

CAHRV

Sub-network 3

Addressing gender based human rights violations

**Women, Children and the Law in Poland:
Protection or Barrier?***

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1. The vibrant shadow of Napoleon

During the 58th Session of the UN Commission on Human Rights (Wednesday, April 17 2002) concerning the framework of International Movement against all forms of Discrimination and Racism (IMADR-UN) the evaluation of the integration of the human rights of women and the gender perspective, and on the rights of the child Poland took place.

It was stated that in Poland women's rights and freedoms particularly in areas of reproductive rights, access to contraception, and sexual education remain limited. Women's NGOs have started to educate on the rights of women, and have organized aid for the victimized. One of the most frequently committed crimes in Poland is domestic violence. The government is taking measures to eradicate domestic violence. It was also stressed that the prepared report is by no means meant to serve as an official record of the actual discussion of the Commission on Human Rights, and the IMADR-UN office does not assume any responsibility for any inaccurate summary of a statement wherever it may exist.

The data concerning Poland were correct as far as problem mentioned. The statement that government is seeking the measures to eradicate domestic violence requires the further elaboration.

Before we start that process it is worth to stop for a while at the very construction of the subject for it disclose our, the researcher way, of perceiving the “natural”. UN Commission treat women and children as almost one, and equal subject, so is the present analysis oriented on building up protection from violence.

Is that because we all know well that physical violence is the male domain? Is that because we all know that women and children are equally treated as “officially declared equal” and officially only? Is it the broader aspect of disregard, disdain and ridicule those who are powerless and vulnerable? And if so, is it also the broader aspect of legal integrity and law and order? Or is it “just” tradition?

It is hard to accept that when tackle the subject of protection from violence through implementing legislation we forget about male victim of violence. For there are also male victim, yet women and children are the two most often studied, and most often – together.

It is not a coincidence that already Wolter and Condorcet, while condemning inequality amongst women and men, drew attention to the fact that nature did not make women servants of men. Men rule women by tyranny, and women allow this since they are, on the one hand, trained to be gentle, so they have better developed humane feelings and sense of empathy. Wolter noticed at the same time that women lack the education they have been declined. The fight for equality in 18th and 19th century was rather about equality for people of different classes than equality for human beings: men, women, or children. (Badinter, 1998). We do understand that and yet we do stick to old stereotypes.

I might be wrong, but I do see the shadow of Napoleon who helped us to internalise the two, women and children as subordinate, weaker, and in need of protection rather than equality.

It was the Napoleon Civil Code of 1804. Considered to be modern and extremely progressive, the real masterwork of legislative art – The Napoleon Code stipulated that it is father to perform the authority over children until their maturity or self-sufficiency. (art. 373 of the Napoleon Code: *‘During the existence of the marriage union only the father maintains the authority’*). The father who is not satisfied with the child's behavior can *‘demand the child's imprisonment’* for the period not exceeding a month if the child is under sixteen years of age (art. 376 of the Napoleon Code). And from the age of sixteen until adulthood or self-sufficiency not more than six months (art.377 of the Code). To what extent

the child's freedom was in the hands of the father can be gleaned from art. 379 of the Napoleon Code. The father is always in the power of shortening the time of confinement he demanded or asked for. If the child, after getting released, will deviate into a new perverse behavior, confinement can be applied again' on the father's own will. Also the father decides what this 'deviant behavior' is and what is not (Sójka-Zielińska, 1995). Disobedience is always a deviance as well as putting one's opinion above that of the parents. That's for children.

And women? Napoleon in his civil code in article 1124 wrote: "People who are not entitled to judicial laws are: minors, married women, criminals and imbeciles". Placed in such an "company" women stay there still today (Platek, 2004 a).

I am asked here to present an issue of women, children and protection from violence. I think it is worth to see the possibility of a trap we are entering by replicating the order of masculine domination and doxa – the order of the world, as it is with its meaning and understanding of the reality as described by Bourdieu (2004).

To avoid the paradox of doxa, the paradox of treating the cultural construct as natural one the two – children and women should not be treated as one and equal subject, and should not be probably studied in the same study. Instead we should be able to see deeper the roots of violence.

I will argue here that the domestic violence is ingrained in the inequality and discrimination patterns. It is also ingrained in the lack of political will to see it as the problem.

I will present the law and will argue that the law and the way it is executed is also the best tests of the attitude towards the law and order and the best indicator of civic society.

My argument is that children are deprived of the adequate legal protection, for neither the law, nor the practice is oriented on the development open for building up self-esteem, respect, responsibility and self-confidence of a child.

I will also argue that while dealing with violence we treat the subject narrowly enough not to be capable to build the adequate social policy oriented on prevention. In my opinion not enough is done to reduce the violence and victimization by tackling the issue before it happens. Using this proactive social development approach, we provide communities with the tools, knowledge and support they need to deal with the root causes of crime at a local level. I do not intend to present Poland as country of failure. I rather would like to use it as an example of the steps required to reach the success.

