

Protection From Domestic Violence: An Essential Human Right or a “Fight” Against Masculinity?

*I object to violence because when it appears to do good,
the good is only temporary; the evil it does is permanent.*

M. Gandhi

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Abstract. Domestic violence is associated with various contemporary legal and cultural issues: fundamental human rights, non-discrimination, hatred, feminist theories, Western roots of aggression etc. In this article, the protection from domestic violence is viewed in the light of national and international laws, of the jurisprudence of the European Court of Human Rights, as well as of certain criminological insights. The structure of the research is divided as follows: first, the substantive issues of domestic violence and the concept of such aggressive actions are investigated. To illustrate the relation between international, criminal, civil and social security law, a schematic interaction between the aforementioned substantive laws is introduced. Secondly, procedural issues are analyzed, certain good practice examples are presented and reflections on law-making are laid out.

Keywords: Domestic Violence, Legal intervention, Predicting domestic violence.

INTRODUCTION

In Art. 1 of the Lithuanian law on the protection of domestic violence, it is enshrined that domestic violence involves the violation of human rights and freedoms. In Art. 12, it is stated that violence incurs criminal liability. These two legal norms shape the main research question and the objective of the text,

i.e., I will try to answer in what circumstances the violation of human rights is severe enough to bring about criminal liability. Also, the opposite question is relevant both from the theoretical and practical purposes: in what cases (if any) is criminal liability is not an adequate response to violent acts?

The chosen perspective of human rights calls for a legal instrument, which should be helpful for analyzing and responding to such a complex phenomenon as domestic violence. Currently, one of the most important instruments is (or, to be more specific, will be¹) the Council of Europe Convention on preventing and combating violence against women and domestic violence (further – the Istanbul Convention). In the analytical study, coordinated by the Gender Equality Commission of the Council of Europe, it was said that the Istanbul Convention “is the most far-reaching international treaty to tackle this serious violation of human rights. It aims at zero tolerance for such violence and is a major step forward in making Europe and beyond a safer place” (Analytical study 2002). This text investigates, on the one hand, the positive sides of the Convention and, on the other, potential dangers if the “zero tolerance” policy is too formally and straightforwardly understood.

1. AMBIGUITY OF THE CONCEPT OF DOMESTIC VIOLENCE AND RELATED PROBLEMS ON THE INTERACTION OF SUBSTANTIVE LAWS

According to Art. 3 (Definitions) of the Istanbul Convention, “domestic violence” shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.

The aforementioned definition is very wide. Besides, it is not only a problem of interpretation and language, but, first and foremost, of different legal responsibilities. From the definition as such, it is not clear what forms of violence should be related to criminal law, and what forms to civil or administrative law.

¹ Some EU countries, for instance, Germany, Lithuania and Latvia have not yet ratified the Istanbul Convention, <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=&DF=&CL=ENG>.

Going further, the Istanbul Convention provides a certain clarity by stating what forms of violence are to be criminalized: i.e., Psychological violence (Art. 33), Stalking (Art. 34), Physical violence (Art. 35), Sexual violence, including rape (Art. 36), Forced marriage (Art. 37), Female genital mutilation (Art. 38), Forced abortion and forced sterilization (Art. 39) and Sexual harassment (Art. 40).

Naturally, certain questions arise: for example, what differentiates serious psychological violence (psychological terror) from not so serious violence? And how should one categorize such acts when psychological violence (for instance, bullying) invokes physical violence? To my view, criminal liability should always be *ultima ratio* and, having in mind the vagueness of the concept of domestic violence, it is advisable to distinguish clearly between domestic violence cases that should give rise to criminal liability and the cases in which civil/administrative and social security measures are sufficient, e.g., the separation of family members without commencement of criminal proceedings, psychosocial support, the obligation to attend special courses etc.

