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The Significance of Recognising Domestic Violence, in Light of Estonian Legal Experts' Opinion and the Prospects for Systematising the Relevant Legislation

Domestic violence has been under public scrutiny for some time internationally as well as in Estonia. A highly negative social phenomenon, it causes considerable harm to individuals' basic rights and thereby poses an acute legal problem. Accordingly, the objective with this article is to address the attitudes of Estonian practising legal experts towards domestic violence from the perspective of recognising it and to support the idea of exploring options for further systematising the relevant legislation.

1. Awareness of domestic violence as a factor changing attitudes and mentality

The world began to pay attention to domestic violence¹ relatively recently, in the 1960s, when the unexpectedly high frequency of violent incidents in intimate relations became apparent. Non-governmental organisations began emerging to address it: The Battered Women Movement formed in London in 1971, the first women's shelters and crisis centres were established at about this time, etc.

Awareness of domestic violence drew attention to a need for legal experts to address the problems from new angles. Martin Partington, a leading British expert on criminal law, has pointed out the issue, stating that efforts to solve domestic-violence problems at the legislative and political levels have brought considerable

¹ The term 'domestic violence' shall be used here to refer to all acts of physical, sexual, psychological, or economic violence that occur within the family / domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared a residence with the victim (this definition comes from the Council of Europe's convention on preventing and combating violence against women and domestic violence, 2011).

changes in the last 20 years. The impact on the structure of the family-law system, as well as the positions and role of individuals engaged with that system, has been significant, according to Partington. The purpose was not limited to helping the victims; rather, it emphasised preventive action and shaping the views of all strata of society in the pursuit of an understanding that violent behaviour must not be condoned*².

The example of the UK validates the generalisation made by Partington. The UK became one of the first countries in the world to classify domestic violence as a serious crime (in 1990). This resulted in police support for the victims. This development took place on the initiative of the Home Office even before the passing of the Domestic Violence, Crime and Victims Act.*³ In 2000, 10 years later, domestic violence was treated as a violation of human rights in the UK, and the Domestic Violence, Crime and Victims Act was passed in 2004.

According to experts, the subject of domestic violence has also significantly influenced the positions of US legal specialists and had its effect on legal regulation. The process in that context can be divided into three main phases.*⁴ During the first phase (1968–1977)*⁵ – the stage of forming of public opinion – the public movement was activated by non-governmental organisations concentrating on helping women who were suffering from abuse. Telephone help lines and shelters for battered women were set up, articles and books were published, and public awareness increased significantly. New problems were highlighted, demonstrating that the issue requires a more in-depth approach while the existing legislation needed to be critically revised and, when necessary, reformed.*⁶ The second phase (1978–1987) is characterised by the emergence of concepts grounded in theories. For the first time in the US, criminology began to define violence against women as a separate sphere, in the early 1980s. The introduction of the term ‘gender-based violence’ was a great step forward in deciphering the complicated nature of domestic violence. It proved important to understand that women and men play different roles in domestic abuse and that the main cause of violence is gender inequality. During that era, theoretical concepts for analysing gender-based violence were developed, which helped to form a new type of criminological approach.*⁷ The third phase, which is still in progress, is characterised by differentiated responsibility. Various criminological research projects have been carried out in the USA in the third phase, studies have been conducted, criminal policy and its effects have been analysed,*⁸ the first courts specialising in domestic-abuse cases have been established, etc. A multidisciplinary advisory committee drafted the Model Code on Domestic and Family Violence in 1994, which had a considerable influence on further development of legislation.*⁹ The US has passed laws regulating domestic violence on four occasions, in 1994, 2000, 2005, and 2013.

The phase of differentiated responsibility ushered in a significantly broader idea of domestic violence. This is evidenced by laws passed in various countries, expanding the concept of domestic violence and encompassing new forms of abuse, extending protection to other classes of individuals, etc. For instance, the gender-based violence act approved in Spain in 2004*¹⁰ stipulated a significantly extended sphere of

² M. Partington. *Introduction to the English Legal System*. New York: Oxford University Press, Inc. 2008, p. 178.

³ A. Matczak et al. *Review of Domestic Violence Policies in England and Wales*. London: Kingston University & St George's, University of London 2011. Online address: <http://eprints.kingston.ac.uk/18868/1/Matczak-A-18868.pdf> (most recently accessed on 10.3.2016).

⁴ *Encyclopedia of Crime and Justice*. The Gale Group, Inc. 2002. Available at <http://www.encyclopedia.com/doc/1G2-3403000124.html> (most recently accessed on 10.3.2016).

⁵ The development of criminological and legislative thought in other countries has occurred, in principle, in a similar manner. The initiating factor has been the forming of public opinion at the initiative of non-governmental organisations, while the handling of criminological and legislative aspects of domestic violence has become increasingly academic and professional.

⁶ Marie-Andrée Bertrand. *The myth of sexual equality before the law. – Proceedings of the Fifth Research Conference on Delinquency and Criminality*. Montreal: Quebec Society of Criminology 1967; Del Martin. *Battered Wives*. New York: Pocket Books 1976.

⁷ R.W. Dobash, R.P. Dobash. *Violence against Women: A Case against Patriarchy*. New York: The Free Press 1979; Meda Chesney-Lind. *Women and crime: The female offender. – Signs* 12 (1986) / 1, pp. 78–96; J. Belknap. *The Invisible Woman: Gender, Crime, and Justice*. Belmont, California: Wadsworth 1996.