Therefore – although – I will do what I am asked for and limit the text to women and children I think it is fundamental to understand that the matter of protection from violence does not refer to women (wives, female partners, concubines, sisters and mothers) and children only. We should also see that that are more victims of even domestic violence than women and children. And protection from violence should equally be addressed to men. Prison, monastery, ships, army, boarding-school, psychiatric hospitals, to mention just few – all those places are filled with vulnerable male victims, and all those places should be also included when protection from violence is discussed. The spectrum than should at the beginning include also male, old people, parents, same sex partners, and handicapped family members. It should also not limit itself to law. The pattern of education and upbringing of boys and girls in most cases have much stronger impact on the everyday practice than the text of the law itself (M. Platek, 2005).

2. Justice system relevant to the protection of women and children

What do we really ask, when asking if the law in Poland is protection or barrier? We ask if the specific law, that regulates certain area of life exists at all, and if so, what it says. We also ask how it works. I will review both elements: the text of the law and the practice.

2.1. Where women and children share the legal status? An overview of the relevant legislation

Poland is party to both the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination Against Women. As a party to these agreements, The Polish government is obliged to ensure that the country policies for addressing domestic violence adequately protect the rights recognized in these treaties. As the party to these agreements authority recognized that domestic violence is not the private matter. It means we can expect both the adequate legal provision regulating the process of protection and action in case the law is not observed

Poland joined the Council of Europe in 1991 and ratified the European Convention of Human Rights and Fundamental Freedoms.

Poland is also part of Convention on the Rights of the Child. Therefore we can also expect here both the legal provisions of the Polish law that secure the dignity of a child and the proper policy that promote the practice of observing child's integrity and value as an individual.

In addition as a member of the United Nations, Poland is also responsible for respecting the rights provided for in the Universal Declaration of Human Rights and the Declaration on the Elimination of Violence Against Women. These documents, along with the 1995 Beijing Declaration and Platform for Action, reflect a global consensus on women's human rights. It serves as guidance to the Polish authorities efforts oriented on combating domestic violence.

We could look for more of the international law and guidance but above quoting are creating sufficient ground for the national law and practice. And in fact as we look into the Polish Constitution that is the supreme law of the country and apply directly, it is evident that the proper protection against all forms of violent is adequately implemented in that legislation.

Poland's Constitution that came into force on April 2, 1997 guarantees the people in Poland many basic rights. Constitution includes provisions that implicitly prohibit domestic violence, through recognition of the inherent and inviolable right to dignity of the person, right to personal security, and the right to life.

Article 32, section 1, of the Constitution provides that "all persons shall be equal before the law, and shall have the right to equal treatment by public authorities". Article 38 of the Constitution requires the state to "ensure the legal protection of the life of every human being ", and Article 41, section 1, provides that "personal inviolability and security shall be ensured to everyone". Article 40 of the Constitution guarantees that "no one may be subjected to torture or cruel, inhuman, or degrading treatment and punishment. The application of corporal punishment shall be prohibited. Some argue that this prohibition does not refer to private and family life but only to disciplinary measures imposed by the state. Yet in the context of above quoted international regulations, especially that of article 16 of Convention on the Rights of the Child protecting a child against degrading treatment and ensuring the child's respect and in the context of article 48, section 1 of the Constitution stating that although parents shall have the right to rear their children in accordance with their own convictions, yet such upbringing shall respect the degree of maturity of a child as well as the child freedom of conscience and belief and also her/his convictions, it is clear that article 40 of the Constitution applies also to situation concerning private and family life.

Article 72 of the Constitution introduces in addition specific *actio populares* to ensure protection of the rights of a child. In accordance with that article "everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense". There is no doubt child

respect is highly appreciated for in the section three of this article we read that “organs of public authority and person responsible for children, in the course of establishing the rights of a child shall consider and, insofar as possible, give priority to the views of the child”.

Following this major guidance the civil procedure regulates in the article 572 of the Polish civil procedure code all the necessary steps to ensure that the Constitutional rights are observed in the practice. Apart from the civil procedure the adequate provisions of the criminal law procedures and other regulations protecting the child in the situation of parents intoxication or absence or negatively influencing the child.

Art. 68, section 1 of the Constitution provides that “everyone shall have the right to have his health protected”. Section 2 of this Article guarantees that “equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation”.

Article 47 of the Constitution secure that “everyone shall have the right to legal protection of her/his private and family life, of her/his honor and good reputation and to make decision about his/her personal; life”. The state regulates many additional matters concerning the private sphere in the laws on marriage, divorce, separation, and reproductive rights. The above should be real along with the CEDAW convention and Convention on the Rights of the Child.

It is obvious that from the legal point of view the constitution guarantees the equal protection of the law independently if the violence is between intimate partners in private or between non-intimates in public. In case of failing to protect the person (so – it refers also to woman, and a child) who is abused at home, the state denies the person her/his constitutional rights. In accordance with Article 37 of the Constitution “anyone being under the authority of the Polish state, shall enjoy the freedoms and rights ensured by the Constitution”. The failure than to enforce laws prohibiting domestic violence violates all the constitutional provisions discussed above.

From the legal perspective the above statement is fully justified. Yet while discussing the law we cannot ignore the state of the prevailing mental attitude towards the issue. It is only from 1997 that the Constitution in Poland applies directly. A natural practice to look into the text of the Constitution and to use it is still missing.

