Selected Legal Aspects of Counteracting Domestic Violence

PRAWO KARNE

Selected Legal Aspects of Counteracting Domestic Violence

edited by
Michał Poniatowski
Nina Maciejczyk-Krysiak
Julia Starybrat

WYDAWNICTWO INSTYTUTU WYMIARU SPRAWIEDLIWOŚCI | **Warszawa 2024**

The Integrated System of Domestic Violence Prevention is implemented within the framework of the Justice Program, financed by Norwegian and national funds.
https://eog.gov.pl https://eeagrants.org/

REVIEWERS *prof. ucz. dr hab. Marcin Wielec*
dr Jerzy Słyk

TRANSLATION AND PROOFREADING *Lingua Lab*
TYPESETTING *AT ONCE*
COVER DESIGN *Marta Turska AT ONCE*
PHOTO Paul Delaroche, *Ejecución de Lady Jane Grey*
NATIONAL GALLERY DE LONDRES, 1834

ISBN 978-83-67149-68-6

WYDAWNICTWO INSTYTUTU WYMIARU SPRAWIEDLIWOŚCI
ul. Krakowskie Przedmieście 25, 00-071 Warszawa
SEKRETARIAT tel.: (22) 630-94-53, e-mail: wydawnictwo@iws.gov.pl

BOUND AND PRINTED BY *„Elpil", ul. Artyleryjska 11, 08-110 Siedlce*

Table of content

Preface

The phenomenon of domestic violence has a complex and multidimensional character. It can include a broad spectrum of behaviours that occur, in various forms, in interpersonal relations, whereas as the society develops and civilisation progresses along with it, determining an exhaustive catalogue thereof is basically impossible. Domestic violence can affect not only family members in the institutional sense, but also people living together in a household. Violence often affects children who, by virtue of being children, are not able to effectively protect their rights on their own.

Domestic violence leads to the infringement of basic human rights, i.e.: dignity, bodily inviolability and integrity, privacy, and other values included in the catalogue of fundamental rights, i.e., the sense of security. Counteracting this phenomenon is a complex process, the effectiveness of which requires multidirectional measures and multilateral cooperation of state as well as private entities, bodies, institutions and units. The normative regulation in the scope of domestic violence prevention instruments in Polish law has a dispersed character. Due to the significance of effective prevention of domestic violence for individuals, the society and the state as a whole, normative measures undertaken in this area are extremely important.

This monograph is the result of research efforts made by law theorists and practitioners. It includes studies on broadly understood problems diagnosed by

the authors within the analysis of the subject matter of counteracting domestic violence from the perspective of various fields of law, including constitutional law and axiology of human rights, substantive penal law, procedural penal law (with a particular consideration of court and prosecutor practice), administrative and family law. Each chapter provides the most comprehensive image possible of the respective analysed subject matter.

The analysis of the issue constituting the subject of the publication was conducted on the basis of valid statutory regulations as well as on the judicial decisions of the European Court of Human Rights, the Constitutional Tribunal of the Republic of Poland, the Supreme Court of the Republic of Poland, courts of general jurisdiction and views of the doctrine. Furthermore, legal solutions adopted in the scope of counteracting domestic violence in selected European and non-European states were presented, which allowed extending the perspective concerning possible legal solutions and thus constitutes an additional value of the study.

This monograph presents not only the normative definition of the concept of domestic violence, but also direct and indirect measures for counteracting this phenomenon resulting from the valid statutory and non-statutory regulations. The above allowed an objective and critical assessment of the entirety of legislative solutions binding in Polish law.

