

THE CONCEPT OF DOMESTIC VIOLENCE IN LITHUANIA AND THE ASPECT OF GENDER FROM THE PERSPECTIVE OF INTERNATIONAL LAW

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Abstract. *This article analyses the problems of defining the concept of domestic violence in Lithuania from the perspective of international law, focusing on the problem of delimitation of domestic violence and gender-based violence against women. The article provides an analysis of the concept of domestic violence under international legal documents (UN and CoE Conventions), and in relevant Case Law and the Lithuanian national legislation: i.e. the recently adopted Law on Protection Against Domestic Violence, which entered into force on 15 December 2011. The paper provides an assessment of the national law in consideration of international law. The author considers whether the law could and should be completely gender-neutral (the model chosen now in Lithuania). In addition, the need to consider the perpetrator's rights (property interests, presumption of innocence, and victim's opposition to criminal sanction) is analysed in the context of the relevant international human rights cases.*

Keywords: *domestic violence, gender-based violence, women rights, concept of domestic violence, presumption of innocence, property rights.*

Introduction

Traditionally violence against women was treated as falling outside the field of the obligation of the state and into exclusively private matters between individuals.¹ Recognition of the state's complicity and its independent obligations to ensure equal protection placed the approach to domestic violence at the crossroad between "exhortation and duty."² Subsequently, it became gradually established that states have a positive obligation to act with due diligence to prevent violations of women's rights and to provide for the right to remedy once violations take place.³ It is no longer acceptable to use the law of fist, or even the rule of thumb, and legal documents adopted at the international and national level provide for measures of protection and remedy for the victims.

The relevance of the analysis in the area of domestic violence against women in Lithuania is tremendous. According to the last specialised Eurobarometer report, 48 per cent of the Lithuanian respondents in Lithuania said they knew a female victim of domestic violence within their circle of friends or family.⁴ Currently this constitutes the highest number in the European Union (hereinafter—the EU). It can only be guessed how much it costs for the state: e.g. it was calculated that in Denmark domestic violence costs over 70 million Euros per year.⁵ The research completed in Lithuania (notably, it was conducted prior to the establishment of a comprehensive support scheme), showed that the state annually loses at least 935 million litas due to domestic violence.⁶ This number is estimated without indirect losses due to failure to come to work, and to lost productivity.

In the first four months of the coming into force of the Law on Protection Against Domestic Violence (further—the Law), almost 10,000 cases have been reported to the police.⁷ The high number of calls has not been triggered by the Law itself, because

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- 1 Tomasevski, K. *Women and Human Rights*. London: Zed Books Ltd, 1995, p. 90.
 - 2 Sewall, R. P.; Vasan, A.; Schuler, M. A. (eds). *State Responses to Domestic violence: Current status and Needed Improvements*. Washington: Institute for Women, Law and Development, 1996, p. 54–59, at p. 54.
 - 3 General Recommendation of CEDAW No. 19, made by the Committee on the Elimination of Discrimination against Women, 11th Session, 1992, General Comments, para. 11.
 - 4 European Commission. Special Eurobarometer 344 on Domestic violence against women [interactive]. September 2010 [accessed on 16-07-2012]. <http://ec.europa.eu/public_opinion/archives/ebs/ebs_344_en.pdf>.
 - 5 National Institute of Public Health University of Southern Denmark. The cost of violence - Economic and personal dimensions of violence against women in Denmark [interactive]. [accessed on 16-07-2012]. <http://www.sifolkesundhed.dk/Udgivelser/Bøger%20og%20rapporter/2010/Voldens_pris.aspx?lang=en>.
 - 6 Lisauskaitė, V. *Lyčių diskriminacijos kaina* [The price of gender discrimination]. Mes neprašome, mes reikalaujame: konferencija Jungtinių Tautų tarptautinės Kairo konferencijos veiksmų programai 15 metų [We do not ask, we demand: conference to commemorate 15 years of UN Cairo conference]. Compiled by Pavilionienė, M. A. Vilnius: *Valsybės žinios*, 2010, p. 53–70.
 - 7 News article at Website 15min.lt. *Nearly 10,000 cases of domestic violence reported in Lithuania in 4 months* [interactive]. [accessed on 16-07-2012]. <<http://www.15min.lt/en/article/in-lithuania/nearly-10-000-cases-of-domestic-violence-reported-in-lithuania-in-4-months-525-212410>>.

in 2010 the police also received a very high number—as many as 42,714 calls on domestic violence.⁸ The difference is in that the police and other institutions now have the instruments to act, thus the cases of domestic violence are now being treated more seriously and the cases have to be investigated. According to the data presented by the Police Department at the end of the first year of implementation of the Law, 19,365 calls were registered, and 7,856 pre-trial investigations were initiated by the police. 83 per cent of victims were women (9%—men, 8%—children),⁹ and in 95.6 per cent of instances suspects were men (4%—women). The numbers were different with regard to murders: men were the victims in most of the cases (61%), and yet, mostly men were also suspects of these—in 74 per cent of instances (women—26%).¹⁰ Thus it can be seen already from statistics that the aspect of gender seems to play a role in domestic violence cases.