The Constitution is treated as major guidance (which is correct), and the guidance only (which is incorrect). It is not yet the major filter of the action taken. Therefore it is also important to look into the specific provisions of the specific law to check the level of protection from violence.

The Polish Constitution applies directly, yet it does not regulate any of the criminal matter. There are countries with no specific legal provisions concerning the domestic violence, but it exists in Poland.

The Polish Criminal Code specifically addresses domestic violence cases. Article 207, section 1, provides the following:

Whoever mentally or physically mistreats a person close to him, or another person being in a permanent or temporary state of dependence to the perpetrator, a minor, or a person who is vulnerable because of his mental or physical condition, shall be subjected to the penalty of deprivation of liberty for a term of between three months and five years.

Two other sections of Article 207 of Polish penal code extend the proscribed prison sentence in specific situations.

Section 2:

If the act specified in section 1 is compounded with particular cruelty, the perpetrator shall be subject to the penalty of deprivation of liberty for a term between one and ten years.

Section 3:

If the consequence of the act specified in section 1 or 2 is a suicide attempt by the injured person, the perpetrator shall be subject to the penalty of deprivation of liberty for a term between two and twelve years.

The word “mistreatment” does not imply that the behavior must be repeated. It is however perceived that way. It is enough to be insulted in public place by stranger once to consider that the provision of criminal law got abridged. Yet a single incident in private place is hardly enough to bring the case under Article 207 of criminal code. This would have to be an aggressive act of violence that would result in serious injury (Zoll & Buchala, 1999).

Such an attitude can relate to two factors.

(1) The first factor relates to lack of recognition that despite the text of the law, domestic violence is indeed the crime, and not just a “family” matter.

In the pilot study conducted in 2000 among police and prosecutors, 21.8 percent of female police officers and female prosecutors favored a definition of domestic abuse that included a single act of battery that resulted in no serious health consequences for the victim. Only 13.6 percent of male respondents agreed (Domestic violence in Poland, 2002, MAFHR). Also when discussing the issue with judges and lawyers they are all of the opinion that court is not a good place when family is facing trouble, even when trouble means actual domestic violence.

(2) The second factor relates to attitude towards penalty. Despite the fact that criminal law provides the cafeteria of different penal measures, imprisonment is what is considered most, and what most often is considered as the only appropriate penalty.

This penalty however is felt to be not appropriate in cases of what is called “a domestic matter”. Criminal law seems not to fit “family” and “intimate” relations. And it is correct. Criminal law is not to regulate “family” and “intimate” relation. Yet the essence of family and intimate relation is that they must provide safety, respect, love, and observe the individual dignity of the person. When the behaviour exhausts the provision of 207 of criminal code it cease its intimate character and gained the criminal one. It seems to be simple, yet it is not read that way. The dominant pattern for the family, reads as – whatever happened in the family is family matter not a crime. It has nothing to do with the law and with article 207 of the criminal code that seeks to protect the family. It has a lot with the false notion of family protection that mixed up protection with want for an intervention. It has a lot to do with deficiency of political will to recognize the violence within close relation as crime and abuse of the law. Violence against women and children is a crime. Domestic violence is a crime. It is so in the criminal law. It is not so perceived in the practice, and it is therefore not treated, most of the time, as crime in the practice.

The tendency to blame a victim, not to believe the victim, and suggest she bring the shame by making the case public is wide spread. The silence from local authority, the silence from local priest, social worker and lack support from neighbours is also wide spread (Bojańczyk, 2004).

“You wash your dirt’s at home, and do not make it public” old traditional policy is still actual and valid. If child face the violence – it is child to blame for the child misbehaved. When a woman faces the violence she also is to be blame. “They deserved” believe is quite common among neighbours who often believe they have no right and no interest to interfere. The same attitude is quite characteristic for law and order agency (Nowakowska, 2004).

We all have civic duty to inform about the crime (art. 305 criminal procedure code), but the law and order agency are by the law obliged to act. The law in fact can actually play an important role to inform victims they can count for protection. It plays equally important role informing the perpetrator that his action will be punished. No action however also sends an important message. The law does not matter. Despite the formal protection the victim can

not count for help and protection and perpetrator can be almost sure that his action will go unpunished. No wonder, he does not change his way of doing.

Penalty provided in article 207 is not in fact limited to imprisonment only. In accordance to article 58 of the Criminal Code the court should consider first all the possibilities for other penalty than imprisonment.

Article 58. § 1. If the law provides for an option of the type of penalty, the court shall impose the penalty of deprivation of liberty without suspending execution thereof, only when no other penalty or penal measure would not serve the purpose thereof.

§ 3. If the offence is subject to a penalty of a deprivation of liberty not exceeding 5 years, the court, instead of imposing this penalty may impose a fine or a penalty of restriction of liberty, particularly when it imposes a penal measure at the same time.

This means it is not only a possible good will but also simply court obligation to look for adequate non-isolative measures. There are no conflict nor any antagonism to use measures like participation in training to control the aggression, and to work for social-public purposes except the one – such trainings exist but just in very few places in Poland.

It is not just article 207 of criminal code. In cases of domestic violence the prohibitions on assault that are not limited to domestic violence can also be applied (art. 156 and art 157 of criminal code).