The source of inspiration for the discussed publication was the work conducted under the research project titled *Zintegrowany system zapobiegania przemocy domowej* (*The Integrated System of Domestic Violence Prevention*) implemented within the framework of the Operational Program *Sprawiedliwość*. We hope that this monograph will not only become an enjoyable read for everyone, but will also inspire their own interpretations and conclusions.

dr hab. Marek Bielecki, prof. ASzWoj
WAR STUDIES UNIVERSITY

Counteracting domestic violence in the perspective of constitutional and human rights axiology

1. Introduction and terminology

The phenomenon of domestic violence has been present since people started living together in common households. Exploitation of the weak and forcing one's own will on them clearly shows atavist aspects of human nature. The dominance of the head of the family over other household members is rooted in the ancient juridical tradition.

In Roman law, the institution of *patria potestas* (paternal authority), vested solely in citizens, was binding. The scope thereof covered, among others, paternal authority over children and remote descendants, which consisted in both taking care of them as well as ensuring order in a family. The status of children and grandchildren subject to the father's authority was often compared to the situation of slaves, with a difference that a slave was treated as a thing, whereas a child was treated as a person. A father could sell a child that was under his authority and had the right to reprimand those subject to him. The extent of this right were usually defined as *ius vitae ac necis* (the right to life and death). However, the gravest punishments had to be preceded by a home court. In the archaic period of the Roman state (800–300 BCE), the murder of a child younger than 3 years old could go unpunished. Also, if a newborn infant was born deformed or with a disability, the father was obliged to kill his newborn

after having shown the baby to the nearest neighbours. He was obliged to do so on the basis of the Laws of the Twelve Tables, and if he failed to comply, the child was killed by the 'authorities'.[1] Cruelty towards family members was, therefore, a kind of obligation and not a condemned and punishable act. Christianity introduced new values to the institution of family life. Jesus' teachings differed from the Old Testament model in which the patriarchal model of marriage and parenthood was emphasised. Jesus stresses the unity of a marriage, emphasising its integrity and inseparability, as well as stressing the dignity of a woman (Mk 10:7).[2] In the Epistle to the Ephesians, St. Paul underlines that marriage was elevated by Christ to the rank of a sacrament, and that spouses should live together, be faithful, and love, respect, trust, and help each other (Ef 5:25–33).[3]

Children, as the weakest in a family, were and still are at a particular risk of what violence there may be. In Poland, the need to protect them from punishment by parents and legal guardians was noticed relatively late, in the second half of the 20th century. As emphasised in the subject literature, until the 19th century, the selection of corrective measures used by parents was very wide. Only the 19th century family law codifications referred to these issues. In each of them, disciplining disobedient children with physical punishments was allowed, although it slightly differed in the details.[4]

The first attempt to provide an institutional dimension to the protection of children from abuse was at the end of the 18th century in the USA. In 1874, the New York Society for the Prevention of Cruelty to Children was founded. This organisation was established after a girl who was only a few years old, who was regularly beaten and maltreated by her mother, was helped by the American Society for the Prevention of Cruelty to Animals. In Poland, the necessity to cease using physical punishment against children was underlined by, among others: Janusz Korczak, Helena Radlińska and Józef Pieter. However, it was mainly thanks to Alice Miller – a Polish-born, Swiss psychologist – that it the

---

[1] A. Nowak, *Pojęcie władzy ojcowskiej w rzymskim prawie kanonicznym,* "Studia Prawnoustrojowe" 2002, No. 1, pp. 40–43.

[2] T. Twardziłowski, *Zarys problematyki rodzinnej w Biblii*, [in:] *Instytucja rodziny wczoraj i dziś: perspektywa interdyscyplinarna*, t. 2: *Społeczeństwo i kultura*, (eds.) J.K. Stępkowska, K.M. Stępkowska, Lublin 2012, s. 117.

[3] *Ibidem*.