Although the issue of domestic violence against women is obviously very important in Lithuania, there is a lack of research by legal scholars in this area. Ministry of the Interior from 2008 administers a website with relevant legal information,¹¹ and a group of specialists (including Rokas Uscila) presented a number of methodological recommendations for police officers.¹² Karolis Jovaišas attempted to analyse the causes of violence.¹³ Prior to adoption of the Law, Darius Urbonas wrote a paper on the right of the police officers to detain a person in domestic violence situations.¹⁴ The issue has also been analysed by psychologists (Alfредas Laurinavičius, Rita Žukauskienė) and other researchers of Social sciences and the Humanities (Laima Ruibytė, Marytė Gustainienė, and others). Nevertheless, comprehensive legal research, especially from the point of view of international law, is lacking. It is necessary, considering that the discussion on

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- 8 Balsytė, L. New legislation reveals law of fist in Lithuanian family life [interactive]. [accessed on 16-07-2012]. <<http://www.15min.lt/en/article/culture-society/new-legislation-reveals-law-of-fist-in-lithuanian-family-life-528-198579>>.
- 9 Conference organized by the Police Department of the Republic of Lithuania. *Apsaugos nuo smurto artimoje aplinkoje įstatymas: tendencijos ir įgyvendinimo problemos* [Law on protection against domestic violence: tendencies and implementation problems]. Statistics presented by Tomas Babravičius. 17 December 2012. Data on the period from 2012-01-01 to 2012-11-30.
- 10 *Ibid.*
- 11 Ministry of the Interior of the Republic of Lithuania. Information site on violence against women [interactive]. [accessed on 16-07-2012]. <www.bukstipri.lt>
- 12 Uscila, R.; Grigutyte, N.; Karmaza, E. *Metodinės rekomendacijos policijos pareigūnams, sprendžiantiems konfliktų šeimoje atvejus* [Methodical Recommendations for Police Officers Dealing with Family Conflicts]. Vilnius: Policijos Departamentas prie Vidaus reikalų ministerijos, 2008 [interactive]. [accessed on 16-07-2012]. <<http://www.nplc.lt/lit/pub/pub049.pdf>>.
- 13 Jovaišas, K. *Smurto šeimoje prevencija: iliuzijų anatomija* [Prevention of domestic violence: anatomy of illusions]. Vilnius: Eugrimas, 2009. This book, however, has been criticized as justifying domestic violence as “eternal” phenomenon that is caused by inclination of human beings to aggressiveness, and for the suggestion that women are often provoking or inventing violence. Pavilionienė, M. A. Presentation at a conference “Lyčių lygybė: dabartis ir perspektyvos.” Lygios galimybės, kurios pakeitė pasaulį [Equal opportunities that changed the world]. *Social Sciences Studies*. 2010, 1(5): 365–370.
- 14 Urbonas, D. Policijos pareigūnų teisė sulaukyti ir pristatyti asmenį į policijos įstaigą smurto privačioje erdvėje kontekste [The rights of police officer to arrest and deliver people to police station in the context of violence in private space]. *Public security and public order*. 2011, 5: 220–240.

the efficiency of the Law and the state's obligations under the international law is ongoing.

The purpose of the article is to disclose the concept of “domestic violence against women” under the relevant international legal acts and Jurisprudence, and to assess whether the national Law corresponds to the main requirements contained in the relevant documents: the UN Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW), the European Convention on Human Rights (the ECHR), and the Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention). This paper is not focused on separate types of domestic violence.

The object of the paper is the concept of “domestic violence” under the CEDAW, the ECHR, and the Istanbul Convention, in particular relating to the aspect of gender. Notably, the object of the research is connected to the perspective of the state's obligations in respect of domestic violence/gender-based violence, rather than perpetrator's individual responsibility.

Methodology. The article employs systematic analysis, historical, logical-analytic and critical analysis methods.

1. The Concept of Domestic Violence under the CEDAW

The CEDAW, adopted in 1979 by the UN General Assembly, defines discrimination against women and provides the relevant state obligations. It is established that states should take “all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”¹⁵ Lithuania ratified the CEDAW in 1995 (accessed in 1994) without reservations¹⁶; the Optional Protocol to the CEDAW, allowing individual petition, was ratified in 2004.¹⁷

The text of the CEDAW does not mention violence against women or domestic violence. However, the Committee on the elimination of all forms of discrimination against women (the CEDAW Committee) in its General Recommendation No. 19 On Violence Against Women (1992) established that “gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men” and is thus prohibited under the CEDAW.¹⁸ In the same document, it is also recognized that gender-based violence may include violence

15 The Convention on the Elimination of All Forms of Discrimination against Women. adopted in 1979 by the UN General Assembly [interactive]. [accessed on 12-07-2012]. <<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>>. Article 2.

16 United Nations Treaty Collection. Convention on the Elimination of All Forms of Discrimination against Women [interactive]. [accessed on 12-07-2012]. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en>.

17 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Adopted in New York on 6 October 1999. Came into force in 2004. *Official Gazette*. 2004, No. 122-4460.

18 General Recommendation No. 19, *supra* note 3, at para. 1.

committed both by “a private act”¹⁹ and “a family violence.”²⁰ Therefore, the definition of “discrimination” under Article 1 of the CEDAW includes “gender-based violence,” and the state responsibility is not limited only to the state actors: significantly, the obligation to act in due diligence has been established.²¹

A question arises whether all acts of domestic violence, directed at women, should fall under the category of “gender-based violence” under the CEDAW and relevant documents? The answer to this question is not obvious, considering that the majority of domestic violence victims are women, and the definitions are often inter-related. The Spanish model takes a serious consideration of this fact. In 2004 the Spain adopted a law to fight domestic violence, which contains the definition “a gender-based violence” in the very title.²² Nevertheless, presumption that women who suffer violence actually experience it because of their gender might be seen as suggesting a direct link between the female gender and violence. In other words, it might be interpreted that being a woman means to be a (potential or actual) victim. On the other hand, it would be a mistake to deny the fact that in many cases, domestic violence acts are based on “traditional attitudes by which women are regarded as subordinate to men.”²³ Notably, the CEDAW Committee recognized the linkage between such attitudes and the resulting widespread “family violence.”²⁴

As mentioned in the introduction, the further analysis concerns only the state obligations. It would be very difficult to determine for a fact, whether a violent crime against a particular woman was gender-based from the perspective of the perpetrator and the victim. The important task on a case-to-case basis is to establish the primary aggressor. It is often difficult, and, especially so, because of the broad definition of violence under the Law, which includes psychological violence²⁵ as well. Yet, for the purposes of this paper, the objective is to establish in which cases the state, as the subject of the international law, is responsible for the failure to protect the victim of domestic violence, which often might be gender-based violence.