In case of rape the article 197 of criminal code applies. It does not address the relationship between the victim and the perpetrator in the case of rape. As a result, any forced or with use of illegal threat or deceit sexual intercourse is prohibited regardless of whether victim and the perpetrator are married to each other.

In practice, however, marital rape is difficult to be accepted as a concept. The court commented the recent divorce case, where wife claimed to be raped by husband that *if the woman would try to have the good sexual relation with husband he would not need to use violence in marital sexual relationship. The fact that one party does not fulfil marital duties does not give the right to the other to withdraw from marital duties* (Decision of the Family Court in Wrocław, 2005). The decision was widely commented and contempt, yet it gave a very accurate illustration of the average opinion on wife's duties.

When it comes to the protection of minors there are special provisions to protect them and to secure the adequate procedure in case the violence takes place.

Article 23 of Criminal Procedure code states that: *In the case of an offence committed to the detriment of a juvenile, or in co-operation with a juvenile, or in circumstances which may be indicative of demoralisation of a juvenile or of a demoralising influence over a juvenile, the court, and in the preparatory proceedings the state prosecutor, shall inform the family court with the purpose of considering measures prescribed in the provisions on the proceedings in juvenile cases and in the Family and Custodianship Code.*

There are also provisions in criminal procedures code (art 275) providing for application of orders for protection and no contact orders.

Article 275. § 1 of criminal procedure code. As a preventive measure, the accused may be committed to the surveillance of the Police and, if the accused is a soldier, to the surveillance of the soldier's commanding officer.

§ 2. A person under surveillance shall be obligated to comply with the conditions set forth in the order of the court or state prosecutor. These obligations may consist in the prohibition of absenting himself from a designated area of residence, in his having to report to the agency under the surveillance of which he remains in specified time intervals, and to inform such an agency of any intention to absent himself and the time of his return, as well as other limitations on his freedom of movement necessary to assist the surveillance.

Similar possibilities are in the family code (art.109). The article 109 of the family code regulates the limitation of parental power over the child. It allows all kind of action with no

contact order included. The truth is that those specific words: *an order for protection* is not used.

There is no regulation describing how and for how long the protection order should apply. The law states however that the police has a right “to impose the limits of his freedom of movement necessary to assist the surveillance. This is, enough to use the protection order and decide in accordance with the need how long it should take place. It can be easily interpreted from the letter of the law, and in fact it is sometimes applied but generally the prevailing practice is restraining itself from applying the law in accordance with its spirit. It is perceived as non-existent.

It is a good indicator of the level of legal culture in the country. We could already at present use the protection order. Yet we practically do not do it. It is the case than, when the specific destruction of the law is needed. The good, advanced law is the law that is not casuistic, and the law that allow to use it in accordance with its spirit. **In case like violence against women and children because of high acceptance of that violence in the society it is necessary to introduce the specific clause which casuistically will regulate the institution of protection order. It is necessary to educate law and order agency, and to give clear instrument for victim protection.**

2.2. A critical summary of the key innovative, defining or successful features of the legislation

The Polish law is rarely described in positive terms, but in fact while comparing with other legislations in other countries? It does represent an important value. The Polish law has special provision on domestic violence whereas many countries do not.

Rape by the letter of the law is possible not only when force is included but also when it is done by illegal threat or deceit. It does not address the relationship between the victim and the perpetrator. It does not also address the sex (masculine or feminine). The law itself is very progressive, relates to male and female victims, and regardless of whether the victim and the perpetrator are in relationship with each other (marriage, same sex partnership, or concubine).

Described earlier in this text provisions on possible action to protect child can serve as an example for other legislations.

We actually could continue mentioning specific provisions, but even those here are enough to create, when there is commitment, a good background for the protection from violence.

The first Polish Ombudswoman professor Ewa Łętowska teaches that we have as much law and order in every day life as much we strive for. The text of law is like music notes on the paper – one has to play it to hear the music, the notes cannot do it by the mere existence. To play it the musicians has to feel it, understand it and interpret it well. The law should not casuistically try to regulate each possible situation for the situations are always more sophisticated and diverse than our imagination. Law is like a signpost that guards the law and order and should adequately affect the implementation policy. And the policy, one or another, is always in place.

During the discussion organized by the Polish Ombudsman on protection of women and children from domestic violence, Karol Napierstki, Country Chief prosecutor in reply to my claim that there is no political will to perceive and fight domestic violence as crime stated that prosecutors can not have any political will for they are obliged to be apolitical. (Platek, 2004 b). I do not think the Country Prosecutor was just playing with the words. I believe he

represented the popular lack of understanding that his own position, as well as the position of other criminal justice agencies, is in fact creating the very clear political demonstration of authority negligence to fulfil the obligation of CEDAW and laws including the country criminal code. I do believe the country prosecutor do believe the violence against women and children is another, less serious type of violence, and I do believe he really does not understand that he represents and shares with many other prosecutors a political issue and guarantee less and lower sort of law and order for women and children.

The policy that prevailed for years and ignored the domestic violence and had, “proprietary”, “reistic” attitude towards children is in fact an issue of state politics towards those less guarded.