To implement such a recommendation, a criterion known in the European Court of Human Rights (further – ECtHR) jurisprudence as “minimum level of severity” could help – this criterion allows handling the case in the context of Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (further – Convention). “The assessment of this minimum level of severity is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.”²

If the criterion of minimum level of severity is not satisfied, then the case is likely to fall under another article of the Convention. The relationship between Art. 3 and Art. 8 is interestingly described in the dissenting opinion of judge Jočienė³:

Turning to the circumstances of the present case, I think that the attacks against the applicant did not attain the minimum level of severity to fall within the scope of Article 3. [...] In particular, in the Valiūnienė case, although the applicant was beaten by her live-in partner on five occasions, each time she sustained only

² *Dorđević v. Croatia*, (no. 41526/10), § 94, ECHR 2012; *Valiūnienė v. Lithuania*, no. 33234/07, 26 March 2013, § 65.

³ Dissenting opinion of judge Jočienė in case of *Valiūnienė v. Lithuania*, 33234/07. <http://hudoc.echr.coe.int/eng?i=001-117636>

minor health impairment, which did not cause any short-term health problems. [...] Accordingly in the particular circumstances of the present case (very minor injuries), I cannot accept that the applicant was subjected to ill-treatment which was sufficiently serious to be considered inhuman and degrading and thus to fall within the scope of Article 3 of the Convention.

Although I do not fully agree with the presented opinion – to my mind, “inhuman and degrading” might be not only physical abuse, but also continuous written and verbal abuse⁴ – the opinion of judge Jočiene aptly illustrates the complexity of the phenomenon of domestic violence in the light of the different rights enshrined in the Convention.

All the more interesting, certain wording primarily related to domestic violence may (negatively?) extend well beyond its source. For example, in the case of *Selahattin Demirtaş v. Turkey*, the Court stated that “it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals 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.” However, this was not a case related to family violence, but a case of possible hate speech. Thus, it is relatively strange that the criterion of “a real and immediate risk to life” was used. In my view, in the case of hate speech, other criteria should be created, for instance, the appearance of publicly expressed hatred, Nazi-like rhetoric, direct provocation or threats. Moreover, according to judge Kūris, the very wording of the aforesaid criterion is oxymoronic: “Real and immediate risk,” so extensively used in the Court’s case-law following the formulation of the so-called ‘Osman test,’ is not the best choice of words, at least if the words ‘real’ and especially ‘immediate’ are interpreted literally and hereby narrowly, as is sometimes the case, [...] ‘risk’ cannot be ‘real,’ it can be only ‘realistic,’ or, to borrow from the U.S. Supreme Court lexicon, ‘present.’”⁵

⁴ In one email, the perpetrator’s son wrote such a threatening text: “I will come for you and then we will see what will happen. One thing I can tell you [is that] you can forget your life and your [boy]friend’s life, I can promise you that. Order yourself a wheelchair already. My friends and I will grab you and you will see what real bandits are like, that you have never seen in Lithuania. Father did everything for you and now look at you. Do you think we can just leave it at that? You are a rotten street whore.” <http://hudoc.echr.coe.int/eng?i=001-117636>, 14 §.

⁵ See more Dissenting opinion of judge Kūris, *Selahattin Demirtaş v. Turkey*.

Recognising that all criteria are subject to interpretation, it is considered that (also) the criterion of “minimum level of severity” is just a complementary guideline – it should not replace the widely accepted condition for criminalization – that is, significant damage to society or individuals (Manifesto on European Criminal Policy 2011). I think that cases which fall short of the “minimum level of severity” criterion and accordingly do not fall within the scope of criminal law could include: 1) Episodic (i.e., not continuous and not constituting “coercive control”⁶) exchange of taunting, scolding and insults; 2) Mutual scuffles without inflicting physical pain; 3) Family conflicts in which direct physical aggression is used not against a person, but against things: for example, furniture or crockery. To my view, criminal liability for such actions would be too discretionary in nature, it would practically be very difficult to prove and it would lead to problems concerning non-compliance with the principle of *ultima ratio*.

