Private law measures relate, for example, to the dissolution of forced marriages, but also to the determination of the rights of the child and the parent. In the context of the Convention, the term “measures of public law” refers to legislative measures in the field of criminal law.

The aim of the article is to present the possibilities of the Estonian legal system to deal with the prevention of domestic violence cases and the protection of victims,

<sup>5</sup> Domestic violence crime not included in Estonia’s crime statistics for 2023.

<sup>6</sup> Kuritegevus Eestis 2022. Justiitsministeerium [Crime in Estonia 2022. Ministry of Justice]. Available: <https://www.kriminaalpoliitika.ee/kuritegevus2022/perevagivald-ja-ahistamine/> [last viewed 23.01.2024].

<sup>7</sup> Kriminaalpoliitika põhialused aastani 2030. Justiitsministeerium [Fundamentals of criminal policy until 2030. Ministry of Justice]. Available: [file:///C:/Users/skaugia/Downloads/kriminaalpoliitika\\_pohialused\\_aastani\\_2030%20\(1\).pdf](file:///C:/Users/skaugia/Downloads/kriminaalpoliitika_pohialused_aastani_2030%20(1).pdf) [last viewed 24.01.2024].

as well as the punitive measures and alternative punishments applied in Estonia in domestic violence cases. The analysis is based on the respective requirements of the Istanbul Convention for States Parties.

## 1. Private law and public law measures to domestic violence in the Estonian legal system

Private law measures relate mainly to civil law. In civil law, provisions protecting the rights of victims of domestic violence can be found in particular in the Law of Obligations Act and the Family Law Act. In order to protect the rights of the victim, the appropriate measures may vary from the possibility of establishing joint custody of the child and contact arrangements through the civil courts to claims under the law of obligations for physical injury or mental harm through the Law of Obligations Act<sup>8</sup> § 1043. In the Estonian Penal Code, domestic violence is theoretically covered by all criminal offences that do not presuppose specific circumstances or a specific subject.

### 1.1. Private law measures

#### 1.1.1. Guardianship and visiting rights

Article 31(1) of the Convention obliges States Parties to take measures to ensure that cases of violence falling within the scope of the Convention are taken into account when determining custody and visiting rights. Cases of violence committed by one parent against a child or against another parent must be taken into account. Article 31(2) also obliges States Parties to take measures to ensure that the exercise of visitation and guardianship rights does not jeopardise the rights and safety of victims and children.

Guardianship and visiting rights are areas of civil law in Estonian law, specifically family law. They are governed by the Family Law Act (PKS).<sup>9</sup> In Estonian law, the relationship between a child and his or her parent consists of custody (PKS § 116), rights of access (PKS § 143) and maintenance (PKS § 96).

Parental custody means that a parent has the duty and the right to care for his or her minor child. A parent's rights of custody include both personal rights and rights of access to the child. Parental custody can be limited or withdrawn entirely on legal grounds. Subsection 134 (1) of the PKS provides for situations in which the limitation of a parent's right of custody comes into question: endangerment of the child's physical, mental or emotional well-being or of the child's property through abuse of parental authority, neglect of the child, failure of the parents to fulfil their responsibilities, the conduct of a third party and the unwillingness or inability of the parents to prevent the danger. Withdrawal of the right of custody comes into question if other measures have failed or if there are reasons to assume that their application is not sufficient to prevent the risk (PKS § 135(2)). Case law has clarified that a previous offence committed by a parent is not sufficient to deprive him or her of custody. However, the combination of a criminal lifestyle, imprisonment and the avoidance of caring for the child while at liberty can lead to the removal of custody of the child.<sup>10</sup>

The right of communication is defined in § 143(1) of the Constitution as the right of the child to communicate personally with both parents and the corresponding

<sup>8</sup> Völaõigusseadus [Law of Obligations Act]. RT I, 06.07.2023, 116.

<sup>9</sup> Perekonnaseadus [Family Law Act]. RT I, 22.12.2021, 15.

<sup>10</sup> RKTKm 3-2-1-142-13, p. 18.

right and obligation of the parents to communicate personally with the child. In the interests of the child, the court may restrict the right of access or the enforcement of earlier decisions on this matter, but may also terminate the exercise of the right of access or the enforcement of earlier decisions on this matter (PKS § 143(2)). In the best interests of the child, the court also has the power to authorise, prohibit or restrict a third person from communicating with the child (PKS § 143(4)). The court may also order the child to communicate with the parent in the presence of a suitable third person (PKS § 143(3<sup>1</sup>)).