One can find good illustration of that politics within the specific Supreme Court ruling. The Supreme Court ruling of August 6, 1996 is very characteristic. The Supreme Court stated that *the essence of an offence of domestic violence consisted in an act qualitatively different, than ordinary insult or bodily integrity. A judgment as to whether any act causing physical pain or severe moral suffering amounts to domestic abuse should not be based on subjective feelings of the aggrieved person but on objective evaluation. It is sure that no behavior may be recognized as domestic abuse within the meaning of Article 184 (later 207) of the Penal Code, unless it causes severe victim's physical or moral suffering or if abuse is reciprocal. To be classed as an offence under Article 184 (later 207), the scope of the perpetrator's behavior cannot be limited to either systematic or single incident, if it is not accompanied by excessive (beyond measure) intensity, severity, degradation and intent to commit acts violating values protected by law (such as bodily integrity, personal dignity or property). Domestic abuse, within the meaning of Article 184 (later 207), should be understood as an intentional act that constitutes an intense and severe violation of bodily integrity, inflicts moral suffering on the aggrieved person and is intended to torment, degrade, distress or otherwise harm the victim, regardless of the motive of such act .*

As Andrzej Dominiczak (Dominiczak, 2000) rightly observed the requirement that the inflicted suffering must be severe narrows the definition of abuse contained in the dictionary of the Polish language, which describes abuse as any act "causing physical or moral suffering". For the repeated acts of violence, even if they do not cause "severe physical pain", can be more harmful to the victim because of their repetitive character than a single, isolated wrongdoing, even if it causes severe moral or physical pain. It is also not clear, how - on the basis of objective criteria - one can judge whether inflicted pain has been sufficiently severe. People differ in their tolerance for pain. Moreover, the perpetrator, who usually knows the victim, can resort to such forms of abuse, which may objectively seem mild while causing actual severe suffering. It is also strange, that in the opinion of the Supreme Court, a violent act may not amount to the offense of domestic abuse simply on the basis of its repetitive pattern. According to the Court, it is also required that violence is intense, degrading, and intentional and causes severe injury, "beyond measure". Ordinary insults or assaults do not constitute domestic abuse and may be prosecuted only privately.

Dominiczak pointed out also another aspect of this Supreme Court's ruling that cause the concern. The Court decided that an act of violence is not to be recognized as domestic abuse if it is reciprocal. Although all studies and statistics on domestic violence show that 98% of perpetrators are men, in some exceptional cases women do fight back. Should such reciprocity be considered as a sufficient reason to release both parties from any kind of criminal responsibility? This way of thinking would lead us to the conclusion that the perpetrators of any crime would not be held criminally responsible if they were at the same time the victims of crimes committed by their victims (Dominiczak, 2000).

When it comes to child welfare in the judicial resolution of 1953, the Supreme Court expressed the opinion, that “the welfare of the child is the fundamental starting point while

interpreting the legal regulations concerning the relationship between parents and children. (Supreme Court jurisdiction, 1956, item 32). The protection of personal inviolability and in fact personal integrity and respect is in the article 217 § 1 of criminal code. It states that *whoever strikes a human being or in another manner breaches his personal inviolability, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.*

The law does not exclude children from that protection, yet the practice does. It is accepted that castigation of the minors is the extra-legal, established by the tradition (sic!) counter-type of the action prohibiting the violation of physical inviolability (art.217 of the CC). Therefore the violation of physical integrity within the framework of the castigation of minors is not considered to be a crime

Self-defense is not excluded by the law from the cases of violence against women and children. It is however excluded by the practice. The same is with inviolability of children.

No one suggests putting parents who spanked the child in front of criminal court. It does not however change the fact that extra-legal deprivation of proper legal protection of women and children is very present in the Polish system. And it has nothing to do with the law, for the law is in place. The fact it is not used is because of the extra-legal facts.

Considering Judith Herman and Pierre Bourdieu analysis of male dominance we can see the civil law as the tool to solve in the civilized way the problems faced by equal to each other males (Herman, 1998; Bourdieu, 2004). Criminal law, following Michel Foucault analysis has the first role to demonstrate the strength and power of authority. (Foucault, 1993). Without authority recognition of the domestic violence as the issue immediately related to the text of the criminal law –it will stay just as the text in the criminal law. In the most of the cases women and children are the victims in the domestic violence cases. Without equal legal protection of male, female and children domestic violence will continue to be the subject of intellectual debates and conferences.

Therefore I claim that we have the law that allows the policy and practice of full protection from violence. The way the law is executed however are the best tests of the attitude towards the law and order and the best indicator of civic society. At present it indicates unequal legal and social position of women and male, children and adults. Women and children are in fact less guarded and guarded with less caution, care, and attention. I suggest the reason is that they are socially weaker. In case of domestic violence individual rights to life, health, freedom and bodily integrity are for law and order agencies of only secondary concerned.

It is not so in case the abuser does abuse a policeman who comes with intervention. There are cases when abuser is finally apprehended for he attacks the policeman. The same attack on child or his close partner (most often – woman) does not meet the same reaction. In cases of domestic violence the police and prosecutors are using “invented” procedures that are not provided by the law. It is used to discontinue and dismiss the case. Withdrawal of complains, annotation that parties reconciled, the lack of consent of the victim to prosecute, all those procedures used as an excuse to, in fact, misuse the law, are not provided and expected by the law when domestic violence is at stake.