In the author’s opinion, the thin and rather unclear divide between the two definitions may be found through the analysis of the relevant case law. Under the CEDAW, the most important cases to mention are the cases of *Şahide Goekce v. Austria* (decision of 6 August 2007), *Fatma Yıldırım v. Austria* (decision of 1 October 2007), and *Ms V. K. v.*

19 General Recommendation No. 19, *supra* note 3, at para. 24 (a).

20 *Ibid.*, at para. 24 (b); see also para. 24 (r).

21 *Ibid.*, para. 9.

22 On 28 December 2004, the Spanish government passed the Organic Act on Integrated Protection Measures against Gender Violence, which is aimed at combatting domestic violence. No 1/2004.

23 General Recommendation No. 19, *supra* note 3, para. 11.

24 *Ibid.*

25 Notably, wide and unclear term of psychological violence allows manipulation: perpetrators might claim that physical violence was a response to psychological; the term also might be abused in divorce cases. The current trend is introduction of “coercive control” or similar precise terminology, rather than adhering to the wide term of “psychological” violence. See Stark, E. Re-presenting Battered Women: Coercive Control and the Defence of Liberty. In: *Violence Against Women: Complex Realities and New Issues in a Changing World*. Les Presses de l’Université du Québec, 2012.

Bulgaria (decision of 17 August 2011). In the first two similar cases, the applications to the CEDAW Committee were brought on behalf of the diseased victims, killed by long-term domestic violence perpetrators. In both cases, the women requested for help, but arrests were not warranted and death threats resulted in killings. Notably, Austria had a comprehensive system of protection against domestic violence: legislation, awareness raising, education measures, shelters, Civil and Criminal Law remedies, counselling for victims, work with perpetrators, etc. However, the Austrian authorities repeatedly denied adequate protection measures for the victims, thus the CEDAW Committee found that the state had failed to implement the law and its “due diligence” obligations.²⁶

The cases against Austria are important in at least a couple of aspects. First, they showed that it is not enough to adopt a good law—it needs to be implemented. The Committee clearly repeated that women’s human rights to life and to physical and mental integrity cannot be superseded by the perpetrator’s rights. In other words, the arrest in such cases is not disproportionately invasive, as Austria suggested—on the contrary, the failure to arrest in this case resulted in the breach of the state obligations.²⁷ Moreover, in the author’s opinion, it is also important that the CEDAW Committee in these cases did not find sufficient proof of the breach of Article 5 (Sex Role Stereotyping and Prejudice),²⁸ although it had found breaches of this Article in previous and subsequent cases against other countries.²⁹ E.g. in case *Fatma Yildirim v. Austria*, the CEDAW committee found that the state infringed the applicant’s right to life and to physical and mental integrity under Article 2 (a) and (c) through (f) and Article 3 of the Convention (read in conjunction with Article 1 and general recommendation 19), but denied the request to find violations of Articles 1 and 5. Thus, efforts of Austria in combatting the causes of gender-based violence (prejudice, stereotyping) in this domestic violence case could be seen as sufficient, although the state failed to protect the victims from violence.

The case of *Ms V. K. v. Bulgaria* was different in this regard. Again, the state also had the law on domestic violence, and the issue of non-implementation arose. In addition, the applicant claimed that the burden of proof was placed entirely on her. As a result, the applicant could not acquire a permanent protection order against her husband due to the lack of sufficient proof. The CEDAW Committee said that the compliance with Articles 2 (Policy measures) and 5 (Sex Role Stereotyping and Prejudice) needs to be assessed through an analysis of how the applicant’s case was handled by the courts. It appeared that the courts were basing their refusal to provide protective order on the narrow, stereotypical and preconceived notion of domestic violence.³⁰ The Committee noted

26 *Fatma Yildirim (deceased) v. Austria*, Communication No. 6/2005. UN Committee on the Elimination of Discrimination against Women, decision of 1 October 2007, para 12.1.6; *Sahide Goekce (deceased) v. Austria*, Communication No. 5/2005. UN Committee on the Elimination of Discrimination against Women, decision of 6 August 2007, para. 12.1.4.

27 *Yildirim v. Austria*, para. 12.1.5

28 *Ibid.*, para. 12.2; *Goekce v. Austria*, para. 12.2.

29 *Ms. A.T. v. Hungary*, Communication No. 2/2003. UN Committee on the Elimination of Discrimination against Women, decision of 26 January 2005; *Ms V. K. v Bulgaria*, Communication No. 20/2008. UN Committee on the Elimination of Discrimination against Women, decision of 25 July 2011.

30 *V. K. v. Bulgaria*, para. 9.12.

that stereotyping adversely affects the right to fair trial and creates inflexible standards. Therefore, in this case, the state also failed to banish gender-related stereotypes, which existed in the heads of state agents.

Nevertheless, it can be said that the delimitation of domestic violence and gender based violence under the CEDAW is rather complicated. The term “gender-based” violence under General Recommendation No. 19 is very wide and includes domestic violence cases, as one of the forms of gender-based violence. From the perspective of this paper, domestic violence is chosen as the one initial focus point, and it is also obvious that domestic violence often (but not always) means gender-based violence. Thus, from this perspective domestic violence may include gender-based violence. However, the CEDAW itself is targeted at discrimination, and this is its main starting point. Therefore, although the theory that the state obligation to protect from gender-based violence is only infringed if the state agents are demonstrating a gender-insensitive view seems plausible, because of the very purpose and scope of the CEDAW (fight against discrimination)³¹, the two terms are too entangled under the CEDAW to provide a clear demarcation.

2. The Concept of Domestic Violence under CoE Conventions

2.1. The ECHR

Lithuania is also a contracting party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter—the ECHR),³² and must take into account the recent developments of the case law of the European Court of Human Rights. Although the text of this document, adopted by the Council of Europe in 1950, does not mention domestic violence or gender-based violence, the landmark ruling in the field of domestic violence (case of *Opuz v. Turkey*, 2009) should be noted in this regard.