In the light of the above, Estonian family law has made it possible to take domestic violence into account in matters of custody and rights of access. In the context of rights of custody, the Supreme Court has explicitly emphasised that, although both parents could participate in the organisation of the child's life, this is precluded by a conflict with the child's best interests and a risk to the child's safety.<sup>11</sup> Similarly, the best interests of the child must also be taken into account in matters of the right of communication, so allowing a parent who is violent towards the child to communicate with the child is also contrary to the best interests of the child. It cannot be in the best interests of the child to be looked after by a parent who has been violent towards the other parent. Violence by one parent against another also indicates a threat to the child's safety and affects the child mentally.

### 1.1.2. Forced marriage

Article 32 obliges Contracting Parties to the Convention to take measures to ensure that forced marriages can be annulled, annulled or dissolved in such a way as not to impose unreasonable financial or administrative burdens on the victim. The criminalisation of forced marriage is dealt with in Article 37(1), which provides that Contracting Parties shall adopt such legislative or other measures as may be necessary to ensure that the intentional coercion of an adult or a child to marry is criminalised. The second paragraph of the same provision states that the intentional luring of an adult or a child into the territory of a Contracting Party or into the territory of a State in which he or she does not reside for the purpose of forcing him or her to marry must also be criminalised.

The civil law consequences of forced marriages are governed by the Family Law Act (PKS).

Paragraph 9(1)(5) of the Civil Code provides that the court may declare a marriage null and void in an action for annulment if the marriage was contracted under the influence of fraud, threat or violence. An action for annulment of a marriage may be brought by a spouse who has entered into the marriage under the influence of fraud, threat or violence (§ 12(1)(2) of the PKS). Therefore, the victim of a forced marriage can bring an action for annulment of the forced marriage before the courts in Estonia. The annulment of the marriage has the effect of nullity of the marriage from the outset (PKS § 14(1)).

### 1.1.3. Options for bringing a civil action

The right of victims to compensation for the offences provided for in the Convention is set out in Article 30(1), which obliges States Parties to adopt measures to ensure that victims are able to claim compensation from the perpetrators of the offences. The second paragraph prescribes state compensation, which is awarded to victims

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<sup>11</sup> RKTkm 2-17-507/51, p. 16.

who suffer serious bodily injury and damage to health, and to the extent not covered by compensation from other sources.

In Estonia, a victim has the right to bring a civil action in both civil and criminal proceedings. According to § 38(1)(2) of the Code of Criminal Procedure<sup>12</sup>, the victim has the right to bring a civil action in criminal proceedings through the investigating authority or the prosecutor's office. The prerequisites for filing a civil action in criminal proceedings are set out in § 38<sup>1</sup>(1) of the Criminal Procedure Code. The first paragraph of this provision makes it clear that a victim may bring a claim, if it is aimed at restoring or remedying the victim's situation damaged by the act which is the subject of the criminal proceedings, if the factual circumstances on which the claim is based substantially correspond to those of the offence being prosecuted and if such a claim could also be examined in civil proceedings. The second paragraph of the provision states that, in addition, the injured party in a civil action may also bring a claim for damages against a public authority which could have been brought before an administrative court.

The acquittal of a person in criminal proceedings does not exclude his civil liability under the general offence of tort/delict.<sup>13</sup> Thus, a victim who is acquitted in criminal proceedings, can bring an action against the injured party in civil proceedings. The claim referred to in the Convention is a non-contractual claim. First and foremost, there is unlawful damage. Section 1043 of the Law of Obligations Act stipulates that a person who has unlawfully caused damage to another person, i.e. the injured party, must compensate the damage if he or she is guilty of causing the damage or liable for causing the damage in accordance with the law.

The Victim Support Act<sup>14</sup> (OAS) in § 7(1) provides that state compensation shall be paid to victims of a crime of violence committed on the territory of the Republic of Estonia. Victims of trafficking in human beings or sexually abused minors are entitled to this benefit regardless of whether they have a legal basis for staying in the Republic of Estonia (OAS § 9(2)(5)). In other cases, a legal basis for staying in the Republic of Estonia is required in order to receive benefits. According to Section 8(1) of the OAS, an offence of violence is an act committed directly against the life or health of a person, punishable by criminal law, which results in the death of the victim, serious injury to his or her health or a disorder lasting at least four months. Thus, the circle of beneficiaries of state compensation for victims of violent crime is limited to situations where there is a serious consequence. The OAS also provides for compensation for the cost of psychological assistance, but this does not apply, for example, in the case of psychological assistance provided in the framework of a women's support centre service to a victim of trafficking, a victim of violence against women or a sexually abused minor (OAS § 6<sup>1</sup> lg 2<sup>1</sup>). In the case of discrimination, which may occur, for example, in the provision of a social service, it is possible under Estonian law to apply to the Chancellor of Justice for conciliation. It is also possible for anyone to apply to the Chancellor of Justice for a review of whether a public authority, a local authority or body, a legal person governed by public law, or a natural or legal person governed by private law exercising public functions, complies with the principle of guaranteeing fundamental rights and freedoms and with the principle of good administration. These possibilities are provided for in § 19(1) and (2) of the Chancellor of Justice Act.<sup>15</sup>