It is an offense where public prosecutor is obliged to prosecute and the victim consent is of no relevance here.

It is not the case when stranger hit a stranger in the public place. The child beaten up in the street by her/his parents trigger most often no reaction. Such reaction though is almost certain when stranger hit a stranger. The lack of proper intervention is done under disguise of family protection. It does not protect family – it in fact, ruined it, so the real reason is elsewhere.

In my opinion the intrinsic lack of male and female equality within the society and lack of adequate respect for women and children should be strongly considered as the cause of the issue.

It is also lack of other than criminal possible modes of social control and response to violence.

F.H. McClintoc adopted and modified model presented by D. Black in *Behavior of Law* (Black, 1976). There are different possible modes of social control model. One of them is penal criminal justice model. Medical therapeutic, Educational, Compensatory or Conciliatory modes are also possible. To be possible they must be available.

If medical therapeutic mode is available than the standards we tend to is normality, identified of deviant or problem situation is called patient or client and solution is seek through help and treatment.

In educational mode education is the standard we seek, ignorant, uneducated/incompetent person is perceived as identified problem, and solution is seen through standard certification and/or recognition of competence.

In compensatory mode the person who has done something wrong is perceived as debtor. The payment (in cash or kind) is perceived as solution of the problem.

Conciliatory mode perceives the conflicts as the problem, and solution to be reached with disputant is seen through resolution of conflict.

There is, of course, also penal criminal justice mode possible. There the standard is neither normality, nor education, obligation nor harmony, but prohibition. The person responsible for the problem is named and perceived as offender and punishment serves as solution.

If all different modes of social control are available and works equally efficient than the probability that penal criminal justice mode is to be overused should be minimal. Yet when the only functioning mode of social control model is the penal criminal justice alone than the tendency to name each occurrence, as crime is quite natural. When nothing else is available than the tendency to use what is available seems to be quite natural.

It is therefore important not to concentrate on penal law as a solely tool to solve the problem of violence but to develop and equip other modes of social control and social support of law enforcement.

So to summarize - we have the provisions in criminal law that could serve as an example for other legislation as far as criminal law protection from violence is concerned. Yet, despite of that we do not follow that very law when violence reaches women and children. The same event is dealt very differently when happened between not related people in comparison to when it takes place within the family circle. The law does not provide for such differences. With far over 100 000 registered by the police cases of domestic violence, not even one fifth ends up with legal consequences provided by the text of the law. Is that than this law, a protection or rather a barrier?

The Polish prosecutors as well as courts often treat domestic violence as a minor crime; courts pronounce low verdicts with no proper obligations imposed on the perpetrator and often dismiss cases. And it is enough to have the basic knowledge on domestic violence dynamics to know that the burden to undertake the action should never be put on the victim, and that in that case more than in other victim's safety should be guaranteed by the state in the very first place.

Because of the policy that in fact ignores the violence in the close relations the level of knowledge about domestic violence and violence at all is not sufficient among both judiciary and criminal justice organs. Should we then have a special statement that prosecutors and police are not allowed to invent the procedures and misuse the law? It sounds ridiculous and it

is ridiculous. It is self-understandable that police and prosecutors as well as judges are to follow the law.

Yet we have the situation when law is constantly omitted. The lack of proper possible mode of social control and response to violence other than the penal one plays here also an important role. The law is than not a barrier, but it does not serve as protection.

It is due to discriminatory reason. Polish women feel discriminated (Słojewska, 2005). The newest European Union report on situation of women in new member countries stress the lack of equality in the male and female status. 58 percent of women and just 35 percent of men admits it. Poland does accept the standards imposed by international bodies and European Union, but as far as now they stay mainly on the paper. It might be due to long process of women marginalization. It helped create the male dominated perspective on notion of what is “good” and “proper”. The case of shelter for women and children, victim of domestic violence can serve here as classical example of that dominance (Słojewska, 2005).

We talk a lot about shelter for women and children. Sometimes, especially female non-governmental organizations stress the shortage of shelter for women and children. Sometimes, especially governmental agencies, show pride that there are shelter for women and children in Poland, and sometimes prime-minister even pays the visit there. There is no doubt hidden from abuser places are needed but the rule should be that shelter are not for victims of violence, but if we to have it, the actor, the perpetrator should have to move out from the place. Yet the idea that the safety should be guarantee by the state in the victim dwelling and not in the shelter is still just an idea, not a practice.

The law itself will not bring the necessary changes. We also have to be aware of those cultural processes that strengthen the patriarchal and discriminatory practices.

The proper infrastructure and operational rules and acts stipulating the very precise action like conditions and length of protection order and consequences of breaches of that order are missing.

How far the legal text can help the proper application of the law? And when the existed law is not implemented - can additional legal provision help change it and make it more workable?

There are efforts to change the situation and bring sensitivity among law and order agencies to the issues of women, children protection from violence. The positive cooperation between universities and criminal justice organs and between non-governmental organizations (ex. Center of Women Rights, Polish Association for Legal Education) and police, prosecutors, judges and probation and prison officers is worth mentioned. It is already several years where appropriate trainings are taking place, the issue of violence against children and women is now present in media and we can talk about presence of the public debate on those issues.