[4] B.K. Truszkowski, *Karcenie dzieci na ziemiach polskich. Regulacje prawne od XIX wieku do dziś*, "Miscellanea Historico-Iurdica" 2020, Vol. 19, No. 1, pp. 41–87.

use of physical punishment was criminalised.[5] After Poland regained independence in 1918, codification and unification of the legal system started. However, the family law was not yet unified and, in the inter-war period, the regulations of the occupying powers were in force.[6] Nevertheless, it cannot be stated that the legislator left domestic violence victims 'without any care'. The benchmark for entities applying law could have been, for instance, the Constitution of 1921.[7] In Article 96 it was underlined, among others that all are equal before the law, and Article 103 protected the youngest citizens of the Republic of Poland. According to the disposition provided therein, children without sufficient parental care, neglected in terms of education, had the right to care and assistance of the state.

Chapter XXXV of the Penal Code of 1932,[8] was devoted to offences against life and health. Among others, dispositions expressed in the following Articles were in force: Article 235 (deprivation of sight; hearing, speech; the ability to procreate; causing a permanent disability; contributing to a serious, incurable disease; a life-threatening permanent mental illness or permanent incapacity for work), Articles 236 and 237 (bodily injury, disturbance of health), Article 239 (beating [hitting] or other violation of bodily integrity), Article 242 (putting someone at a direct risk), Article 243 (abandoning a person toward whom there is a duty of care or surveillance in a situation of a direct risk to their life), Article 246 (physical or moral abuse of a person below 17 years old or an incapacitated person remaining in a permanent or temporary dependency relationship with the perpetrator). Furthermore, it is worth mentioning that in 1929 the Komisja Kodyfikacyjna (Codification Commission) presented a draft of marriage law, which was not, however, adopted.[9] In the light of the proposed solutions, spouses held common parental authority and each of them

[5] M. Procner, *Dzięki niej prawnie zakazano bicia dzieci. Kim była Alice Millller?*, Twoja Historia, 12.03.2022, https://twojahistoria.pl/2022/03/12/dzieki-niej-prawnie-zakazano-bicia-dzieci-kim-byla-alice-miller/ (accessed on: 30.07.2023).

[6] More details in: A. Mezglewski, A. Tunia, *Wyznaniowa forma zawarcia małżeństwa*, Lublin 2007.

[7] The Act of 17 March 1921 – the Constitution of the Republic of Poland (Journal of Laws of 1921, No. 44, item 267).

[8] Regulation of the President of the Republic of Poland of 11 July 1932 – the Penal Code (Journal of Laws of 1932, No. 60, item 571, as amended).

[9] Draft of the Marriage Law adopted by the Codification Commission on 28 May 1929, https://www.bibliotekacyfrowa.pl/dlibra/doccontent?id=35389 (accessed on: 27.07.2023).

had equal rights and obligations toward children (Articles 41 and 42 of the draft of marriage law).

After World War II the possibility of using physical punishments against children was upheld in the decree of 22 January 1946 *The Family Law*.[10] Pursuant to Article 25 par. 2, parents could reprimand children under their authority, however, without a detriment to their physical or moral health, and within upbringing norms. Later versions of family codes did not uphold the aforementioned norms; however, they did not explicitly prohibit using physical punishment. Nevertheless, it should be emphasised that the ban on violating bodily integrity, also family members' bodily integrity, regulated in the provisions of the Penal Code of 1932, was upheld in later penal codes. The Penal Code of 1969 regulated these issues in Chapter XXI titled *Offences Against Life and Health,*[11] and currently, the binding code of 1997 refers to these subject matters in Chapter XIX.[12] On the basis of the amendment of the Family and Guardianship Code in 2010, Article 96 (1) was added, pursuant to which people exercising parental authority and taking care or exercising custody of a minor were forbidden to use corporal punishment.

Regulations included in many legal systems allowed not only corporal punishment of children, but also wives. As underlined by F. Ciepły, in British case law a husband could punish (whip) his wife with a reasonable item. Over time, it was specified that a rod 'should not be thicker than a thumb.'[13] The first regulations forbidding the beating of women were introduced in Massachusetts Bay Colony, in 1641, however, the brutal treatment of women was tolerated for a very long period of time.[14] It should be added that in 1918, pursuant to the Decree of the Chief of State, women were given active and passive right to vote.[15]

[10] Decree of 22 January 1946 – the Family Law (Journal of Laws of 1946, No. 6, item 52).