In this significant decision, the applicant and her mother suffered long-term abuse by her violent husband, who finally also shot her mother. In the meantime, the Family protection act was in force in Turkey, but it did not sufficiently protect the applicant from repeated violence. The European Court of Human Rights (hereinafter—the ECtHR or the Court) analysed the development of international law in the field of domestic violence against women, and recognized that there had been a violation of Article 14 (prohibition of discrimination) read in conjunction with Articles 2 (right to life) and 3 (prohibition of inhuman and degrading treatment) of the Convention. The Court noted:

“the applicant has been able to show, supported by unchallenged statistical information, the existence of a *prima facie* indication that the domestic violence

31 Gender-based violence is therefore one of the forms of discrimination, and domestic violence—one of the forms of gender-based violence under the CEDAW.

32 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos 11 and 14. *Official Gazette*. 2011, No. 156-7390. Lithuania signed 14 May 1993; came into force 20 June 1995.

affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.”³³

Although this judicial passivity was recognized as unintentional, the Court considered that its affect on women revealed “*gender-based violence* which is a form of discrimination against women.”³⁴ Despite the reforms carried out by the Turkish Government, the overall unresponsiveness of the system proven in this case indicated that there was insufficient commitment to take appropriate action to address domestic violence.³⁵

Thus, the case of *Opuz v. Turkey* did not merely concern the failure to protect a domestic violence victim, but revealed the phenomenon of state tolerated gender-based violence. Despite the lack of active involvement of the state actors, the state is considered responsible in cases of repeated domestic violence. *Opuz v. Turkey* was the first domestic violence case where the Court has found infringement of Article 14 (prohibition of discrimination) in conjunction with Article 2 (right to life) and Article 3 (prohibition of inhumane or degrading treatment). In the subsequent domestic violence cases, the Court would usually find a violation of Article 8 (right to respect for private and family life),³⁶ or Article 3, and Article 8.³⁷ These decisions are also interesting and add to the debate in Lithuania, in particular regarding the perpetrator’s right to property. It can be said that the ECtHR, like the CEDAW committee, consistently holds that the perpetrator’s rights cannot substantiate the refusal to protect women’s human rights in domestic violence cases.

2.2. Istanbul Convention

Moreover, in 2011 the Council of Europe (hereinafter—CoE) opened for signature the Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention). Currently it has been signed by 26 CoE states and ratified only by Turkey; the Istanbul Convention will enter into force after 10th ratification.³⁸

The need to adopt a regional Convention, which would impose precise obligations on states, has been recognized as an actuality for many years and by various scholars. It has been recommended to prepare a document providing a clear binding definition of domestic violence and precisely defining positive obligations of states. Lithuania so far is not a member to the Istanbul Convention. In fact, some disturbing statements that the state will not sign the Convention because of the “position of the Vatican” have been

33 *Opuz v. Turkey* [2009] ECHR 33401/02 (9 June 2009), para. 198.

34 *Ibid.*, para. 200. Emphasis added by author.

35 *Ibid.*

36 *A.V. v. Croatia* [2010] ECHR 55164/08; *Hajduová v. Slovakia* [2010] ECHR 2660/03; *Kaluczka v. Hungary* [2012] ECHR 57693/10.

37 *E.S. and Others v. Slovakia* [2009] ECHR 8227/04.

38 Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210 [interactive]. [accessed on 15-01-2013]. <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=1&DF=&CL=ENG>>.

reported.³⁹ The final official decision is not yet taken, although the working group has presented its conclusions on the Istanbul Convention shortly before this paper went into press.⁴⁰

Already from the title of the Istanbul Convention it can be seen that the notion of domestic violence is separated from gender-based violence, because both of these terms are mentioned next to each other. For the purposes of the Istanbul Convention, domestic violence is described in the following way:

“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.” (Article 3 (2))

Meanwhile, the definition of gender-based violence is copied from the CEDAW General Recommendation No. 19: “gender-based violence against women” shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately” (Article 3(4)). The Explanatory memorandum to the Convention states that the term “gender-based violence against women” should be seen as equivalent to “gender-based violence” used in these documents: the CEDAW Committee General Recommendation No. 19 on violence against women (1992), the United Nations General Assembly Declaration on the Elimination of Violence against Women (1993) and Recommendation Rec (2002)5 of the Committee of Ministers of the Council of Europe to member states on the protection of women against violence (2002).⁴¹

Although the term “gender-based violence” is still rather broad (violence can be seen as “disproportionate” in all instances), the efforts to disentangle the terms should be evaluated positively. This decision does not project the idea that being a woman, who happens to be a victim of violence, is always caused by the fact that she is a woman (i.e. victimization of identity itself). On the other hand, because of the comprehensive system of protective measures, preventative measures, and wide non-discrimination principle, the Istanbul Convention provides a solid and functional basis for improving the situation of wide-spread domestic violence against women.

Several states suggested amendments of various articles of the Istanbul Convention. The suggestion of Vatican, which was mentioned in the press, actually concerns Article 4 (Fundamental rights, equality and non-discrimination) of the Convention. Together

39 Lydeka, A. *Kodėl Socialinės apsaugos ir darbo ministerija nenori užkirsti kelią smurtui šeimoje?* [Why the Ministry of Social affairs does not want to prevent domestic violence?]. Press release of the head of Parliamentary human rights committee [interactive]. Released 21-04-2011 [accessed on 12-07-2012]. <http://www3.lrs.lt/pls/inter/w5_show?p_r=6407&p_d=110079&p_k=1>.