⁸ Ronet Bachman. *Estimates of violence against women: A comparison of the National Crime Victimization Survey and the National Violence against Women Survey. – Violence against Women* 2000/May.

⁹ *Model code on domestic and family violence*, available at <http://harrellcenter.hsc.usf.edu/resources.html> (most recently accessed on 10.3.2016).

¹⁰ *Organic Act 1/2004 of 28 December on Integrated Protection Measures against Gender Violence*, available at http://www.isotita.gr/var/uploads/NOMOTHEA/VIOLENCE/SPANISH%20LAW%20Organic%20Act%201_28-12-04%20on%20Violence.pdf (most recently accessed on 10.3.2016).

family relations to be protected: relations with either a current or a former spouse, romantic and sexual relations, relations between generations, and relations with dependants (minors or disabled people).

The list of forms of domestic violence has been expanded too. For example, France outlawed psychological violence in 2010. In 2009, Bulgaria outlawed emotional and economic violence. Furthermore, Bulgaria deems violent acts committed in the presence of minors equivalent to violence against minors. Mexico passed a law in 2007 forbidding violence within the family as well as at work, in learning institutions, and within the civil service; it also outlawed femicide as an extreme form of violence. Several countries (France, Germany, the UK, etc.) have outlawed arranged marriages and so-called honour killings.

Analysis of various countries' legislation shows the toughening of punishments for sexual crimes, especially those committed within the family and those involving children. The legislation of many countries is paying increasing attention to the protection of women and girls, but also all children, from violence and applies special protective measures.

While the developed countries began to pay attention to domestic-violence problems in the 1960s, Estonia turned its attention to the issue 30–35 years later. Estonia was subsumed by the Soviet Union for 51 years (1940–1991), during which time the subject of domestic violence was hardly addressed in the communist bloc. All issues related to violence against the person were discussed to a minimal extent. The official ideology declared that there were no reasons or bases for violence against the person in the Soviet Union, although some individual cases occurred, since every society has a small percentage of antisocial and violent elements. Domestic violence was addressed mainly by criminologists and a few other specialists in the context of studying non-political lawbreaking. It was unthinkable that domestic violence could become a social problem in a society whose criminal-justice doctrine viewed the protection of state interests and property as a priority. Domestic abuse was treated purely as physical violence under the Soviet penal code. Almost no attention was paid to the various levels and forms of this social phenomenon.

Open discussion of domestic violence in Estonia began only in 2000. At that time, the attitude to addressing this issue was negative and sceptical rather than understanding. This emerging opposition was overcome, however, by means of raising public awareness. Several studies were carried out; articles were written; and the first Estonian book on violence against women was published¹¹, containing interviews with victims and their analysis by specialists. This brought important information about domestic violence to the general public.

All of this prepared the ground for the opening of Estonia's first shelter for women, in Tartu, not much later, in 2002. At present, Estonia has 15 shelters for women and one for men. The Estonian police declared the issue one of its priorities in 2004; a victim-aid service with 28 workers was established, alongside telephone help lines for children and adults. A national strategy for the prevention of violence has been drafted twice, for the years 2010–2015 and 2015–2020 (covering violence among children, abuse of children, intimate partner and other domestic violence, sexual abuse, and human trafficking).

Domestic violence is widespread in Estonia, and the number of incidents is showing an upward trend. In total, 2,997 cases of domestic violence were registered in 2015 (the number was 2,021 in 2011). Domestic violence accounts for 38% of reported cases of physical abuse. Every fourth case involves a child as a victim of violence or as a witness. The number of rape cases too is high; 161 incidents were registered in 2015. The police received more than 12,000 reports of domestic violence in 2015 (up from 5,146 reports in 2011). Eighty-eight per cent of the abusers were men, and 82% of the victims were women. Most of the cases (75%) occur between current or former spouses or partners. Physical abuse accounts for 78% of all cases of domestic violence in Estonia, and every fifth case is a repeat offence. In 2012, there were 20 cases of manslaughter or murder related to domestic violence (in 2015, the figure was five).

The problem of violence transcends the limits of family and affects Estonian society as a whole. Evidence of this can be seen in the high cost of domestic violence, estimated at approximately 116 million euros per year, with the share of law-enforcement costs coming to roughly 15–16%.¹²

¹¹ H. Kase. *Vaikijate Hääled. Raamat soolisest vägivallast* ['Voices of the Silent: A Book on Gender Violence']. Tallinn: Eesti Avatud Ühiskonna Instituut 2001 (in Estonian), 446 p. (reprinted in 2002, Russian translation in 2003).

¹² The cost of domestic violence was calculated in 2016 on the initiative of the Estonian Institute for Open Society Research within the project Developing a Joint System for the Prevention of Intimate Partnership Violence in Estonia, supported by the Norwegian financial mechanism. The method used in cost calculations was based on British experience and methodology. There were only a few countries in Europe that had estimated the cost of domestic violence – the UK, Finland, Sweden, and Denmark – and now Estonia has joined these pioneers. The cost calculated includes the expenses for relevant activities of the police and other elements of the criminal-justice system, the health-care expenses, costs for the social system (such as