[11] The Act of 19 April 1969 – the Penal Code (Journal of Laws of 1969, No. 13, item 94, as amended).

[12] The Act of 6 June 1997 – the Penal Code (consolidated text of Journal of Laws of 2022, item 1138, as amended).

[13] F. Ciepły, *Partnerstwo w rodzinie a prawnokarny kontratyp kształcenia małoletnich*, [in]: *Partnerstwo w rodzinie*, (ed.) J. Truskolaska, Lublin 2009, p. 257.

[14] *Massachusetts Body of Liberties. Synopsis of the history of the Massachusetts Body of Liberties*, available at: https://www.mass.gov/service-details/massachusetts-body-of-liberties (accessed on: 30.12.2022).

[15] Decree on the election ordinance to the Legislative Sejm of 28 November 1918 (Journal of Laws, No. 18, item 46).

It was one of the first of this type of regulation in Europe where rights of both sexes were made equal. Despite the existing ban on violating bodily integrity, in 2004 a peculiar judicial decision was issued by the District Court in Wrocław, in which the court recognised violence and rape as an admissible form of cohabitation. Rape was qualified as evidence that the marriage has not been irretrievably broken, which is the only premise for dissolution of a marriage provided for in the Family and Guardianship Code. If, according to the court, 'the cohabitation was as good as claimed by the defendant, the plaintiff would not have to use violence…'[16] The court did not notice that on the grounds of binding provisions of the Penal Code, as well as in the light of judicial decisions and doctrine opinions, rape could happen in a marriage.[17] Despite consecutive new initiatives both of the legislator and various types of organisations, the problem still exists, as is explicitly confirmed by Police statistics. In 2021 alone, there were almost 80 thousand cases of suspected domestic violence. Women are in the majority of such cases 55,000 cases. Moreover, 11,000 domestic violence suspicions were reported with regard to children, whereas as many as 9,000 proceedings were conducted with regard to men. Nonetheless, this data does not present the scale of the phenomenon, but only shows measures undertaken by the Police in accordance with the "Niebieska Karta" (*Blue Card*) procedure. Interventions of other entities authorised to counteract domestic violence were not included in the research. The reported cases included: 50,002 cases of physical violence, 70,611 cases of mental violence, 1,048 cases of sexual violence, 1,548 cases of economic violence and 18,200 cases of other types of violence.[18] Furthermore, as underlined by the creators of the Krajowy Program Przeciwdziałania Przemocy Domowej na rok 2023 (National Programme for the Prevention of Domestic Violence for 2023), family violence in Poland and in other countries is a social problem that requires comprehensive measures aimed at counteracting this

[16] Judgement of the District Court in Wrocław of 25 October 2004 (XIII RC 2865/03 – unpublished), text as in: P. Kruszyński, K. Wlaźlak, *Przeciwdziałanie przemocy w rodzinie na tle porównawczym,* [in]: "Prokuratura i Prawo" 2017, No. 5, pp. 40–41.

[17] More detail in: A. Michalska-Warias, *Zgwałcenie w małżeństwie. Studium prawnokarne i kryminologiczne*, Warszawa 2015.

[18] Family Violence – data as of 2012, https://statystyka.policja.pl/st/wybrane-statystyki/przemoc-w-rodzinie/201373,Przemoc-w-rodzinie-dane-od-2012-roku.html (accessed on: 30.12.2022).