3. Protection from domestic violence law

When existing law does not operates well or at all, there is a tendency in Poland to draft a new law. The more of the same hardly ever change the practice so again after sometime another new law is drafted and accepted by the parliament. We have a tendency to mix up the fairy stick with the law. Yet the law does not work as fairy stick.

I argue here that the domestic violence is ingrained in the inequality and discrimination patterns. As the consequence there is not enough commitment and political will to see it as the problem and to fight it back. The challenge we face is not only to make law and order agency aware that violence against women and children is a crime, and that domestic violence is a crime. The challenge is to comprehend and internalize that notion.

Yet it would be too simple to state that there is one line of arguing among different governmental bodies. It would also not be fair or true to state that government and Parliament as the whole keeps one line of neglecting the issue. The Parliamentary Women Group, and many, mostly from the left side PM members are for years eagerly advocating and working in favor of women, and children protection against violence. In fact they are committed to guarantee proper protection from violence. Similar situation is in government.

There is evidently no unity within the government and no unique line reaction to domestic violence.

The Prime Minister' Plenipotentiary for equal rights of men and women, Izabella Jaruga-Nowacka, started already in 2003 in cooperation with non-governmental organizations to draft the law to combat the domestic violence. She continued the work as deputy Prime Minister together with Magdalena Środa, the new Plenipotentiary. The draft prepared by the Jaruga-Nowacka reflected the understanding of the need of immediate action when domestic violence takes place. They did agree with the opinion that while dealing with violence we treat the subject narrowly enough not to be capable to build the adequate social policy oriented on prevention. Therefore the new draft of the law on Protection from domestic violence is debated in the Parliament.

The draft that reached the Parliament in January 2005 did not keep much of the nature, text and spirit of the first draft prepared by Jaruga-Nowacka, Środa, and non-governmental organizations. The text was strongly reworked, rephrased, modified and simply changed during the governmental drafting. It perfectly all right illustrates the state of mind of vast majority of people in government but it does not fit the goal of protection from domestic violence.

I do not think it is worth to discuss it in details here for it is still in the process of Parliamentary procedure. Two moments, however are significant enough to present them here. One for it is a good illustration of my argument that there is general approval of the lower legal protection when woman or child is a potential victim. The second one refers to Parliament's attitude toward children.

The article 9 of the draft of the Law against the domestic violence provided that when there are in case of domestic violence grounds to use the temporary arrest the court can instead of temporary arrest use the police supervision and impose protection order obliging the indict person to leave in the time prescribed by the court the place he lived with the victim and move to another specified place. The patronizing and discriminating nature of such proposed clause is evident to anybody who understands that where there is ground to use the temporary arrest, the temporary arrest should be used. There is no good reason to treat the cases of domestic violence differently and agree for the lower legal standards in those cases. No drop policy prevailing in the law should not be excluded in those cases. The legislator however knows far too well that prosecutors do not ask for temporary arrest in domestic violence cases and judges even if they do, hardly ever tend to apply it. By proposing that specific clause legislator tries to adjust to the practice. Since the law is not used that something else is invented that would help the victim. It is totally out of law and order rules, it degrades the sense of law, yet the legislator well aware of the hopeless practice seems to look for solution. It is interesting to notice that it is perceived as success rather than in fact what it is – a failure to implement the law.

The situation is equally interesting when it comes to protection of children. My argument is that children are deprived of adequate legal protection, for neither the law, nor the practice is oriented on the development open for building up self-esteem, respect, responsibility and self-confidence of a child.

The draft stirred hot discussion if it is any need for any additional regulation on protection of women and children from violence. The hottest debate did not refer to women

issue but to the proposed passage where parental rights and chastisement were supposed to be executed without abuse of dignity of minors. Almost aggressive, negative reaction to such phrasing indicates the actual problem that we face in Poland to protect children properly both as far as legislation and practice is concerned.

Today, in Poland, the allowance of corporal punishment prevailed. Public opinion research leaves no doubt that corporal punishment and so-called physical castigation are commonly used. Many people cannot even imagine that children can be brought up without such beating. The borderline between beating a child ‘for their own good’ and to ease one’s own frustration is very fluid. Family relations based on emotional ties cannot be fully codified and ethical and moral norms operate here more forcefully than the normative content of the law. However, those customary and ethical norms are formulated under the influence of the specific legal regulations, as we have demonstrated earlier. It will suffice here to observe that a relationship exists between the lack of clear permission for corporal punishment and the use of physical violence as an educational method in the family and guardian code, and the simultaneous clear permission for the same conduct expressed in the criminal code.

For physical and moral tormenting, the criminal code in the article 207 envisages the punishment of 3 months to 5 years. However, this is not synonymous with the legal prohibition of corporal punishment against the child.

The fundamental value that is protected in the family law regulations is the so-called “welfare” of the child. Such is a consistent position of the jurisdiction. In the judicial resolution 2 of 1953, the Supreme Court expresses the opinion, that “the welfare of the child is the fundamental starting point while interpreting the legal regulations concerning the relationship between parents and children.” (Supreme Court Judgment, 1956) .