40 The conclusions regarding the Convention are more negative than positive: it has been underlined that the Convention cannot be implemented with the current Lithuanian legal regulation, and some amendments are necessary, before it can be done. *Darbo grupės, sudarytos socialinės apsaugos ir darbo ministro 2011 m. lapkričio 5 d. įsakymu Nr. A1-472, išvados ir analizė dėl ET konvencijos dėl smurto prieš moteris ir smurto artimoje aplinkoje prevencijos ir šalinimo*. adopted on 26 November 2012.

41 Explanatory report on the CoE Convention on preventing and combating violence against women and domestic violence, paragraph 43.

with the Russian Federation, the Holy See⁴² offers to delete “sexual orientation and gender identity” as prohibited grounds of discrimination (Art 4(3)). This would mean that lesbian, bisexual and transgender women would be outside of the scope of protection of the Istanbul Convention. Amnesty International and other international human rights organizations criticized this suggestion.⁴³

Meanwhile, the UK suggested to amend Article 3 (Definitions), changing the reference to violence against women as a violation of human rights and replacing it with the formulation “[v]iolence against women constitutes a serious obstacle for women’s enjoyment of human rights.” Although no explanation has been provided for the suggestion, it can be claimed that this to some extent reflects the language of the Beijing Declaration and Platform for Action (1995), which states that “violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms.”⁴⁴ However, the documents adopted at Beijing have been criticized for the failure of recognizing violence against women as violations of human rights themselves, rather than impairing women’s *enjoyment* of human rights.⁴⁵ The right to be free from violence should be clearly stated as a right in itself, rather than an additional obstacle to implementation of human rights. Thus, while comparing accomplishments of Vienna and Beijing conferences, and subsequent documents, it could even be claimed that Beijing Conference did not realize a potential to recognize a women’s human right to be free from violence as such, a potential that the Vienna Declaration gave basis to by proclaiming that women’s rights are human rights.⁴⁶ Meanwhile, the UK’s suggestion is even weaker than the mild expression under the Beijing Declaration and Platform for Action and would have weakened the legal basis significantly. On 8 June 2012, the UK decided to join the Istanbul Convention as it is.

It can be concluded that the Istanbul Convention manages to untangle “domestic violence” from “gender based violence” and discrimination. In the author’s opinion, it is a positive development, because the terms are clearer and domestic violence does not always presuppose discriminatory experience because of being a woman. At the same time, the drafters recognize and stress that domestic violence is, in fact, a “gendered phenomenon”⁴⁷ which is evidenced by high numbers of violence against women.

42 The Holy See (and not, indeed, the Vatican) has the status of the observer with the Council of Europe from 1970.

43 Amnesty International opposes amendments that will weaken the Council of Europe treaty on violence against women [interactive]. [accessed on 10-07-2012]. <<http://www.amnesty.org/en/library/asset/IOR61/004/2011/en/6c1d23c1-f37e-41f1-aded-3e7b25ce7861/ior610042011en.html>>.

44 The Beijing Platform for Action, adopted in Fourth World Conference of Women, September 1995, Strategic Objective D.1. Violence against women [interactive]. [accessed on 12-07-2012]. <<http://www.un.org/womenwatch/daw/beijing/platform/violence.htm>>, paragraph 112.

45 Otto, D. A Post-Beijing Reflection on the Limitation and Potential of Human Rights Discourse for Women. In: Askin, K. D.; Koenig, D. M. (eds.) *Women and International Human Rights Law*. Volume I. New York: Transnational Publishers Inc., 1999, p. 131–132.

46 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, A/CONF.157/23, 12 July 1993 [interactive]. [accessed on 12-07-2012]. <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)>.

47 Explanatory report, paras. 27, 42.

From the conclusions of the National working group on ratification of the Convention,⁴⁸ it can be seen that precisely the *gender* aspect has been rendered problematic. The working group doubted whether tendencies in behaviour of men and women can be reasonably rendered stereotypic (relying on research that underlines biological, natural causes for certain behaviour), said it is “debatable” whether such behaviour can be always evaluated negatively and should be eradicated, and noted that legal regulation does not provide for the definition of “stereotype” in this respect.⁴⁹ It can be said that the discussion in this regard is definitely important, and should be respectfully continued in order to reach the hearts and minds of the persons involved.

On the other hand, within the scope of the Istanbul Convention, the aim is eradicating practices that are based on the idea of the “inferiority of women” and stereotypes that may add to tolerance of violence,⁵⁰ rather than eliminating all gender-specific behaviour (choice of clothes, toys, etc.). The European Institute for Gender Equality (hereinafter—EIGE) summarizes the problematics as following: “gender-based violence cannot be understood outside the social structures, gender norms and roles that support and justify it as normal or tolerable.”⁵¹ Meanwhile, the drafters of the Istanbul Convention recognize that gender-based violence and domestic violence can be understood differently on structural and individual level: these are “complex phenomena and it is necessary to use a variety of approaches in combination with each other in order to understand them.”⁵² The author concludes that the Istanbul Convention is much clearer and comprehensive in this regard than the legal regulation under CEDAW.

3. The Assessment of the Law Against Domestic Violence in Consideration of International Law

3.1. Gender

In its Concluding observation on Lithuania (2008), the CEDAW Committee recommended that the state introduced a specific law on domestic violence against women that provides for redress and protection.⁵³ The criminal law provisions on separate crimes, and programmes aimed at reduction of violence against women were not considered sufficient. Lithuanian Government itself has acknowledged that the legal

48 *Darbo grupės, sudarytos socialinės apsaugos ir darbo ministro 2011 m. lapkričio 5 d. įsakymu Nr. A1-472, išvados ir analizė dėl ET konvencijos dėl smurto prieš moteris ir smurto artimoje aplinkoje prevencijos ir šalinimo*. adopted on 26 November 2012.

49 Neither at the EU, nor national regulation level. *Ibid.*

50 Explanatory report, point 43, Article 12 (1) of the Istanbul Convention.

51 What is gender-based violence? EIGE website [interactive]. [accessed on 21-11-2012]. <<http://www.eige.europa.eu/content/what-is-genderbased-violence>>.