In order to imagine the complex legal regulation of domestic violence, a simplified scheme is presented.



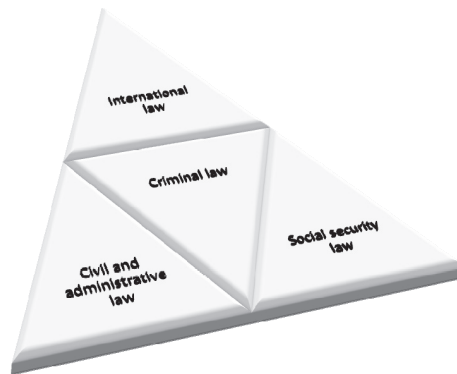
SCHEME No. 1. The static interrelation of laws regulating domestic violence.

In the scheme, it is seen that international law (in the context of this topic – the Istanbul Convention) draws certain guidelines for national regulation, putting in the centre criminal law. However, other “marginal” (therefore,

⁶ For more on the concept of coercive control, see Vaigė L., 2013.

lying in the “corners”) branches of law are not less important while dealing with domestic violence: civil and/or administrative law might provide certain immediate measures not necessarily related to criminal proceedings, whereas social security law might be the basis for providing psychosocial help for the victims (inter alia – in order to avoid secondary victimization). For the sake of objectivity, it should be noted that civil law might cover social security law – for instance, intervention or counselling centers and women’s/men’s shelters might fall under the provisions of civil and not social security law. Pragmatically speaking, it is not so important under which branch of law one or another institution falls – it is more significant that a complex system of primary, secondary and tertiary prevention is created.⁷

The graphically said relation of laws is seen as a three-dimensional “jigsaw”, where each branch of law might be twisted and turned, raised or laid (see Scheme No. 2). Such playful construction resounds one of the universal strategies of peacemaking (non-violent) criminology: not static control and domination, but dynamic subsidiarity and decentralization should be the focus of prevention of violence (Pepinsky and Quinney 1991).



SCHEME No 2. The dynamic interrelation of laws regulating domestic violence.

⁷ In criminological theory, primary prevention is understood as basic prevention, aimed at all individuals. Secondary prevention is understood as aimed at particularly vulnerable individuals. Primary and secondary prevention is both proactive and reactive, whereas tertiary prevention is a reaction to an already occurred act of violence. See more, for example, in Brantingham, L Faust, F. L. 2009, “A conceptual model of crime prevention.” In: *Key Readings in Criminology*. Ed. T. Newburn, Willan, pp. 554-558.

2. AMBIGUITY OF THE APPROPRIATE LEGAL REACTION TO DOMESTIC VIOLENCE: PROCEDURAL ASPECTS

The importance of procedural aspects has been accentuated by ECtHR: for instance, in *Bevacqua and S. v. Bulgaria* (§ 44-46, 80-84), it was stated that the private prosecution instituted by the victim (Lith. *privatus kaltinimas*) was not appropriate for the domestic violence in this particular case.⁸ Speaking about exact measures, it is important to say that in the Istanbul Convention, two key procedural measures are mentioned: emergency barring orders (Art. 52) and restraining or protective orders (Art. 53). Let us look at how these forms of orders are implemented with regard to the prevention of domestic violence in one of the most developed countries, namely Austria.

In a practical sense, it is not so important what form of liability is applied to the perpetrator, but what is being done to protect victims when the act of violence has occurred. In Austria, there basically exist two kinds of protection orders: short-term and long-term. Police officers can immediately evict the dangerous person from the dwelling, and in this way an immediate short-term barring order (Ger. *Betretungsverbot*) is applied, which is valid from two to four weeks. If the barring order is not enough for the victim's safety, then, after two weeks, the victim may ask for a longer-term measure, a temporary injunction (Ger. *einstweilige Verfügung*), which is issued by the district court (Ger. *Bezirkgericht*). Social workers from intervention centers proactively help to fill in the documents for the temporary injunction, which might last up to one year. Both barring orders and temporary injunctions can be granted without the commencement of criminal proceedings.