Yet, as I already mentioned castigation of minors is perceived as extra-legal, established by tradition counter-type of the action prohibiting the violation of physical inviolability. The child is a person, so logically it also prohibits castigation of minors. It is so, however only in theory and in logic. In practice it won’t be a case. When a parent castigates a child it is not perceived as illegal action, but as an educative parent’s action. Therefore, the violation of physical integrity within the framework of the castigation of minors is not considered to be a crime. Such castigation is an extra-legal that is, not envisaged in the regulations of the criminal code, under circumstances that exclude criminal liability. ‘The justification of it rested initially on the conviction that corporal punishment was necessary for their proper upbringing and that it is an activity that is socially beneficial. Today, the criminal law tolerates the castigation of the minors not as an educational right of the parents, but rather as a way of accommodating a certain social fact (Gardocki, 1998).

It is so despite that we know that the application of physical measures in upbringing is quite harmful. Humiliation and violence do not serve upbringing—they are its contradiction (Mika, 1969). Criminal law is continuing a tradition of violence by accepting physical castigation, and permitting the use of physical force in family relations. In this situation, having legal measures counteracting physical abuse of children in mind, we will try again to recall foreign experiences.

We have examples that the same issue can be dealt with differently. On July 1, 1979, the law prohibiting physical castigation of children came unto power in Sweden. Introduced next into the family code (Föräldrabalken) it stipulates in the par. 1 that ‘Child has the right to care, safety and good, proper upbringing. Child is treated with respect due to each individual. It is prohibited to use corporal punishment against children as well as any other humiliating methods.’[SFS 1949: 381 Föräldrabalk (1949: 381)]. This regulation exists in logical relationship with Chapter 5 of the Swedish Criminal Code, which in Paragraph 5 stipulates that inflicting pain and causing harm will be punished as the violation of physical inviolability or offence.

When, in 1977, Sweden introduced the ban on child beating, 70% polled citizens' expressed negative attitude towards such a regulation. Twenty years later, in 1997, there were only 10% opposed to the bill. Those numbers show how much the average mentality has changed under the influence of the law. At the same time, other European countries such as Austria, Denmark, Italy, Norway, Finland, Cyprus, Latvia and Italy have introduced a similar legal ban on child beating (Miller, 1999).

Yet notwithstanding individual person and organizations efforts to follow the Swedish example, Poland did not join the following Swedish example countries. In turn, the Polish judicial practice strengthens the continuation of child abuse by the approval of castigating, which all too often, is the veiled term for beating and corporal punishment.

4. Summary

When our car is stolen, or our apartment is burgled or our money pilfered or our ID taken away, we immediately report that fact to the law enforcement agency, we get advice from our friends, we tell about it to our neighbours. We do not hide that fact and we share the information of the event with a deep sense of being harmed.

It is different with child and women abuse. This phenomenon is taboo. It is not 'appropriate' to discuss it; it is 'a shame' to talk about it. Why? According to the generally recognized ethical and legal norms, as well as religious ones, parents, caregivers, and adults in general, are obligated to provide a child with care and love (also respect, although that is less obvious to many). Spouses, husbands, partners are also not allowed to abuse their female partners.

Harming a child or/and woman (as well as man) is the evident violation of social, legal, moral, ethical, religious norms. It is black mark on the adults, and it sheds dark light on the community that tolerates such behaviour. It is in sharp contrast with the view according to which the family as the fundamental social unit is almost sacred, and the parents and guardians, as children's educators, know best what is good for them. It is still a common stereotype that children belong to the parents or guardians and are their property.

Until recently, we definitely opted for silence and believed that what was not spoken about, or was not named – did not exist. 'Years long silence and marginalization of the problem of women and child abuse in our country poses an additional barrier in making a diagnosis or estimating the extent of the problem. The minimal interest in the problem of women and child abuse results in not only the dysfunctional system of help but also in the lack of evidence and statistics concerning those abuses and a small amount of scientific research aiming at the analysis of the range and characteristics of various forms of women and child abuse' (Nowakowska & Jabłońska, 2000; Sajakowska, 1995).

It would be a simplification if we blamed the past system for all the wrongdoing. The roots of the problem reach much further in time. At the same time, we still miss the proper public debate concerning the issue. We have the law but we also miss the adequate policy.

Public debate on women and children protection from violence and from discrimination cannot be considered as an assault against the family and an attempt to disband the basic social unit. Such an attitude not only makes the proper diagnosis difficult. It actually promotes the violence.

The law is a barrier when is supposed by mere existence to solve the issue. It might however serve as the protection if it is accompanied by adequate policy.

To summarize it finally - such a policy needed in Poland (requires?) to:

- Treat domestic family violence, and violence against women and children as crime involving uncompromising, assertive and thorough intervention;
- Emphasize safety of the victim, and accountability of the perpetrator;

- Offer procedures for comprehensive protection order for victims;
- Guarantee the safety for the victim, and the temporary eviction of the perpetrator;
- Set forth ways for authority and local communities to coordinate efforts to identify, intervene, and prevent domestic and family violence and violence against women and children.

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