<sup>12</sup> Kriminaalmenetluse seadustik [Code of Criminal Procedure]. RT I, 06.07.2023, 49.

<sup>13</sup> *Tampuu, T.* Lepinguvälised võlasuhted [Non-contractual debt relations]. Juura: Tallinn, 2012, lk 206.

<sup>14</sup> Ohvriabi seadus [Victim Support Act]. RT I, 06.05.2020, 22.

<sup>15</sup> Oiguskantsleri seadus [Chancellor of Justice Act]. RT I, 26.05.2020, 11.

#### 1.1.4. Convergence ban

Article 29(1) and (2) of the Convention obliges States Parties to provide victims with adequate civil remedies both against the perpetrators of the offence and against public authorities that have failed to take preventive and protective measures. Civil remedies against perpetrators include restraining orders, injunctions to stop, refrain from or desist from doing something, and libel and defamation actions. The latter should offer protection to victims in cases of stalking and sexual harassment where the committed acts are not covered by the criminal law of the State Party.

In the Estonian legal system, the court has the right to decide on the imposition of a restraining order in both criminal and civil proceedings. Pursuant to subsection 141<sup>1</sup>(1) of the Code of Criminal Procedure, at the request of the prosecutor's office and on the basis of a preliminary investigation judge or a court order, a suspect or accused in a crime against the person or against a minor may be prohibited from staying in places designated by the court, from approaching persons and from communicating with them in order to protect the privacy and other personal rights of the victim. Paragraph 1<sup>2</sup> of the same provision also allows for the imposition of a restraining order by order of the prosecutor's office in an urgent case and without the consent of the victim. Section 544(1) of the Code of Civil Procedure<sup>16</sup> similarly provides that a court may apply a restraining order or other measures to protect a person's private life or other personal rights on the basis of Section 1055 of the Law of Obligations Act.

With regard to the restraining order, § 1055(1) of the Law of Obligations Act provides that if the unlawful act of causing damage is continuous or if a person is threatened with it, the victim or the person who was threatened with it may demand that the conduct causing damage or the threat of it cease. The second sentence of the provision specifies that the prohibition of the approach of the person causing the damage to another person, i.e. a restraining order, applies in the case of bodily injury, damage to health, invasion of privacy or other violation of personal rights. In civil proceedings, the application of a restraining order presupposes the filing of a request to that effect, but in criminal proceedings this is not necessary in the case of an urgent situation. According to § 310<sup>1</sup>(1) of the Code of Criminal Procedure and § 544(1) of the Code of Civil Procedure, the period of application of the prohibition of approach is three years.

Section 331<sup>2</sup> of the Penal Code provides for a financial penalty or imprisonment of up to one year as a sanction for violation of a restraining order, if the violation has caused a threat to the life, health or property of a person, or if the violation is repeated.

Chapter 55 of the Code of Civil Procedure, which deals with the use of restraining orders and similar measures to protect personal rights, does not explicitly refer to intimate partner violence. Also § 1055 of the Law of Obligations Act, to which § 544(1) of the Code of Civil Procedure refers, does not contain such a reference. However, it has been clarified in the case law of the Supreme Court that according to the Law of Obligations Act § 1055(2), a person does not have the obligation to tolerate communication that exceeds any reasonable limit, including the obligation to tolerate repeated violence with aggressive, threatening and degrading text messages.<sup>17</sup> Thus, in Estonia it is possible to use a restraining order in both civil and criminal proceedings, its violation is punishable and the application of restraining orders has been used in court practice in cases of intimate partner violence.

<sup>16</sup> Tsviivilkohtumenetluse seadustik [Code of Civil Procedure]. RT I, 22.12.2021, 23.

<sup>17</sup> RKTKm 2-18-1221, p-d 1 to 25.