phenomenon.[19] While diagnosing domestic violence, authors of the document also emphasise that it is significantly influenced by the predator's inheritance of a model of violence from his/her background. Children observe adults and learn their behaviour, at the same time believing that the use of violence is one of the ways to solve conflicts. Justifying the introduction of the Programme, the creators refer to numerous diagnostic studies conducted in previous years. In 2014, upon the request of the Ministerstwo Pracy i Polityki Społecznej (Ministry of Labour and Social Policy), the scale of family violence among adults and children was diagnosed, and violence victims and perpetrators were described and characterised. The research shows that 24.7% of respondents declared that in their lifetime they experienced one of the 4 types of violence (physical, mental, sexual, economic). The most frequently reported form of violence was mental violence.[20] Further research, conducted in 2019, concerned Poles' awareness of the phenomenon of family violence and the mechanisms of the experiencing of violence. Results show Poles' growing awareness of the analysed phenomena. However, differences in perceiving violence by women and men were also noted. The question whether parents have the right to hit their children was answered positively by 13% of men and 5% of women. It is also thought-provoking that the question whether those who experience violence accept their situation was positively answered by 40% of respondents. Research conducted in 2021 concerned diagnosis of the phenomenon of family violence against children. According to respondents, the most common form of violence against the youngest family members was mental violence. The next-most-reported were negligence and physical violence. As underlined by the authors of the conducted research, over the years studied, the percentage of children below 18 years of age against whom parents or carers use spanking as a parenting method, decreased. In 2021 this indicator amounted to 38%.[21] Therefore, it is clear that it is still necessary to undertake measures aimed at preventing instances of the abuse of family members or other people living in a common household.

[19] Resolution No. 248 of the Council of Ministers of 9 December 2022 on the establishment of the National Programme for Counteracting Family Violence for 2023, 9th Official Gazette of the Republic of Poland of 2022, item 1259.

[20] *Ibidem*.

[21] *Ibidem*.

For the transparency of further deliberations, several terminological notes should be made, since there is a certain dichotomy in the scope of used terms. The terms: "domestic violence" and "family violence" are used interchangeably to describe the phenomenon discussed herein. Both terms also have legal definitions included in normative acts. Nevertheless, firstly, the scope of the term "violence", which is crucial for the characterised institutions, should be defined. *Słownik języka polskiego PWN* (*Polish Dictionary PWN*), defines violence as an advantage used to get one's way, to force someone to do something or illegally impose power on someone.[22] In the subject literature, a significant difficulty with defining violence due to continuous changes in the social situation is underlined.[23] What the term "violence" meant for the society of 100 years ago, is today a reprehensible, condemnable behaviour. Violence can be understood as interpersonal relations based on the perpetrator's use of prevalent force. Violence is aimed at causing damage, pain or suffering, or humiliating the victim. A perpetrator consciously puts the victim at a health and life risk. Violence can be of an instrumental, motiveless, collective, or individual nature. What is important, it is not a single action but a cyclical action with a tendency to recur. J. Helios and W. Jedlecka distinguish three stages of violence. At the first stage, tension and hostility are growing in the perpetrator. Everything irritates them, while the victim is making all efforts to avert the threat. At the second stage, action is taken. The victim is injured physically and mentally. At the third stage, after taking out his anger on the victim, the perpetrator, wanting to avoid punishment, looks for a way to explain and to justify his behaviour.[24]

The phenomenon of violence, regardless whom it is targeted at, can take on various forms. In the subject literature the following are most often enumerated: physical, mental, sexual and economic violence.[25] Actions taken by the perpetrator are related to using physical force and usually consist in: pushing, pulling, hitting, kicking, burning with a lit cigarette or choking. It is impossible to enumerate all forms of physical violence, since it is impossible to fathom

[22] https://sjp.pwn.pl/sjp/przemoc;2510670.html (accessed on: 30.12.2022).
[23] J. Helios, W. Jedlecka, *Współczesne oblicza przemocy. Zagadnienia wybrane*, Wrocław 2017, p. 15.
[24] *Ibidem*, pp. 15–17.
[25] W. Jedlecka, *Formy i rodzaje przemocy*, "Wrocławskie Studia Erazmiańskie" 2017, Vol. 9, pp. 13–29.