52 Explanatory report, point 25.

53 Concluding observations of the Committee on the Elimination of Discrimination against Women: Lithuania. CEDAW/C/LTU/CO/4 8 July 2008, para. 74 and 75.

bases for isolating the aggressor are lacking, bases for initiating criminal proceedings are inadequate, and the enforcement of existent bases is unsatisfactory.⁵⁴

The current text of the Law is based on the Austrian model. It is a gender-neutral law, and the decision to turn to a gender-neutral approach cannot be evaluated negatively. The Istanbul Convention provides for a gender-neutral definition of “domestic violence” as well,⁵⁵ and Article 2 (Scope of the Convention) suggests applying the Convention to “all victims of domestic violence.” This means that the states can extend the application also to men and children victims of domestic violence.⁵⁶

Nevertheless, it cannot be disregarded that the biggest numbers of the victims of domestic violence in Lithuania are women; it is a gendered phenomenon. This is significant, because in *Opuz v. Turkey*, the statistical information has been considered to prove that domestic violence is tolerated by the state, despite the existing national law. In this case, the data was not even taken from official statistics, but presented by Amnesty International and a local NGO. There were no clear numbers cited, just statements that domestic violence affects “mainly women.” In fact, the actual percentage of women in Turkey, who were affected by domestic violence was smaller (40%)⁵⁷ than the Lithuanian data.⁵⁸ Thus it is essential for Lithuania, in order to fulfil its due diligence obligations, to put efforts to tackle the very *causes* of domestic violence. Adopting a national Law is not enough, as shown by the examples of Turkey, Austria, Bulgaria, etc.

The CEDAW Committee has expressed repeated concerns with the prevailing patriarchal attitudes and gender stereotypes in Lithuania.⁵⁹ As it is now, the Law and subsequent post-legislative acts do not mention gender stereotyping and prevailing patriarchal attitudes in family structures at all. The last action plan (2009–2012) of the Strategy for combating violence against women (further—the Strategy) expired in the end of 2012.⁶⁰ The working group has prepared a Draft Programme on decreasing domestic violence, which is to be adopted by the Government of the Republic of Lithuania and which would replace the previous strategy. Just like the Law, the Draft Programme is gender-neutral. This means that the gender aspect completely disappears from all legislation, related to violence.⁶¹ This is in clear contrast with the state’s obligations under the international law, as discussed above.

54 Resolution of Lithuanian Government on the affirmation program for equal opportunities for men and women (3 June 2003, came into force 7 June 2003), para. 47.

55 *Supra* note 38, Article 3.

56 Explanatory report on the CoE Convention on preventing and combating violence against women and domestic violence, Comment on Article 2.

57 Abdel-Monem, T. *Opuz v. Turkey: Europe’s landmark judgment on violence against women*. University of Nebraska, 2009 [interactive]. [accessed on 16-07-2012]. <<http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1037&context=publicpolicypublications>>.

58 *Supra* notes 4 and 9.

59 *Supra* note 53.

60 *Supra* note 11.

61 Gender aspect is not mentioned in the implementing acts to the Law: Minister of Social Affairs and Labour, Minister of Health care, Minister of the Interior, Collegial Order No. A1-534/V-1072/1V-931 of 19 December 2011 on adoption of the Programme for Specialised Assistance Centres. *Official Gazette*. 2011, No. 159-7530. Police Department under the Ministry of the Interior, Order No. 5-V-84 of 31 January

If all legislative and strategic documents are lacking any bases for the gender-sensitive approach to this gendered phenomenon, it can be even more difficult for state agents to act cautiously. Based on the discussions at the Parliament during the adoption of the Law,⁶² it seems that there is still a very strong wish to deny the need to acknowledge the gender aspect. In such a context, complete gender neutrality can even work backwards, because avoidance of naming the problem makes it look like there is a hidden agenda, a secret conspiracy against men, who do constitute the majority of the accused and convicted. Gender roles that teach young boys to seek control, to clench their fists, and swallow their tears, and the girls to be submissive and helpful despite their needs, are damaging both to men and women.

3.2. Rights of the Perpetrator

The Law has been criticized on the basis of the rights of the perpetrator (presumption of innocence, right of ownership) and limiting the possibility of the victim to forgive the perpetrator.⁶³ These arguments in general do not stand under the international law documents and case-law.⁶⁴ Of course, in each separate case the state institutions must assess the actual situation, in order to respond adequately. In the context of criminal proceedings and protection of victims' rights, there are always conflicting rights of the victim and the perpetrator. It is up for the state authorities to evaluate the risks. The response cannot be limited only to direct and immediate threats to life and health of a woman.⁶⁵ The arrest based on the victim's reporting of threats to life is not always disproportionate and, in some cases, may be necessary.⁶⁶

Regarding property rights, the ECHR in its case *Kalucza v. Hungary* (2011) analysed the situation where the victim lived in the apartment owned jointly by the victim and the perpetrator. Beside the argument of the right to ownership, the existence of mutual violence was proven. However, the Court held that the victim's rights under Article 8 (Right to respect for private life) have been violated because the state authorities failed

2012 on Adoption of Regulations of Response of Police Officers to Reports on Domestic Violence. Police Commissioner General, Order of 31 January 2012 No. 5-V-84 On Adoption of Regulations of Response of Police Officers to Reports on Domestic Violence. Police Commissioner General, draft order on adoption of a procedure of control for police officers on the implementation of a court order not to approach a victim, not to communicate with the victim, and not to look for connections with the victim. Police Commissioner General, Order of 14 December 2011 No. 5-V-1115 On Approval of the Procedure of Forcing a Perpetrator of Violence to Move Out.

62 As well as discussions back in 2008, when the Resolution on Domestic violence Conceptual Framework was not adopted, because recognition of wide-spread violence against women would allegedly mean discrimination of other members of the society, and the use of the term "family violence" would ruin the reputation of all families in Lithuania.