The issue of domestic violence has influenced the attitudes of legal specialists in Estonia as well. Yet we have only reached the beginning of the second phase as defined by the US analysts (equivalent to 1978–1987 in their context)^{*13}, with the study of gender-based violence and violence against women as a separate field of research having only started. The specifics of gender-based violence and violence against women have not yet been subject to extensive study in Estonia from a criminological standpoint, and police and crime statistics allowing more detailed analysis are sparse as well.^{*14} The absence of reliable information and of analyses and generalisations based on it is certainly one of the reasons the legal regulations dealing with domestic violence are significantly less effective than those of more developed countries. Accordingly, only every fourth case of physical abuse reported to the police reaches the courts (25% of all cases), while only 13% of all cases lead to a prison sentence.^{*15}

The Estonian authorities concentrate primarily on the consequences of violence rather than on preventing it. The Estonian legal norms do not provide for early intervention and efficient regulation of domestic violence. That, in effect, means tolerating violence and, to some extent, even supporting it. The main problem lies in the mentality and attitudes, which have become a serious obstruction to efficient regulation of domestic violence.

One of the problems is the failure in Estonia to view domestic violence as a human-rights violation. Instead, domestic violence is seen as a private matter between members of the family rather than a crime against society.^{*16} Violence against a stranger in a public place is treated as a much greater source of public threat than violence within the family against close relatives and other family members.

According to the UN, legislation regulating general crimes does not provide for handling of domestic-violence cases that is adequate for ensuring the victims' protection and preventing abuse:^{*17}

1. Laws on general criminal acts such as assault, battery, and causing serious bodily harm cannot address all of the intricate and specific aspects of domestic violence. Domestic violence manifests itself in various forms; it is not merely physical violence and might also involve sexual abuse, damage to property, intimidation, stalking, deprivation of economic support, or threats of violence. A separate law on domestic violence would allow for more integrated handling of features specific to domestic violence, along with its prevention.
2. As a rule, general crimes are viewed as individual acts, while domestic violence consisting of a single isolated incident is extremely rare. In general, the opposite tendency exists: domestic violence becomes a repeated scenario of cruel treatment, which can include physical, sexual, psychological, and other violence.
3. In general, acts of law regulating general criminal acts are useful only after the physical violence has occurred. Analyses show that punishment for assault and battery is insufficient for preventing violent individuals from committing more serious crimes.

those of shelters), civil legal aid, and other services, along with the cost of lost output. The biggest cost element is the decline in victims' quality of life, the psychological and emotional impact, which amounts to approximately 60% of the total cost.

¹³ Encyclopedia of Crime and Justice (see Note 4).

¹⁴ Domestic violence is a largely hidden phenomenon, as an EU Agency for Fundamental Rights (FRA) study in 2012 showed; only 10% of victims approach the police in Estonia, even after very serious violence. The overwhelming majority of domestic violence still goes unreported; it is not registered anywhere, and no agency has complete information about it. In the FRA survey, 4,200 women in the EU were interviewed in total. FRA Survey 2013, available at http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-factsheet_et.pdf (most recently accessed on 24.7.2015).

¹⁵ J. Salla, L. Surva. Perekäivallatsetjate retsidiivsus [‘Recidivism of Familial Perpetrators’]. – Kriminaalpoliitika analüüs [‘Analysis of Criminal Policy’], 2012, (in Estonian) p. 8. Available at http://www.kriminaalpo-liitika.ee/sites/www.kriminaalpoliitika.ee/files/elfinder/dokumendid/perevavallatsetjate_retsidiivsus._justiitsministeerium._2012.pdf (most recently accessed on 10.3.2016).

¹⁶ Estonia, similarly to other EU countries, has signed international agreements on human rights and European legal instruments, according to which domestic violence shall be treated as international violation of human rights. After making this statement, a country can no longer advance the argument that individuals' private life is inviolable and should not be interfered with for justification of unwillingness and inability to protect victims against violence in their own homes.

¹⁷ Handbook for Legislation on Violence against Women. New York: UN Women 2012. Available at <http://www.un.org/womenwatch/daw/vaw/handbook-for-nap-on-vaw.pdf> (most recently accessed on 20.7.2015).

2. Legal resources for the combating of domestic violence in Estonia

World judicial practice uses two fundamental types of regulation to address domestic violence: reconciling and punitive. Reconciling regulation is based on empathy, evoking compassion towards the victim as well as the violent individual. According to this view, the violent persons too suffer, since their spouses/partners may traumatise or provoke them, with violent behaviour resulting. The response to violence relies on a mild approach (with reconciliation, counselling, etc.), and the violent persons generally go unpunished. Attempts are made at reconciliation between them and their victims and to get them to promise never to use violence again, to address the victim in a respectful and polite manner, etc. The main purpose of reconciliation-focused regulation is to keep the family together and to strengthen it by reconciling the partners' perspectives and providing psychological counselling, anger management, etc. Milder solutions are sought in the responses to violence (reconciliation of the parties, psychological counselling, anger management, etc.). Again, the primary objective of reconciling regulation is to keep the family together.

The purpose of punitive regulation, in contrast, is to establish control over violence, to end the cycle of violence, to separate the violent person and the victim, and to punish the user of violence. The state assumes the obligation of taking the case to court and pursuing a conviction even if the victim does not want it. Regulation of this sort proceeds from the idea that intimate partner and other domestic violence is a crime and, hence, the perpetrator is to be punished. Punishing the perpetrators is considered inevitable if one is to reduce the level of violence.

According to a survey carried out among Estonia's practising lawyers in 2014^{*18}, legal professionals may favour either approach. Reconciling regulation was favoured by a somewhat higher number of respondents (50–62%), though a considerable percentage (20–37%) supported punitive regulation. Quite a large percentage (12–28%) remained neutral.