## 1.2. Public law measures

### 1.2.1. Psychological violence

Article 33 obliges States Parties to criminalise psychological violence, i.e. an act seriously impairing the mental integrity of a person committed by coercion or threats. The word “serious” used in the article is not defined, hence, it is left to the legislation and jurisprudence of the Contracting States to define. However, according to the Explanatory Memorandum, the provision also refers to repeated conduct and not just a one-off event. While Article 33 itself obliges States Parties to criminalise psychological violence, Article 78(3) leaves the possibility for States Parties to provide for non-criminal sanctions instead of criminal sanctions. However, the punishment must be effective, proportionate and dissuasive.<sup>18</sup>

In Estonian criminal law, psychological violence falls at least partly within the scope of § 120 of the Penal Code<sup>19</sup> (KrK), i.e. threatening. In the case of § 120 of the Penal Code, harm to the mental integrity of another person is not an element of the offence, but the legal interest that is attacked by threats is the physical and mental well-being of a person, i.e. the health of a person.<sup>20</sup> If the act of which the person is threatened is actually committed, the perpetrator is liable for the act committed, i.e., for example, assault within the meaning of § 121 of the Penal Code or manslaughter within the meaning of § 113.<sup>21</sup>

The alternative of harm to health in § 121(1) of the Penal Code also comes into question in the criminalisation of psychological violence. The possibility that an act causing harm to the health of another person may also constitute psychological influence has been mentioned.<sup>22</sup>

According to § 1(2) of the Rules on the Forensic Medical Examination of Injuries to Health<sup>23</sup>, a health impairment is a disturbance of the anatomical integrity of the organs and tissues of an organism or of their physiological functions, as well as a disease or other pathological condition that arises as a result of a mechanical, physical, chemical, biological, psychological or other factor. Therefore, injury to health caused by mental violence falls within the scope of application of § 121(1) of the Penal Code. Speech impediment and neurotic phobia, for example, have been identified in the legal literature as health impairments that can be caused in this way.<sup>24</sup>

### 1.2.2. Stalking

Article 34 of the Convention obliges States Parties to criminalise stalking. It defines stalking as an intentional act against another person, in which the other person is repeatedly threatened and which causes the other person to be concerned for his or her safety. This definition of stalking encompasses both physically, such as

<sup>18</sup> Seletuskiri Euroopa Nõukogu naistevastase vägivalda ja perversivägivalda ennetamise ja tõkestamise konventsiooni juurde [Explanatory memorandum to the Council of Europe Convention on preventing and combating violence against women and domestic violence], lk 36. Available: [https://www.enu.ee/lisa/611\\_Istanbuli%20seletuskiri.pdf](https://www.enu.ee/lisa/611_Istanbuli%20seletuskiri.pdf) [last viewed 26.01.2024].

<sup>19</sup> Karistusseadustik [Penal Code]. RT I, 06.07.2023, 40.

<sup>20</sup> *Kurm, M.* KarSK § 120/1. *Sootak, J., Pikamäe, P.* Karistusseadustik. Kommenteeritud väljaanne [Comments on the Penal Code]. 2021. Available: <https://karistusseadustik.juuraveeb.ee/> [last viewed 26.01.2024].

<sup>21</sup> *Ibid.*, § 120/6.

<sup>22</sup> *Ibid.*, § 121/3.1.

<sup>23</sup> Tervisekahjustuse kohtuarstliku tuvastamise kord [Procedure for forensic identification of damage to health]. RT I, 29.12.2014, 12.

<sup>24</sup> *Kurm, M.* KarSK § 121/3.1.



showing up at the victim's place of work or school, and cyber stalking, such as in chat rooms or through social media. Stalking is understood to be directed at the victim, but States Parties to the Convention have left the possibility to extend the definition of stalking to people in the victim's social environment, such as the victim's family, friends and colleagues. Also, in the case of stalking, Article 78(3) leaves the possibility for States Parties to apply non-criminal sanctions to stalking.<sup>25</sup>

In Estonian law, stalking is criminalised through three provisions: section 120 of the Penal Code (threatening), section 137 of the Penal Code (private stalking) and section 157<sup>3</sup> of the Penal Code (harassing stalking).<sup>26</sup>

Subsection 120(1) of the Penal Code criminalises threatening to kill, to inflict bodily harm or to cause substantial damage to or destruction of property, if there is reason to fear that the threat will be carried out. Subsection 137 (1) of the Penal Code criminalises the surveillance of another person by a person who has no legal right to do so, for the purpose of collecting data on that person. Subsection 157<sup>3</sup> (1) of the Penal Code criminalises repeated or continuous contact with, surveillance of, or other interference with the private life of another person against his or her will, if the purpose or effect of such interference is to intimidate, humiliate or otherwise substantially interfere with the private life of another person, unless there is an offence provided for in Section 137 of the Penal Code.