In Lithuania, up until 2017,⁹ there is no possibility to impose an immediate barring order. Currently, the only possible way is to initiate criminal proceed-

⁸ Interestingly, the Court did not say that private prosecution is not in line with domestic violence in all cases. "In this particular case the Court cannot accept the applicants' argument that her Convention rights could only be secured if Mr N. was prosecuted by the State and that the Convention required State assisted prosecution, as opposed to prosecution by the victim, in all cases of domestic violence (§ 82)."

⁹ On October 12, 2016, the changes of the Lithuanian law on the protection of domestic violence were accepted. According to Art. 5.2, a barring order can be imposed by the district court without the commencement of criminal proceedings. A barring order is sought by a police officer after evaluation of the risk or upon the request of the victim. <https://www.e-tar.lt/portal/lt/legalAct/a59249c0946e11e69ad4c8713b612d0f>.

ings and thereafter to ask the pretrial judge for the formal approval of the order (Art. 5-7 of the Lithuanian law on the protection of domestic violence).

Besides, there exists an inevitable conflict of laws between the specific Lithuanian law on the protection of domestic violence and the Lithuanian code of criminal procedure (Art. 5.2 of the Lithuanian law on the protection of domestic violence). For example, the pretrial investigator has to wait 48 hours until the prosecutor decides whether oppressive measures (Lith. *kardomosios priemonės*) are to be imposed. It emerges that the victim's protection depends on a good relationship between the individual prosecutor and the pretrial investigator.¹⁰ What is more, criminal proceedings are commenced relatively seldom: i.e., in less than 50% of cases.

TABLE No 1. The relation between registered complaints and commencement of criminal proceedings in 2012-2015.¹¹

	The number of registered complaints (Lith. <i>kreipimysai skaičius</i>)	The number of criminal proceedings commenced	Percent
2012	18268	7586	41.5
2013	21615	10015	46.3
2014	29339	10374	35.4
2015	38510	10703	27.8

In the table, it is seen that more of half of the victims who apply to the police are (were) left without protection. It also should be pointed out that a relatively small proportion of criminal proceedings reach the court; they are either cancelled, or victim-offender reconciliation is initiated, the effectiveness of which is doubtful in terms of domestic violence. Similar tendencies are witnessed in other European countries and regions, like Spanish Aspacia or Croatia (Tardon Recio 2013, Čokešić 2013).

In other words, there exists a gap between vertical justice measures – i.e., criminal law – and the real situation, where criminal law and procedure do not work so well, but other branches of law or social help measures remain unde-

¹⁰ Practical material from the round table discussion organized by Vilnius Women's House. Vilnius, Italian Center of Culture, December 2, 2015.

¹¹ Statistical information was presented in 21 July 2016 by Vilnius Women's House in the seminar on improvement of institutional cooperation (Lith. *institucijų darbo tobulinimas ir bendradarbiavimo užtikrinimas įgyvendinant apsaugą nuo smurto artimoje aplinkoje*).

veloped. From a theoretical point of view, the said situation might be explained by peacemaking criminology. That branch of criminology speaks about the crisis of criminal justice and the ways according with which certain segments of society are scapegoated, those possibly being youths, drug dealers, terrorists and others (Pepinsky 2006). The formal criminal-law-oriented debate on domestic violence resembles scapegoating: when an issue is not dealt with in essence, but the perpetrator is “detected” and the society demonstratively gets rid of him. In such a way, feminist debate turns out to be no more than reversed patriarchy. Oddly enough, one Disney movie – *Maleficent* – represents such an “ideal” scenario. The raped and betrayed Maleficent becomes a villain; at the end, she regains what was taken, and when the man who had betrayed her lies dead on the ground, she glides over him in flight, a victim turned victor (Gloudeman 2014). Such a “zero tolerance” scenario is not the one that European countries should follow. The quest for criminal revenge resembles a penal populism, where one side (for example, Lithuania) shows that it has implemented international standards, and another side (EU or European Council or another “patriarchal” institution) is artificially “happy” that required standards have been met.