63 Some relevant amendments have been suggested, e.g. the possibility to refrain from protection measures if the perpetrator has some household duties with the victim. The parliamentary Committee of Legal affairs assessed the proposal as contradicting the very purpose of the Law on 7 November 2012.

64 Due to the scope of this paper, only a very general overview of these issues may be provided: each separate issue may be an object of a separate study.

65 *Ms V. K. v. Bulgaria*, paras. 9.8, 9.9.

66 *Yildirim v. Austria*, para. 12.1.5

to adopt a requested restraining order, or otherwise remove the perpetrator from the same apartment. If so needed, two restraining orders could have been adopted, but it does not mean that the protective measures could not be applied at all in cases of mutual violence.⁶⁷ In this respect, however, it must be warned that double restraining should never be abused, and especially in respect of psychological violence.⁶⁸

The aforementioned “forgiveness” of the perpetrator by the victim is often caused by threats of violence and fear, and the ECHR has found violations of the victims’ rights in such situations.⁶⁹ Moreover, an interesting judgement has also been adopted by the Court of Justice of the European Union (hereinafter—the CJEU) recently that relates to the victims’ opinion about the penalty in criminal proceedings, and also to mediation in criminal proceedings. The CJEU analysed the joined cases of *Magatte Gueye* (C483/09), *X*, and *Valentín Salmerón Sánchez* (C1/10) under the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (the Framework Decision). It was established that the Spanish victims in both cases were living with the perpetrators despite restrictive injunctions. The women declared that they had themselves, consciously and voluntarily, decided to resume cohabitation with the offenders. Thus the question arose whether the victim of domestic violence should have her word in the choice of penalties for the perpetrator. The Court responded negatively. Although the victims do have the procedural right to be heard under the Framework Decision, it does not mean they have the rights in respect of the choice of penalties to be imposed, or their level. The CJEU interestingly relied on the interests of protection of the victims, but also “more general interests of society” and claimed that the mandatory penalties imposed in Spain are compatible with the Framework Decision. The CJEU also found that mediation in criminal proceedings is not against the Framework Decision. It is up for the member states to choose the particular means of implementation of victims’ rights under this document. Nevertheless, their decisions may be restricted by the obligation to use objective criteria in order to determine the types of offences for which they consider mediation not to be suitable.⁷⁰ It is doubtful whether domestic violence can be effectively met with mediation, but it might be useful in some cases involving minor perpetrators.

Therefore, the argument that victims should have the right to mitigate the penalty and on their request, it would be made possible to recall a restrictive order (prohibition to approach a victim, or order to move out of the apartment) is not valid. There is no basis for support of this idea under international law; however, there is plenty of evidence to the contrary.

67 *Kalucza v. Hungary*, para. 66.

68 Dual arrests in domestic violence cases are reported as a big problem in former Soviet Republic countries. It should be recalled that it is important to adopt guidelines on establishing the primary aggressor, and accusations of psychological violence should be assessed critically.

69 *Opuz v. Turkey*; *Kontrova v. Slovakia* [2007] ECHR 7510/04.

70 *Gueye and Salmerón Sánchez*, CJEU Joined cases C483/09 and C1/10.

3.3. Vulnerable Persons

As mentioned previously, the law applies to all violence perpetrated in “domestic environment.” This notion is explained widely, as including all persons “currently or previously linked by marriage, partnership, affinity or other close relations, also the persons having a common domicile and a common household.”⁷¹ This means that actually there is no more reason not to sign the Istanbul Convention based on the position of Holly See (i.e. its suggestion to strike out sexual orientation from the scope of Article 4). Considering the broad definition of law, domestic violence in the households of same-sex couples already falls within the scope of application of the national law.

Women of different abilities, skin colour, ethnicity (e.g. Roma women in Lithuania), pregnant women, and sexual minority women are affected by additional structural inequalities. In this regard, the research on inter-sectionality⁷² is significant. K. Crenshaw has analysed domestic violence cases and situations in shelters.⁷³ It appeared that women’s race significantly contributed to structural inequalities and the state support system was less helpful. It can be claimed that it (and subsequent research in the area) is indispensable, in trying to draft effective measures against discrimination and violence. We need to think of all sorts of women, when drafting laws and statutory acts. It is not an accident that Article 4 (3) of the Istanbul Convention mentions such a wide list of grounds: “sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.” Notably, national minority women often face more difficulties in obtaining help: this could be seen even from cases analysed in this paper.⁷⁴ National minority women, disabled women, etc. should be encouraged to apply for help, instead of being left out. Domestic violence that women experience is different and has multi-cultural faces. Thus, so should have the measures that address it.

Conclusions

The analysis of the concept of domestic violence under the CEDAW and the relevant CoE Conventions reveals a very thin line between the notions of “domestic violence” and “gender based violence.” Although the terms are very much tangled under the CEDAW, the existence of the thin line between “domestic violence” and “gender

71 Law on Protection Against Domestic Violence of the Republic of Lithuania. *Official Gazette*. 2011, No. 72-3475, Article 2 (1).

72 Crenshaw, K. W. *Demarginalizing the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine*. Feminist Theory and Antiracist Politics. University of Chicago Legal Forum, 1989, p. 139–67.

73 Crenshaw, K. W. Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color. In: Fineman, M. A.; Mykitiuk, R. (eds.) *The Public Nature of Private Violence*. New York: Routledge, 1994.

74 *Yildirim v. Austria*; *Goekce v. Austria*.

based violence” is expressed more clearly under the Istanbul Convention, which is not yet signed by Lithuania. Already from the title of this Convention, it can be seen that these notions are separated. It can be concluded that not every case of domestic violence against a woman is “gender based.” Nevertheless, it often might be, and for that reason, it is necessary to target the causes: sex role stereotyping and prejudices.