perpetrators' imagination in this scope.[26] This manner of treating the subject of such violence is very often encountered in a family environment, not only by parents against children but also by spouses (partners) against each other. Physical violence is also used by older children against younger ones in order to coerce certain concessions. The research conducted by S.D. Herzberg shows that 82% of parents observed aggression between children. Whereas, 75% of respondents admitted that their teenage children hit brothers and sisters on average 19 times a year.[27]

Although the effects of physical violence are visible "with the naked eye", sometimes it is much more difficult to diagnose the effects of mental violence. As attested by the subject literature, a victim is often not aware of what is happening to them. Negative treatment of the other person consists in the perpetrator entering long-term relations with the victim resulting in the latter feeling bad. As in the case of physical abuse, mental violence can take on various forms, i.e.: threats, name-calling, manipulation, blackmail, humiliation, public derision or other actions.[28] In a family, the weakest usually are the victims of mental violence, that is, mainly children but also women. In consequence, the victim experiences a drastic worsening of their self-esteem. Mental violence against children usually leaves a scar that lasts a lifetime and can predestine them for depression or continuing violent behaviours in their adult lives.[29] A form of violating the victim's bodily integrity is sexual violence consisting in leading to intimacy or performance of another sexual act against their will. Sexual violence is also every sexual act performed against the victim when they were not able to effectively express their will due to their age below 15 years old, disease or use of awareness-changing substances. The perpetrator can exercise various forms of influence. These include, among others: a direct use of physical force, mental pressure, deception, and combinations of some or all of the aforesaid

[26] M. Ciesielska, *Rodzaje, formy i cykl przemocy w rodzinie*, [in]: "Zeszyty Naukowe Państwowej Wyższej Szkoły Zawodowej im. Witleona w Legnicy" 2014, No. 12, p. 9.

[27] S.D. Herzberg, *Przemoc wobec rodzeństwa*, "Niebieska Linia" 2003, No. 3, https://psychologia.edu.pl/czytelnia/59-niebieska-linia/813-przemoc-wobec-rodzenstwa.html (accessed on: 31.12.2022).

[28] *Przemoc psychiczna*, https://psychoterapiacotam.pl/przemoc-psychiczna/ (accessed on: 31.12.2022).

[29] *Co to jest przemoc psychiczna?*, https://mojapsychologia.pl/definicje/40,przemoc/44,przemoc_psychiczna.html (accessed on: 31.12.2022).

elements. Usually, the motive is the will to satisfy a sexual urge or to release aggression through sexual contact.[30] The specific nature of the acts means that victims often do not admit to having been sexually abused and many crimes go undetected. Nevertheless, as shown by official statistics from the Główny Urząd Statystyczny (GUS) (Central Statistical Office (CSO)), this phenomenon is still present in Polish homes. Data for 2013–2021 include the number of disclosed cases. In the following years, the scale of sexual abuse in Polish homes was: 2013 – 796; 2014 – 814; 2015 – 672; 2017 – 722; 2018 – 764; 2019 – 719; 2020 – 572 and in 2021 – 599 cases. Furthermore, this data show that in 2021, in a group of 599 people there were 575 women and 24 men, of which violence affected 80 girls and 6 boys below the age of 16.[31]

Financial dependency of a partner or other family members very often takes on a form of economic violence. The victim, who is unable to meet his or her own needs, becomes dependent on the perpetrator, who deliberately exploits this fact. Another form of economic violence can consist in stealing from a family when a perpetrator wastes family money, e.g., on gambling. Often victims, for the price of financial benefits, endure the disrespectful treatment or physical aggression from the person who controls the household money, i.e., by the person who "controls the purse strings". On the basis of the subject literature's analysis, J. Helios and W. Jedlecka distinguish types of perpetrators: psychopathic – preying, sadistic, narcissistic, compulsive, hidden – dissatisfied and immature – helpless.[32] Furthermore, these authors distinguish other types of violence, one of which is negligence consisting in not satisfying the biological and mental needs of children that occur at the stage of foetal life, when the mother has an unhygienic lifestyle. Another type of violence can be structural violence, which refers to violating human rights in various care institutions.[33]

---

[30] P. Kiembłowski, *Przemoc seksualna w okresie dzieciństwa i adolescencji – wyniki badania ankietowego młodzieży*, "Dziecko Krzywdzone. Teoria, Badania, Praktyka" 2002, No. 1, p. 2, https://www.dzieckokrzywdzone.fdds.pl/index.php/DK/article/view/95/84 (accessed on: 31.12.2022).