It goes without saying that domestic violence is a phenomenon that is closely connected with other painful worries: bullying, hatred, violence against children, suicides; basically, the entire aggressive psychological and social microclimate of society (Povilaitis 2016). By paying attention to the aforementioned contextual factors, it is easier to perceive that criminalization of domestic violence is just one preventive measure and probably not the most important one.

Speaking about the contextual prevention of violence, the insights of J. Gilligan are crucial to mention: the main catalysts of violence are shame and humiliation, which are escalated by poverty, discrimination, racism and other risk factors. For most men, the sorest effect of poverty is the shame of not being a “real man.” Consequently, by aggressive acts, men try to “restore” their masculinity and regain respect (Gilligan 2002). In such a way, masculine aggression is understood as *ultima ratio* to defend one’s honor. Going deeper, from a historical point of view, it should be noted that the establishment of monogamous (in the context of this article – domestic) relations coincides with the rise of patriarchy. Then emerges a turn from *mythos* to *logos* – from

natural cosmos to metaphysical, unambiguous logocentrism, restrictions and limitations (Mickūnas 1997). It is held that the patriarchal order is higher, nobler and purer, since it is subjugated to rational rules. It comes out that Western civilization by itself presupposes violence – since the inherent Eros, the mystery and vitality of a woman is negated by the use of “plain” masculine power (Mickūnas 2006). A recent example from Turkey negatively illustrates the latter sentence: in this country, “a bill which would allow men accused of raping underage girls to be cleared if they marry the girl has been preliminarily backed by Turkish MPs” (BBC News 2016). Marriage should not be seen as a tool that magically transforms rape into “normal” sexual intercourse, to say the least.

These perceptions echo the topic of this article and help to formulate its findings: by employing criminal law as *ultima ratio*, a state behaves with the perpetrator in the same way that he behaved with his victim, *id est* equally aggressively. Then, a vicious circle arises, which does not help in the long run. Still, with the current values and order of Western society, nothing better is invented – when a state really needs to *defend* the victim and the rest of society from a very dangerous perpetrator, criminal law is to be applied.

CONCLUDING REMARKS

If a “zero tolerance” policy is interpreted as an ongoing fight against domestic violence, then we risk falling into the state known to Hobbes as a “war of all against all.” Thus, it is not enough to say that all forms of domestic violence should be prevented and the most serious of them criminalized, and that, in consequence, harsh criminal sanction, including imprisonment, should be imposed. Rather it is essential to say what short- and long-term measures are to be implemented to protect the victim (not necessarily related to criminal proceedings). Also, people working with victims should be instructed how to avoid secondary victimization. What is more, it should not be forgotten that some immediate measures, like barring orders, might sound unconstitutional, and, logically, there could be a criterion according with which barring orders can be issued. Or, on the other hand, it should be honestly recognized that, in practice, there could hardly be any formal criterion (like the oxymoronic “real and immediate risk,” for instance), only a socially responsible concern

about the victim's safety. Such remarks may well fit into a critical criminological discourse, yet it is much more difficult to put them into legal shape. As R. Quinney has said, "building safety, security, trust, and peace takes place in a realm quite different from that of doing justice. 'Stop seeking justice' might be the call (Pepinsky 2006).

With these considerations in mind, one of the most noticeable problems can be formulated as follows: if criminal proceedings are not commenced, but some measures are already applied to the (potential) perpetrator, then there arises a reasonable question about violating *inter alia* the right to fair trial according to Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

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