### 1.2.3. Physical violence

Article 35 obliges States Parties to the Convention to take the necessary measures to ensure that the intentional use of physical violence against another person is punishable. The scope of Article 35 also covers physical violence which results in the death of the victim. The purpose of the provision is to oblige the criminalisation of physical violence irrespective of the context in which it is committed.

In Estonian criminal law, physical violence is criminalised by the provisions of Chapter 9 of the Penal Code. This is a chapter on offences against the person, which covers both fatal and less serious offences. In particular, Estonian law corresponds to what is described in Article 35 of the Convention in §§ 121 and 118 of the Penal Code.

The first of these criminalises harm to the health of another person and bodily harm causing pain. Injury to health is defined as a disturbance of the anatomical integrity of the organs and tissues of the body or of their physiological functions, as well as a disease or other pathological condition resulting from a mechanical, physical, chemical, biological, mental or other agent. Physical abuse causing pain is an act, however described, which consists of affecting the body in a socially unacceptable way, but without causing harm to health.<sup>27</sup> Examples of painful physical abuse include hitting, arm twisting and biting.<sup>28</sup>

Paragraph 121(2) of the Penal Code sets out the most serious offences in the first paragraph: injury to health lasting at least four weeks, commission of the offence in

<sup>25</sup> Seletuskiri Euroopa Nõukogu naistevastase vägivalla ja perversivalla ennetamise ja tõkestamise konventsiooni juurde [Explanatory memorandum to the Council of Europe Convention on preventing and combating violence against women and domestic violence], lk 37. Available: [https://www.enu.ee/lisa/611\\_Istanbul%20seletuskiri.pdf](https://www.enu.ee/lisa/611_Istanbul%20seletuskiri.pdf) [last viewed 26.01.2024].

<sup>26</sup> Karistusseadustiku ja välismaalaste seaduse muutmise seaduse (millega viiakse Eesti õigus kooskõlla Istanbuli konventsiooniga) eelnõu seletuskiri [Explanatory memorandum to the draft Act amending the Penal Code and the Aliens Act (which brings Estonian law into line with the Istanbul Convention)], lk 11–12. Available: <https://eelvoud.valitsus.ee/main#7JQ01TRq> [last viewed 27.01.2024].

<sup>27</sup> *Kurm, M.* KarSK § 121/4.1.

<sup>28</sup> RKKKo 3-1-1-48-08, p 8.

a close or dependent relationship, repeated commission of the same offence. Under Estonian law, it is possible to prosecute a person for physical violence irrespective of the context in which the violence was committed. It is violence in intimate relationships and violence against women that is the subject matter of the Convention, which is why it is also important that according to § 58(4) of the Penal Code, the commission of an offence in an intimate relationship is an aggravating circumstance that is taken into account in sentencing under § 56(1) of the Penal Code.

#### 1.2.4. Sexual harassment

With regard to sexual harassment, Article 40 of the Convention states that Parties shall take such legislative or other measures as may be necessary to ensure that unwanted verbal, non-verbal or physical conduct of a sexual nature, which is intended to or has the effect of violating the dignity of a person, or which creates an intimidating, hostile, discouraging, degrading or offensive environment, is subject to criminal or other legal measures.

This provision covers several forms of sexual harassment. Verbal conduct is taken to mean words and vocalizations communicated orally or in writing by the perpetrator. Non-verbal conduct, on the other hand, refers to any communication by the perpetrator that does not consist of words or vocalizations, i.e. facial expressions, hand gestures, symbols, etc. Physical conduct is sexual conduct by the perpetrator that may or may not involve the perpetrator touching the body of the victim. In order to fall within the definition of sexual harassment, the conduct must be of a sexual nature and directed at violating the dignity of the victim. The latter clarification is intended to cover also conduct the individual acts of which are not punishable.

Estonian Penal Code § 153<sup>1</sup> is entitled sexual harassment. The offence is defined as an intentional act of a physical sexual nature committed against the will of another person, with an intent to degrade the person's human dignity, with an object or effect degrading to the person. The provision covers two alternative acts: an act of physical intercourse against the person's will of a sexual nature, and the same act of sexual intercourse with a degrading consequence for the victim.<sup>29</sup>

An act of a sexual nature is any activity related to the human body that is normally intended to induce or increase sexual arousal and gratification<sup>30</sup> and in which the infringement of the right to sexual self-determination is sufficiently important.<sup>31</sup> Verbal and non-verbal sexual harassment is not covered by this provision of the Penal Code. If verbal or non-verbal sexual harassment is of sufficient intensity that it can be regarded as a threat within the meaning of Section 120 of the Penal Code, then it is also criminalized.