The current text of the Law against domestic violence in Lithuania is gender-neutral. This approach *per se* cannot be evaluated negatively. The Istanbul Convention also provides a gender-neutral definition of “domestic violence”⁷⁵ and it is suggested to extend the protection from domestic violence to all victims of this crime. Nevertheless, it cannot be disregarded that the highest numbers of the victims of domestic violence in Lithuania are women. It is significant, because statistical information is considered to render that domestic violence is tolerated by the state, despite the existing national law.⁷⁶ The Law has also been criticized on the basis of the rights of the perpetrator (presumption of innocence, right of ownership) and for limiting the possibility of the victim to forgive the perpetrator. However, the analysis of the related case law of international courts and CEDAW committee shows that this criticism is not sufficiently grounded. For example, in *Kalucza v. Hungary* (2011), the ECtHR held that neither the property rights nor mutual violence is a valid excuse for the failure to adopt a restraining order. A woman’s human rights to life and to physical and mental integrity cannot be superseded by the perpetrator’s rights, although a specific restrictive measure must be carefully chosen.⁷⁷ Moreover, victims do not have the rights in respect of the choice of penalties to be imposed, or the level of these penalties.⁷⁸

Finally, persons of different abilities, skin colour and ethnicity (e.g. Roma women in Lithuania), pregnant women, and etc. are affected by additional structural inequalities. Minority women may have a different understanding of the notion of domestic violence than Lithuanian women and they may face various obstacles while trying to seek for help (language, economic, etc.). Domestic violence wears very diverse faces, and so should the measures that address it.

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75 *Supra* note 35, Article 3.

76 *Opuz v. Turkey*.

77 *Yildirim v. Austria; Goekce v. Austria*, para. 12.2.

78 *Gueye and Salmerón Sánchez*.

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SMURTO ARTIMOJE APLINKOJE SĄVOKA LIETUVOJE IR LYTIES ASPEKTAS PAGAL TARPTAUTINĘ TEISĘ

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Santrauka. Šiame straipsnyje apžvelgiami probleminiai klausimai, apibrėžiant smurto šeimoje ar artimoje aplinkoje (angl. domestic violence) sąvoką Lietuvos Respublikos apsaugos nuo smurto artimoje aplinkoje įstatyme, atsižvelgiant į tarptautinę teisę ir gilinantis į lyties aspekto reikšmę. Straipsnyje bandoma atskirti sąvokas „smurtas artimoje aplinkoje prieš moteris“ ir „smurtas prieš moteris lyties pagrindu“. Autorė nagrinėja praktiką pagal Konvenciją dėl visų formų diskriminacijos panaikinimo moterims (toliau – CEDAW konvencija), kuri nustato valstybės pareigas šiuo atžvilgiu. Konvencijos kontekste sąvokos praktiškai neatsiejamoms, kadangi Konvencija skirta kovoti su diskriminacija, o smurtas lyties pagrindu (įskaitant smurtą šeimoje) yra viena jo formų. Valstybės taip pat kartais (tačiau ne visada) pripažįstamos pažeidžiančios Konvencijos 5 straipsnį dėl lyčių vaidmenų stereotipų, pavyzdžiui, kai nacionaliniai teismai, atsisakydami priimti nutartį dėl pareiškėjos apsaugos, remiasi siaura ir stereotipine smurto artimoje aplinkoje samprata, taiko nelankščius ir griežtus įrodinėjimo standartus.

Be to, byloje *Opuz v. Turkey* Europos Žmogaus Teisių Teismas (toliau – EŽTT) pirmą kartą tokių bylų kategorijoje nustatė Europos žmogaus teisių konvencijos 14 straipsnio (draudimo diskriminuoti) pažeidimą. EŽTT sutiko, kad pareiškėja įrodė, jog dėl netyčinio valstybės institucijų pasyvumo egzistavo ne tik 2 straipsnio (teisė į gyvybę) ir 3 straipsnio (nežmoniško ir žeminančio elgesio uždraudimas), bet ir 14 straipsnio pažeidimas – taigi, diskriminavimas dėl lyties. Teismas rėmėsi statistika, pagal kurią smurtą dažniau patirdavo moterys nei vyrai. Pažymėtina, kad statistiniai duomenys buvo pateikti nevyriausybinių organizacijų, buvo netikslūs, o šiuo metu apie Lietuvą pateikiami smurto prieš moteris skaičiai yra didžiausi ES ir netgi galimai didesni, nei buvo pateikti apie Turkiją.

Nagrinėdama Apsaugos nuo smurto artimoje aplinkoje įstatymo atitiktį tarptautinei teisei, autorė teigia, kad sąvoka „smurtas artimoje aplinkoje“ įstatyme gali būti neutrali lyties aspektu. Tai yra siūloma ir 2011 m. Europos Tarybos konvencijoje dėl prevencijos ir

kovos su smurtu prieš moteris ir smurto šeimoje (Stambulo konvencija), kuri atsieja „smurto artimoje aplinkoje“ ir „smurto lyties pagrindu“ sąvokas. Tačiau norint sėkmingai kovoti su smurtu lyties pagrindu artimoje aplinkoje, turi būti numatytos priemonės, kuriomis siekiama kovoti su tokiais lyties stereotipais ir tradiciniais požiūriais, pagal kuriuos viena lytis laikoma pranašesne už kitą. Priešingu atveju, valstybės institucijoms nepavykus apginti moters, patyrusios smurtą artimoje aplinkoje, teisių, valstybė bus pripažinta ne tik pažeidusi savo pareigas konkrečioje byloje dėl smurto artimoje aplinkoje (šeimoje), bet ir nedėjusi pastangų apginti nuo smurto lyties pagrindu.

Reikšminiai žodžiai: *smurtas šeimoje, smurtas artimoje aplinkoje, smurtas lyties pagrindu, smurtas dėl lyties, smurtas prieš moteris, moterų teisės.*

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