In Estonia, criminal proceedings can be terminated on the basis of conciliation, according to Article 203¹ of the Code of Criminal Procedure^{*19}. Criminal proceedings can be terminated by the prosecutor's office during the pre-trial proceedings or by the court at the request of the prosecutor's office. Upon termination of the criminal proceedings, a written conciliation agreement shall be concluded, specifying the procedure and conditions for remedying the damage caused by the criminal offence.

The survey shows that, while reconciling regulation is somewhat more popular among practitioners, the conciliation proceedings themselves were problematic for the respondents and experts were not convinced of the procedure's efficiency. The main problem is the absence of supervision and feedback about the effect of the conciliation agreements: the ensuring of the victim's required security and the changes in the perpetrator's behaviour. Experts argue that the content of the agreements may be vague and general, failing to discipline the perpetrator.

The attitude to conciliation proceedings is increasingly critical, and Europe is moving towards reduction or even elimination of this option. The Council of Europe's convention on preventing and combating violence against women and domestic violence (the Istanbul Convention^{*20}) – which was signed by Estonia's then minister of justice, Andres Anvelt, on 2 December 2014, making Estonia the 37th country to

¹⁸ A nationwide survey of practising experts was carried out in November–December 2014 within the Developing a Joint System for the Prevention of Intimate Partnership Violence in Estonia project, supported by the Norwegian financial mechanism and the Estonian Ministry of Social Affairs. This was responded to by 203 specialists: 122 practising lawyers (prosecutors, attorneys, judges, and other legal specialists) and 81 police investigators (the article reports the views of lawyers and police investigators; attorneys could not be presented as a separate group, on account of their low representation in the sample). The methods for the survey were developed by the Estonian Institute for Open Society Research (and its Ivi Proos and Iris Pettai) in co-operation with the University of Tartu's Institute of Public Law (Silvia Kaugia, Raul Narits, and Jüri Saar in the main), with Kati Arumäe, of the Police and Border Guard Board, assisting as a consultant. While the online questionnaire portion of the survey was targeted at prosecutors, judges, attorneys, and other legal specialists, it also was aimed at police investigators, who, to a greater or lesser degree, encounter victims of domestic violence. Participation in the survey was voluntary and anonymous; the respondents did not need to state their name, and the programme did not record their personal data in its database.

¹⁹ Kriminaalmenetluse seadustik. – RT I, 06.01.2016, p. 19.

²⁰ See the Council of Europe convention on preventing and combating violence against women and domestic violence, of 11.5.2011. Council of Europe Treaty Series, No. 210. Istanbul. Available at http://www.kriminaalpolitika.ee/sites/www.kriminaalpolitika.ee/files/elfinder/dokumendid/euroopa_noukogu_istanbuli_konventsioon_naistevastase_vagivalla_ja_perevagivalla_ennetamise_ja_tokestamise_konventsioon.pdf. (most recently accessed on 12.3.2016).

join^{*21} – includes a corresponding article^{*22}, which obliges the signatories to take a more critical view of the practice of reconciling. According to the Istanbul Convention, the authorities must put the primary emphasis on protection of the victim and separation of the victim from the perpetrator of violence. In the absence of intervention by society (and the state), the victim cannot protect herself or free herself from the influence of the violent partner, as a rule.

A key issue connected with the prevention of domestic violence is that of ensuring the victim's safety. This pertains to the competence of the state and public organisations.

Those countries that have criminalised domestic violence (e.g., the USA, the UK, Spain, Sweden, and Austria), use the restraining order as the most significant preventive measure.

The use of a temporary restraining order in Estonia is stipulated by §141¹ of the Code of Criminal Procedure^{*23}. It can be applied for the protection of the victim's private life or other personality rights and is applied to the suspect or the accused with the consent of the victim. The article on restraining orders stipulates that a person suspected or accused of a crime against the person or a crime against a minor may be prohibited from staying in the places designated by a court, approaching the persons identified by the court, or communicating with said persons at the request of a prosecutor's office and on the basis of either an order by a preliminary-investigation judge or a court ruling. According to §141³ (1) of the same act, at the request of a victim or, alternatively, at the request of a prosecutor's office and with the consent of the victim, a preliminary-investigation judge or court may amend the conditions of a temporary restraining order or annul the temporary restraining order. According to subsection 2 of that section, in order to issue a ruling on amendment of the conditions of or annulment of a temporary restraining order, a preliminary-investigation judge or court shall examine the criminal file and interrogate the suspect or accused and the victim with a view to ascertaining whether the request is justified. The prosecutor, victim, suspect or accused, and (if requested by the suspect or accused) suspect or accused's counsel shall be summoned to appear before the preliminary-investigation judge or court.

According to §331² of the Penal Code^{*24}, the violation of a restraining ('restriction') order is a crime that is punishable by a pecuniary punishment or up to one year of imprisonment.