#### 1.2.5. Sexual violence

Article 36(1) of the Convention provides a list of descriptions of acts relating to sexual violence, the deliberate commission of which must be criminalised by the States Parties. These acts include: the introduction of a part of the body or object into another person's vagina, anus or mouth without the consent of the other person as an act of a sexual nature; committing acts of a sexual nature on another person without his consent; forcing another person to engage in acts of a sexual nature with a third person without their consent. Subsection (2) of the provision clarifies that consent must be given voluntarily as a result of a person's free will and is assessed in

<sup>29</sup> *Kurm, M.* KarSK. § 153<sup>1</sup>/3.2.

<sup>30</sup> *Ibid.*, § 141<sup>1</sup>/3.2.a.

<sup>31</sup> *Ibid.*, § 141<sup>1</sup>/3.2.b.

the context of the circumstances involved. In the case of the acts of sexual violence described in the Convention, the emphasis is precisely on the lack of consent.

In Estonian law, the legal definition of rape is provided by § 141 (1) of the Penal Code. According to this provision, rape is the act of entering into sexual intercourse with a person against their will by violence or by taking advantage of a condition in which the person was unable to resist or understand what had happened. The definition of rape mentions the lack of consent, or involuntariness, as an element of composition. Violence refers to threats and harm to another person's health or abuse that causes pain. § 17(1) of the Penal Code states that a person who, when committing an act, does not know the fact that corresponds to the composition of the offense, does not commit the act intentionally and is therefore liable only in the cases provided for by law for an offense committed by negligence. Rape by negligence has not been criminalised in Estonian law.

Article 36(3) of the Convention also contains an obligation to criminalise sexual violence committed against former or current spouses or partners. This has been done successfully in Estonian law. According to § 58 clause 4 of the Penal Code, an aggravating circumstance of punishment is the commission of an offense against a person who is in service of, or under economic dependence on the offender, as well as against a former or current family member of the offender, a person living with the offender or a person who is otherwise dependent on the offender in a family way.

In Estonian law, the acts described in Article 36(1) of the Convention are criminalized. The legal definition of consent used in Estonian law for offences against sexual self-determination corresponds to the definition of consent in Article 36(2) of the Convention. The existence of consent is assessed in Estonian law according to objective circumstances.<sup>32</sup> At the same time, the offences in the Estonian Penal Code have not emphasised the lack of consent as a basis for considering the act to be sexual violence as much as it has been done in the Convention.

## 2. Penal measures and punitive alternatives in domestic violence cases applied in Estonia

When applying punitive measures, it is very important to establish whether an act qualifies as domestic violence. There is only one section of the Estonian Penal Code that distinguishes between family violence and other violence: according to § 121(1) of the Penal Code (KarS), a perpetrator may be punished with up to one year's imprisonment for physical abuse of another person; Subsection (2) of the same section includes, as an aggravating circumstance, the commission of an act in a close or dependent relationship, which may result in imprisonment for up to five years. In both cases, the alternative to a prison sentence is a financial penalty, and neither case precludes either the termination of proceedings on the basis of opportunism nor the total non-parole of a prison sentence.

An analysis of the Estonian court files for 2012–2018 revealed that of the qualified domestic violence cases under § 121 of the KarS, which were resolved in settlement proceedings, 69% were resolved by imposing a suspended prison sentence, 14% by replacing the sentence with socially useful work, 10% by actual imprisonment and 7% by imposing a financial penalty.<sup>33</sup>

<sup>32</sup> Kurm, M. KarSK § 141/3.5.2.

<sup>33</sup> Kaugia, S. Kuidas suhtuvad Eesti elanikud ja kohtunikud lähisuhtevägivalda [How Estonian residents and judges view intimate partner violence]. Riigikogu Toimetised [Proceedings of the Riigikogu], 42, 2020, lk 196.