[31] Central Statistical Office, *Ofiary gwałtu i przemocy domowej*, https://stat.gov.pl/obszary-tematyczne/wymiar-sprawiedliwosci/wymiar-sprawiedliwosci/ofiary-gwaltu-i-przemocy-domowej,1,1.html (accessed on: 31.12.2022).

[32] J. Helios, W. Jedlecka, *op. cit.,* pp. 24–25.

[33] *Ibidem*, pp. 28–29.

In order to describe the scope of concepts directly related to the subject matter of this study, terms that are legally defined should be also specified. On 11 May 2011 the Council of Europe adopted the Convention on preventing and combating violence against women and domestic violence.[34] For authors of the document, violence against women is: "a human rights violation and a form of discrimination against women. 'Violence against women' refers to all acts of violence that result in, or are likely to result in physical, sexual, psychological or economic harm or suffering to women, including threats, coercion or arbitrary deprivation of liberty, whether occurring in public or private spaces" (Article 3(a)). This Convention introduces the category of "gender-based violence against women" understood as: "violence directed against a woman because she is a woman, or which disproportionately affects women ". (Article 3(d)). While domestic violence is defined as: "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim" (Article 3(b)). Adoption of the Istanbul Convention triggered numerous protests by conservative elements due to the ideology contrary to the assumptions of the Polish Constitution, among others, regarding the issues of references to the institution of marriage.[35] Omitting at this point the issue of axiology of the document, it is worth citing allegations against the provided definitions. Cezary Mik observes, among others, that the conception of "violence against women" is exceptionally broad, since *de facto* the scope of the concept coincides with the concept of discrimination. As further underlined by the author, not all discrimination results from violence and not all violence results from discrimination.[36] "Definition of the domestic violence was also provided in the Opinion of the European Economic and Social

[34] The Council of Europe Convention of 11 May 2011 on preventing and combating violence against women and domestic violence (Journal of Laws of 2015, item 961).

[35] *Dlaczego Polska powinna wypowiedzieć Konwencję stambulską*, K. Pawłowska, I. Zych (ed.), Warszawa 2020.

[36] C. Mik, *Opinia w sprawie Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej, podpisanej w Stambule 11 maja 2011 r., jej zgodności z Konstytucją RP oraz o niektórych konsekwencjach jej ratyfikacji dla Polski*, "Przegląd Sejmowy" 2015, No. 3, p. 113.

Committee on Children as indirect victims of domestic violence.[37] Pursuant to this document, domestic violence is understood as mental or physical (also sexual) violence against a partner in a formal or informal union. As further underlined, in the majority of cases it consists in violence of men against women. "The majority of the women affected are mothers. When these women experience violence at the hands of their partners, the children are in most cases either present or within earshot" (2.2.3). "Violence against the mother is a form of violence against the child. Children who witness domestic violence and have to experience and watch their father, stepfather or mother's partner hitting and abusing her are always victims of psychological violence" (2.2.4). However, it is explicitly underlined that children should be provided with effective support: "it is essential to distinguish their indirect experience of violence as witnesses of domestic violence from direct experience of violence through parental abuse, including sexual abuse. Although there is often overlap between these two areas, children indirectly affected by domestic violence should be considered as victims in their own right, for whom specific support must be developed and made available" (2.4.7.2).