With respect to domestic violence, the need for a restraining order may emerge in cases wherein a person is released on parole and it is necessary to ensure the separation of the perpetrator from the victim until the victim becomes an adult. On the other hand, the use of restraining orders in cases of domestic violence can sometimes be problematic. One of the drawbacks to applying a restraining order is victims' often limited awareness or incorrect interpretation of the restraining order, which has resulted in false expectations regarding safety or victims' change of mind and appeal for lifting the temporary restraining order or even breaking of the terms of the restraining order. Other problems arise in relation to the removal of the perpetrator from the home, which require more extensive analysis and seeking of solutions. At the request of the prosecutor's office, a temporary restraining order may be applied to a perpetrator of violence, and in the event of conviction, the court can apply a civil-law restraining order for a period of up to three years. The Ministry of Justice and the Ministry of the Interior have found that problems with application of restraining orders and their extent emerge in cases in which the persons involved share the same residence: according to §32 of the Constitution, the property of every person is inviolable and exceptions are permitted only in rare circumstances.^{*25}

Practising lawyers in Estonia agree that the application of restraining order results in the victim's safety. In the survey of experts, we asked the respondents to assess five distinct options for ensuring the victims' safety and providing them with aid. The lowest level of confidence was associated with conciliation with the aid of a consultant or a religious adviser, with police investigators being the most sceptical; only 7% of them expressed support for this method. Prosecutors (26%) and judges (12%) were more in favour

²¹ The minister of justice signed the Istanbul Convention. See <http://www.just.ee/et/uudised/justiitsminister-allkirjastas-istanbuli-konventsiooni> (most recently accessed on 1.3.2016).

²² Article 48, 'Prohibition of Mandatory Alternative Dispute Resolution Processes or Sentencing', paragraph 1, states: 'Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention.'

²³ Kriminaalmenetluse seadustik. – RT I, 06.01.2016, p. 19.

²⁴ Karistuseseadustik. – RT I, 17.12.2015, p. 9.

²⁵ Kriminaalpoliitika arengusuunad aastani 2018. Seletuskiri ['Guidelines for Development of Criminal Policy until 2018, Covering Letter'] (in Estonian). Available at http://www.just.ee/sites/www.just.ee/files/elfinder/article_files/seletuskiri_kriminaalpoliitika_arengusuunad_aastani_2018.pdf (most recently accessed on 1.3.2016).

of conciliation. The establishment of shelters and state-funded housing found little support as aid measures: 20–30% were in favour of shelters and 16–21% of state-funded housing. Applying restraining orders was rated higher by the experts as a measure increasing victims' security (36–52% favoured this approach). The most favoured measure (44–60%) was the imposing of mandatory programmes for violent individuals to help them control their violent tendencies (anger management).

The key issue in ensuring the victim's safety and preventing domestic violence is the capability of the state to handle cases of domestic violence. Several parameters exist for assessing this capability, and the most significant of them were included in the questionnaire compiled for experts by the authors of this article.

The experts' assessment of the state's capability varies. The treatment of victims by law-enforcement agencies found the highest levels of support among respondents, and ensuring the safety of victims' children received high marks too. Yet the respondents pointed out that several key problems remain unsolved.

The majority of the respondents (58–72%) indicated that the state is incapable of preventing domestic violence, even in serious cases; they also blamed the state for failing to establish supervision of violent individuals (68–71%) and of households characterised by violence (60–68%). According to the experts, the state is utterly inefficient at providing the victims with subsistence support and other material resources for independent survival: 88% of the judges, 81% of the police investigators, and 74% of the prosecutors deemed this support inadequate. The survey shows that judges are somewhat more critical of the state's capability.^{*26}

The experts' answers show that the state has the least capability with respect to the aspects related to prevention of domestic violence and has greater capability to handle the consequences of violence. It would probably be practical to concentrate more extensively on co-operation between local government and the state while increasing the share of the local level in the efforts. Item 7 of the appendix to the Estonian Parliament's resolution of 9 June 2010 (757 OE 1) refers to this element of operations by stipulating that 'crime prevention must primarily occur at the local level. The local government's task is to reduce the factors fostering crime by involving the local residents and the private and not-for-profit sector'.^{*27}

Dealing with domestic violence as such was introduced for the first time in the amendments to the Penal Code that came into force on 1 January 2015. Namely, the Penal Code's §121 (2) 2) stipulates that causing harm to the health of another person and physical abuse that causes pain, if committed in a close relationship or relationship of subordination, is punishable by a pecuniary punishment or up to five years' imprisonment.^{*28}

We used the survey of experts to learn the opinion of practising lawyers on the resources provided by present laws for handling cases of domestic violence.

Most of the respondents were of the opinion that, in general, the existing laws allow for adequate handling of domestic-violence cases. Opinions as to whether the existing laws definitely enable or, in contrast, generally do not enable the handling of domestic-violence cases are not so unanimous. The gap is especially noticeable from the opinions of prosecutors and police investigators: as many as 31% of the prosecutors indicated believing that the existing laws definitely allow for adequate handling of domestic-violence cases, while only 8% of the police investigators agreed with this opinion. While 30% of the police investigators claimed that the present laws do not allow for adequate handling of domestic-violence cases,

²⁶ Estonia has apparently failed to realise the goals set in the strategy for preventing violence for 2010–2014 (*Vägivalla vähendamise arengukava aastateks 2010–2014*) in full. This is evident from the proposal for drafting a strategy for preventing violence in 2015–2020, which lists a number of drawbacks and not just positive outcomes of the previous strategy: the prevention of violence is not consistent or systemic, specialists cannot recognise the signs of violence, services for the victims do not meet all their needs, the security of underage victims is not always sufficiently ensured, law enforcement is not always capable of preventing secondary victimisation, intervention to prevent repeat offences by violent perpetrators is insufficient, and statistics on victims and perpetrators of violence are inconsistent and not readily accessible. Details are available at https://www.osale.ee/konsultatsioonid/files/consult/263_VVA%202015-2020%20ettepanek.pdf (most recently accessed on 12.3.2016).