The analysis of criminal cases resolved through settlement proceedings was intentional, as over the years, domestic violence cases in Estonia have mostly been resolved in settlement proceedings. According to the results of a survey conducted among the Estonian people in 2019, 30% of the respondents found that the sentences in domestic violence criminal cases are extremely lenient and 41% that the sentences are rather lenient; 24% of respondents could not answer, 1% felt that the penalties were too severe and 5% that the penalties were right.<sup>34</sup>

Estonian Criminal Policy<sup>35</sup> contains references to penal alternatives and restorative justice, the essence of which is the reconciliation of the parties. While, on the one hand, the application of a prison sentence to domestic perpetrators raises doubts, restorative justice methods are not always considered a suitable alternative in cases of domestic violence. Although restorative justice is currently a “fashion topic” in Estonia, the scientific literature already in 2014 expressed the view that “the implementation of mediation is an easier way to process cases, but on the other hand, the suitability of mediation in each specific case must be carefully considered. It is important that the prosecutor meets with the parties and makes sure that their consent is sincere, avoiding that the victim gives consent because he has been threatened by the perpetrator”.<sup>36</sup> Estonia’s renowned attorney-at-law Tambet Laasik has noted the following: “The second main prerequisite for the implementation of restorative justice is the desire of the person who caused the damage to take responsibility and make good the damage. This, too, is problematic, although the perpetrator’s desire for reconciliation is very understandable, because instead of taking responsibility, it allows him to be relieved of his responsibility. In criminal proceedings, reconciliation results in the termination of criminal proceedings without a conviction. From the point of view of the perpetrator, this is a jackpot for which one can pretend to have a little regret. Especially for a perpetrator with personality disorders, this is an easy way to escape punishment without correcting his behaviour”.<sup>37</sup>

In the case of the implementation of the conciliation procedure, it is possible to renew the criminal proceedings within 6 months if the perpetrator does not fulfil the obligations imposed on him or her or commits a new intentional crime against the victim (Code of Criminal Procedure § 203<sup>1</sup>(5)). Unfortunately, this condition does not constitute a guarantee for the end of violence or the fulfilment of obligations: the revelation of the violation presupposes that the relevant information reaches the law enforcement authority either through the relevant notification of the perpetrator, the victim or a third party. In that regard, it can be stated that what is at issue in the present case is not so much a defect in the procedural rules as it is the quality of the implementation of the measures. The prerequisite for the implementation of punitive alternatives is that a new violation by the perpetrator is detectable. Alas, there is no reason to believe that this assumption always corresponds to reality.

When it comes to resolving civil disputes between parties to domestic violence, there are also several problem areas in Estonia here. Attorney-at-law T. Laasik has pointed out that when conducting civil proceedings, the victim of domestic violence

<sup>34</sup> *Kaugia, S.* Kuidas suhtuvad Eesti elanikud ja kohtunikud lähisuhtevägivalda. Riigikogu Toimetised, 42, 2020, lk 196.

<sup>35</sup> Kriminaalpoliitika põhialuste aastani 2030 heakskiitmine [Approval of the fundamentals of criminal policy until 2030]. RT III, 13.11.2020, 6.

<sup>36</sup> *Valma, K., Surva, L., Hääl, H.* Lepitusmenetlus perevaidlustes [Conciliation procedure in family disputes]. *Juridica* 1, 2014, lk 96–97.

<sup>37</sup> *Laasik, T.* Leppimise kriitika. ERR. Arvamus [A critique of reconciliation. Estonian Public Broadcasting. Opinion] 15.04.2020. Available: <https://www.err.ee/1077539/tambet-laasik-leppimise-kriitika> [last viewed 25.01.2024].

is not guaranteed the opportunity to participate in civil proceedings without physical contact with the perpetrator. To date, no corresponding amendment has been introduced into the Code of Civil Procedure, but the use of family mediation services in criminal cases concerning the procedure of communication and custody of a child has been made mandatory. However, this amendment is contrary to Article 48 of the Istanbul Convention, ratified by Estonia, which prohibits, among other things, obliging a person suffering from domestic violence to alternative resolution of disputes, including conciliation and mediation. The family mediation service is a mandatory alternative to civil proceedings in civil courts for resolving issues of child welfare and custody. This means that if either party decides to separate the family or separate from a violent partner in order to protect their child or children, it is not possible to turn to a civil court to start proceedings in Estonia, only first it must be proved that an agreement on the family mediation service could not be reached. The obligation to meet with a family mediator may lead to repeated meetings with the perpetrator in addition to the meetings that accompany the court proceedings later.<sup>38</sup>

## Summary

Domestic violence is not a self-resolving problem, yet, unfortunately, it cannot be argued that Estonia has the necessary support system and sufficient legal protection for persons suffering from domestic violence. Although the introduction of legal requirements arising from the Istanbul Convention into Estonian law has to some extent been realised, it still seems more general and not directly aimed at victims of domestic violence. Provisions have been incorporated into private and public law laws that are expressly mentioned in the Convention, but in laws they are often excluded from the general context.