²⁷ Kriminaalpoliitika arengusuunad aastani 2018 ['Guidelines for the Development of Criminal Policy until 2018'] (in Estonian). Available at http://www.just.ee/sites/www.just.ee/files/elfinder/article_files/kriminaalpoliitika_arengusuunad_aastani_2018.pdf (most recently accessed on 1.3.2016).

²⁸ J. Sootak. Karistusõiguse revisjon kuriteo-, väärteo- ja haldusõiguse piirimail ['Revising the Penal Law between Criminal, Misdemeanour, and Administrative law']. – *Juridica* 2013/4, pp. 242–248; J. Sootak. Karistusõiguse arengumudelid: enklaavid ja nende iseseisvumine ['Development models for Penal Law: Enclaves and Their Gaining of Independence']. – *Akadeemia* 2014/4, pp. 687–713.

only 12% of the judges and 7% of the prosecutors agreed with them. Eight per cent of the judges remained neutral and refrained from expressing their opinion on the current laws with regard to the relevant question.

No matter the practising legal experts' opinions of the existing laws' adequacy for handling cases of domestic violence or the opinion of a large number of experts responding in the survey that a separate law on domestic violence would not significantly improve the handling of domestic-violence cases²⁹, there are still reasons for raising the issue of a domestic-violence prevention act.

3. Further systematisation of Estonia's legal system for preventing and combating domestic violence

Estonia has ratified the Istanbul Convention³⁰. This Council of Europe convention, referred to above, is a supranational agreement obliging the signatory countries to offer the maximum support and protection possible to victims of violence. By signing the convention, a country takes on the obligation of ensuring the necessary amendments to its legislation and all support services for victims of domestic violence, including children witnessing it. The legal ideology of this convention is highly ambitious, since the countries ratifying the convention must develop a comprehensive framework, body of policies, and set of measures for aiding and protecting all victims of domestic violence and violence against women. It is especially important to point out that Article 5 of the Istanbul Convention obliges the signatory countries to adopt the necessary legislative and other measures for preventing, investigating, punishing, and compensating for the acts of violence within the field of application of that convention that have been carried out by non-state actors. In other words, signing the Istanbul Convention places the Estonian state in a completely new position with respect to the handling of domestic violence – the state has to take a firm stand on this acute problem that reflects the seamy side of the society. This is a serious challenge for the state, one that requires both the finding of resources and their concentration.

The authors of this article hold the view that Estonia needs fairly separate regulation for preventing and combating domestic violence yet regulation integrated well into the system at large³¹. We pointed out above that the Estonian legal specialists consulted saw no need for a separate legal act on domestic violence's prevention. However, in the rule of law, the laws cannot be the domain of only lawyers. Laws must contribute to creating a sense of security among all members of the society. From the rule-of-law standpoint, such regulation should belong to a higher level of legislation – for example, at the level of laws. The systematisation of law creates and develops the system of concepts within which the entirety of legal thought operates, including the explanation of the content of legal norms. The organisation of objective law is an important instrument in the ultimate realisation of the rule of law as an idea. This position is consistent with the Guidelines for Development of Legislative Policy until 2018 (*Õiguspoliitika arengusuunad aastani 2018*³²), which state that in a democratic state based on the rule of law, law is the principal means for implementing political decisions, as well as with the Better Lawmaking Programme ('Parema õigusloome programm'), which ended in 2014 and has been continued through two new programmes, titled 'Codification of Law' and 'Developing Better Lawmaking'³³.

²⁹ Our survey also examined the need for a separate domestic-violence prevention act and its usefulness in daily work. Half of the police investigators and every third lawyer indicated a belief that such a law would improve the efficiency of handling domestic-violence cases. Every fifth lawyer but only seven per cent of police investigators definitely opposed the idea.

³⁰ For details, see the text of the Council of Europe convention on preventing and combating violence against women and domestic violence (cited in Note 20).

³¹ See I. Pettai *et al.* *Perevägivald nõuab jõulisemat juriidilist sekkumist* ['Domestic Violence Requires More Vigorous Legal Interference']. – *Riigikogu Toimetised* 31 (2015), pp. 155–167; I. Pettai *et al.* *Perevägivalda juriidilise regulatsiooni hetkeseis ja perspektiiv Eesti õiguspraktikute küsitluse põhjal* ['The Current Status of, and Prospects for, Legal Regulation of Domestic Violence, according to a Survey of Estonia's Practising Lawyers']. *Juridica* 2015/IX, pp. 645–658.

³² Resolution of the Estonian Parliament 'Õiguspoliitika arengusuunad 2018.a' ['Guidelines for Development of Legislative Policy until 2018'], approved on 23.2.2011. See RT III 07.03.2011, p. 1.