On the other hand, the fact that Estonia has supplemented and amended the provisions criminalising stalking for the very purpose of complying with the Convention is a positive development. In Estonian law, stalking within the meaning of the Convention is criminalised by three provisions of the Penal Code: § 120 (threatening), § 137 (private stalking) and § 157<sup>3</sup> (harassing stalking). In the area of criminal law, Estonian law also complies with the requirement to criminalise psychological violence laid down in Article 33 of the Istanbul Convention. Since psychological violence is defined in the Convention as an act seriously damaging the mental integrity of a person, committed by coercion or threats, psychological violence is at least partly covered by Section 120 of the Penal Code. Since Estonian law also recognises the possibility of causing damage to another person's health through mental influence, mental violence is also criminalised in Estonian law by the alternative of damage to health in § 121(1) of the Penal Code. The Estonian legal system also meets the requirements of the Convention with regard to the criminalisation of physical violence. Section 121(1) of the Penal Code (KarS) criminalises harm to the health of another person and physical abuse causing pain. The second paragraph of the same provision lays down the aggravating circumstances of the first paragraph: impairment of health lasting at least four weeks, commission of the offence in a close or dependent relationship, repeated commission of the same offence.

The criminalisation of sexual harassment in line with the Convention on the Protection of All Persons from Enforced or Involuntary Sexual Harassment has not yet been implemented in Estonia. Namely, Article 40 of the Convention requires

<sup>38</sup> *Laasik, T. Lähisuhtevägivalda kohtupraktikast: kuidas edasi? [From the jurisprudence of intimate partner violence: how to proceed?]. ERR Arvamus 31.05.2020. Available: <https://www.err.ee/1096122/tambet-laasik-lahisuhtevagivalda-kohtupraktikast-kuidas-edasi> [last viewed 26.01.2024].*

the criminalisation of physical, verbal and non-verbal sexual harassment. In this context, physical sexual harassment refers to sexual conduct by the perpetrator, which may or may not involve the perpetrator touching the body of the victim. Verbal sexual harassment, on the other hand, refers to words and vocalizations communicated orally or in writing by the perpetrator. Non-verbal sexual harassment refers to any communication by the perpetrator that does not consist of words or vocalizations, i.e. facial expressions, hand gestures, symbols, etc. Currently, § 153<sup>1</sup>(1) of the Penal Code defines sexual harassment as an intentional physical act of a sexual nature committed against the will of another person with an intent to degrade his or her human dignity and with an object or effect degrading to his or her human dignity. This wording is therefore narrower than the requirements of the Convention.

In the opinion of the author, domestic violence is treated in the Estonian legal order similarly to any other violence, without taking into account the specifics of domestic violence. Consequently, the vast majority of domestic violence cases are resolved in a settlement procedure and restorative justice is also used in the case of domestic violence. The requirements arising from the Istanbul Convention, *inter alia*, for law enforcement agencies, are aimed at protecting victims of domestic violence. The author holds that the settlement procedure, restorative justice and conciliation tend to support the position of the offender: as neither the state nor the local authorities have the means or resources to separate the victim and the perpetrator once the proceedings have been concluded and a decision taken (the perpetrator returns home to his/her family), there is a real risk that the victim will not be adequately protected and that domestic violence may continue.

The implementation of such procedural measures does not guarantee the victim's sense of security and does not limit the perpetrator's sense of impunity. This, in turn, is an important reason why, in many cases, the possibility of renewing criminal proceedings does not materialise and the cycle of violence is not interrupted. Differences between the experience of people suffering domestic violence and the legal system's assessments of the situation may lead to a lack of substance in the alternatives to punishment and may hinder the assessment of the suitability and effectiveness of the measures. The measures may not be ineffective, but if their implementation is not accompanied by effective monitoring, the assessment will be directed not so much at the measure applied as at the half-finished version of the measure applied.

Developing a coherent system and cooperation is crucial to effectively prevent and tackle domestic violence. A prerequisite for the creation of such a system could be a law on domestic violence that defines the role and tasks of key institutions and professionals in preventing violence, intervening in time and precluding serious cases. The Domestic Violence Act would create the essential conditions for dealing with cases of domestic violence in a holistic manner, would lay down rules of conduct (legal provisions) on how to arrive at effective solutions, which include detecting and preventing domestic violence as early as possible, providing victims and perpetrators of violence with a comprehensive package of assistance.

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