³³ These programmes are realised in Estonia primarily on the initiative of the Ministry of Justice. They currently concentrate on several concrete spheres wherein the regulations are fragmented and lack systemic organisation, which would ensure comprehension: environmental law, social law, construction and planning law, economic administration law, law of mis-

Legislative policy is understood as deliberate and purposeful shaping of the working of society by implemented legislative acts. It is important to remember that the modern theory of law also considers the guiding and forming function of law highly important^{*34}. The Better Lawmaking Programme admits that fragmentation of legal acts and norms obstructs the comprehension of law. The fragmentation seen in Estonia's law has been caused by the rapid reforms of the legal system, on the one hand, and the need to bring the country's legal system into conformance with that of the European Union, on the other. Countries belonging to the legal community of Continental Europe have the tradition of using codification to overcome such fragmentation and inconsistency. Codification is what creates legal stability and clarity and provides a method for qualitative changes in law's development. It seems that countries that have passed laws on the prevention of domestic violence (Austria, the UK, the USA, Australia, Germany, Spain, Slovenia, the Netherlands, Bulgaria, Lithuania, and many others^{*35}) possess certain advantages. These countries have kept in mind that the development of law and order should primarily address its systemic nature; i.e., every legal provision should have its proper place in the legal system.

The main purpose of systematisation in jurisprudence is further organisation of the basic system expressed in legal provisions. The organisation of the basic system does not emerge out of nothing – it is already based on some definite set of norms. Therefore, the new set of norms can expand, change, or elaborate upon something while the elements of reality hitherto unregulated by legal provisions form a totality in which a change to one element (or even several elements) would not change the totality.

The process of approving a domestic-violence prevention act would, however, serve as a foundation for developing a systemic approach ensuring the collection of corresponding objective statistical information, relying on scientific research and analyses, and emphasising preventive interference in violence.^{*36}

We point out especially that before a truly systematic legal system can be developed, it is necessary to agree upon the meaning of the concepts it incorporates. This requirement is, in fact, not fundamentally new in any way. Referring to the ideas of F.C. von Savigny, we are aware that every concept must have its 'juridical reality' and only after clarity in concepts has been achieved can we begin organising the set of rules into an integrated system^{*37}.

The more developed a society is and the more its various institutions both are distinct from each other and yet co-operate, the more efficient it should be in the prevention of domestic violence and combating of the actual phenomena of domestic abuse and related problems. Therefore, the object of the domestic-violence prevention act should, in principle, encompass the regulative norms orienting various institutions

demeanour proceedings, penal law, and intellectual property law. See <http://www.just.ee/et/eesmargid-tegevused/oiguspoliitika/parem-õigus> (most recently accessed on 21.3.2016).

³⁴ B. Rüthers. *Rechtstheorie*. Munich: Beck 2011, Rn. 72 ff., 91 unten II.

³⁵ The number of countries where laws to prevent domestic violence have been passed has been increasing steadily. While such laws had been passed in only a single country in 1976, the number reached 76 by 2013. See R. de Silva de Alwis, J. Klugman. Freedom from violence and the law: A global perspective, an FXB Center working paper from January 2015. Available at <http://wapp.hks.harvard.edu/lles/freedom-from-violence-and-the-law.pdf> (most recently accessed on 21.3.2016).

³⁶ The situation in Lithuania before the passing of the relevant act, in 2011, was quite similar to that of Estonia, making the perpetrator and the victim equally responsible. The law-enforcement agencies had the right to interfere and initiate proceedings only in serious cases – e.g., in the event of grievous injuries to the victim. Therefore, it was quite usual before the approval of the law that violence in households, once started, continued indefinitely, and it was difficult to break the cycle. It was decided in Lithuania that the main reason for which only a few domestic-violence cases reached the courts and perpetrators tended to go unpunished was not related to victims' retraction of their statement. The primary cause was the inefficiency of legislation, and this situation could be changed only by legal regulation assigning responsibility for prevention of violence to the state and granting the law-enforcement agencies the competence to ensure immediate protection of the victims so as to prevent repeated acts of violence. It was apparently because of the intimate partnership violence prevention act that the number of intimate-partnership-related killings in Lithuania declined by 30% within a year. Furthermore, the police gained the legal right to intervene immediately, before the situation could become critical.

³⁷ F.C. von Savigny. *Juristische Methodenlehre*. Nach der Ausarbeitung des Jacob Grimm. – G. Wesenberg (ed.). Stuttgart, Germany: Koehler 1951, p. 37. The problems with systematisation of the law reached Estonia's contemporary legal literature as an independent subject in 2000, with the publication of a special issue of the journal *Rechtstheorie 'Gesetzgebung und Rechtspolitik'*, titled 'Sonderheft Estland' (or 'Special issue: Estonia'). *Rechtstheorie 'Gesetzgebung und Rechtspolitik'* 31 (2000) / ¾. Berlin: Duncker & Humblot, VII–XII. E. Catta, adviser to the higher codification committee of France, wrote in the Estonian legal journal *Juridica* that the need for systematisation of law and order varies between individual eras in a state's development: it is greater in cases wherein the legal system has been developed over a long time and the body of legislation is large and partly contradictory. However, the need may be urgent also if the legal system has been arranged over a relatively short time but extensively. See E. Catta. Kodifitseerimise ja süstematiseerimise tähtsuse õige seaduse leidmise lihtsustamisel [The Importance of Codification and Systematisation for Simplifying the Search for the Right Law] (in Estonian). – *Juridica* 2002/IX, pp. 588–592.

towards co-operation and co-ordination predominately for the prevention of domestic violence, as well as law-enforcement norms that would forbid all forms of domestic violence by threat of criminal repression and would introduce corresponding types and terms of penalties enforceable upon violation of the norms.

The strategies for the prevention of violence that have been advanced so far in Estonia have not mentioned the approval of a separate act. This is probably due to the fact that the violence-prevention programmes have been drafted so as to proceed from a generic purpose of preventing violence and secondary victimisation. But precisely such an act could become the basis for further improvement of law and order in Estonia, by bringing together the preventive regulations and also the violence-suppression regulations, both with the aid of and within the domestic-violence prevention act.

The systematisation of law requires knowledge and use of the necessary methods. As for the methods of systematising the law in present-day Estonia, it is apparently possible to rely on the tradition of systematising legislation in combination with considering, incorporating, and consolidating the existing sources of law. However, Estonia's systematisation work so far has relied considerably on France's experience, which consists of reformative and constant codification, consolidation, and compilation. Estonia's peculiarity has largely been that over the past couple of decades, the development of a new – and qualitatively new – legal system has occurred apart from codification yet the activity has been very extensive and obviously possessed a new quality. Hence, the drafting of a domestic-violence prevention act could combine the codification tradition with the use of the French doctrine^{*38}. The extensive codification processes carried out in Estonia so far have been using this very methodology in combination with specific organisation of the work and its various stages.^{*39}

In our opinion, the above does not contradict the plan for reduction in the volume of legislative activities, or *Õigusloome mahu vähendamise kava*^{*40}, developed on the initiative of the minister of justice of the present coalition government, which links the drafting of a new normative act with the *ultima ratio* principle, or convincing explanation of the need for the normative act and an analysis of the application practice. From among the nine steps set forth for reduction of the volume of legislative activity, we should underscore the idea that at the beginning of the legislative process, it is necessary to agree on legal policy alternatives and, **whenever possible, to combine legislative initiatives affecting the same significant sphere of problems** (our emphasis – R.N., S.K., I.P.). Considering that the Rules for Good Legislative Practice and Legislative Drafting ('*Hea õigusloome ja normitehnika eeskiri*'^{*41}) require the drafting to specify the legislative intent for the co-ordination related to the need for the relevant bill, more effort should be exerted in the drafting of the legislative intent so as to avoid imposing unnecessary rules and targeting individual issues piecemeal and in order to assess the horizontal impact of the legislative changes.^{*42} Thus the plan for reducing the volume of legislative activities is directed not against legislation as such but against creating unnecessary regulations. At the same time, improved legislation in its own right naturally remains a priority in most countries, and it is obvious that Estonia should not ignore the trend in this regard or lag behind.

³⁸ R. Narits. Objektive õiguse korrastamisest Eestis: kodifitseerimisest õiguse ümberkujundamiseni ['On the Organisation of Objective Law in Estonia: From Codification to Reorganisation of Law'] (in Estonian). – *Riigikogu Toimetised* 12(2005), pp. 71–79.

³⁹ Codification projects in Estonia are composed of preparatory and codification stages. The preparatory stage is handled by experts and the codification stage by a working group with at least five members. Besides officials, at least half of the committee members are experts in the field, scientists, representatives of major stakeholders, or members of their representative organisations.

⁴⁰ The plan for reduction in the volume of legislative activities is available at <http://www.just.ee/et/eesmärgid-tegevused> (most recently accessed on 21.3.2016). The plan is based on Article 4.2 of the agreement among the Reform Party, the Social Democratic Party, and the Pro Patria and Res Publica Union *Valitsuse moodustamise ja valitsusliidu tegevusprogrammi põhialused* ['Basic Principles of Forming the Government and the Ruling Coalition's Action Programme'].

⁴¹ RT I, 29.12.2011, p. 228.

⁴² The authors of this article participated in a two-year project (in 2014–2015) entitled 'Ühtse süsteemi ülesehitamine lähisuhtevägivalla tõkestamiseks Eestis' (meaning 'developing a joint system for the prevention of intimate partnership violence in Estonia', as noted above), supported by the Norwegian financial mechanism and the Estonian Ministry of Social Affairs, and advanced in the final report a plan for systematising Estonia's legal order so as to address domestic violence as a problem sphere by using the standards for the drafting of bills stipulated in the Rules for Good Legislative Practice and Legislative Drafting. The following requirements were listed: information and reasoning pertaining to the problematic issue; stating of the purpose; possible policy options for resolving of the issue, with comparison of the options and identification of the preferable option; policy options for resolving the issue in countries with a social order and legal system similar to Estonia's; and description and presentation of the structure of the planned legal instrument, including determination of the level of regulation entailed and outlining of the significant impact, along with the methods for assessing the impact.

Obviously, laws are unable to solve all problems related to domestic violence on their own. Yet the potential of laws should not be underestimated^{*43}. It is important to determine by legal regulations the immediate and long-term services to be provided for the victims; guarantee the immediate and lasting protection of domestic-violence victims; provide for easy and free access to safe housing, advisory services, and legal aid; and, naturally, outlaw all forms of domestic violence under pain of sanctions under criminal law. We would hope that Estonia's legal system will see the emergence of a domestic-violence prevention act in the near future. A law with a clear political purpose, based on empirical and juridical analysis, a law creating benefits that outweigh the costs of its enforcement and that is efficient in achieving its purpose and expressed in clear language, would interlock with the rest of the legal system both domestically and internationally, thereby rendering it even more ordered (systemic). A true system is one wherein internal harmony creates unity. This should encompass the general content and the common purpose of jurisprudence and the entire body of legislation^{*44}.

⁴³ Separate laws for the prevention and suppression of domestic violence have now been passed in more than 70 countries.

⁴⁴ F.C. von Savigny (see Note 37), p. 15.