An extended definition of domestic violence was proposed in the Act of 29 July 2005 on counteracting domestic violence.[38] Pursuant to the Act of 9 March 2023, the term "family violence" was changed to "domestic violence".[39] Thus, the title of the Act of 29 July 2005 changed.[40] The term "domestic violence" should be understood as a single or repeated intended action or omission that uses physical, mental or economic advantage, infringing the rights or personal goods of a person experiencing domestic violence, in particular:

a) exposing this person to the threat of losing life, health or property;
b) violating their dignity, bodily integrity or freedom, including sexual freedom;

---

[37] Opinion of the European Economic and Social Committee of 30 December 2006 on: *Children as indirect victims of domestic violence* (OJ EU C 2006/C 325/15).

[38] The Act of 29 July 2005 on counteracting domestic violence (consolidated text of Journal of Laws of 2021, item 1249, as amended).

[39] The Act of 9 March 2023 on amendment of the Act on counteracting family violence and certain other acts (Journal of Laws of 2023, item 535).

[40] The Act of 29 July 2005 on counteracting family violence (consolidated text of Journal of Laws of 2021, item 1249).

c) causing damages to their physical or mental health resulting in suffering or moral damages;
d) limiting or depriving this person access to funds or the possibility to take up employment or gain financial independence;
e) significantly violating privacy of such a person or causing a feeling of a threat, humiliation or torment, including actions undertaken through the agency of means of electronic communication (Article 1 par. 1 of the Act of counteracting domestic violence).

According to the drafter, replacing the term "family violence" with "domestic violence" was prompted by the fact that the no longer binding Act stigmatised family by indicating the obviously false imputation that the only environment where acts of violence are committed is the family. Violent behaviours can also occur between former spouses or people living in informal unions.[41] The new definition of domestic violence coincides in part with the functioning definition of "family violence" that was included in the amended Act on counteracting family violence of 28 July 2005.[42] Pursuant to Article 2 par. 2 of the Act on counteracting family violence, family violence should have been understood as a single or repeated intended action or omission infringing the rights or personal interests of family members pursuant to Article 115 par. 11 of the Act of 6 June 1997 – the Penal Code (a spouse, an ascendant, a descendant, siblings, relatives by affinity in direct line or degree, a person in an adoption relationship and their spouse, a person in cohabitation, as well as another person living together or co-managing a household). The perpetrator's action or omission puts the victim at risk of losing life or health, violates their dignity, bodily integrity, freedom, including sexual freedom, causes damages to their physical or mental health, as well as results in suffering and moral harm.

The legislator specified in the Act the term "a loved one", however, he did not define the concept of a family. It should be underlined that despite the fact that in Polish law "family" is a normative concept, neither the Family and

[41] Justification to the Bill on amendment of the Act on counteracting family violence and certain other acts, https://sip.lex.pl/#/act-project/105633488/1/zmiana-ustawy-o-przeciwdzialaniu-przemocy-w-rodzinie-oraz-niektorych-innych-ustaw?cm =URELATIONS (accessed on: 31.12.2022).

[42] The Act of 29 July 2005 on counteracting family violence (consolidated text of Journal of Laws of 2021, item 1249).

Guardianship Code[43] nor the Constitution of the Republic of Poland[44] provide a legal definition thereof. Rather, the legislator stipulates family members without specification of what a family is. Apart from the Act on counteracting family violence, the personal scope of family can also be found in other normative acts. Pursuant to Article 6 par. 14 of the Act on welfare,[45] a family is made of related or non-related people in an actual relationship, living together and co-managing a household. Therefore, the group of individuals making a family is not limited to parents and their children.

In the Act on family benefits,[46] the legislator specifies that a family means individuals entitled to receive family benefits. Pursuant to Article 3 par. 16 the Act on family benefits, a family is made of spouses, parents, children, an actual carer of a child, dependent children until 25 years old, children over 25 years old with a certificate of severe disability who if due to such disability they are entitled to an attendance benefit or a special care benefit or carer's allowance. Family members do not include a child under care of a legal guardian, a child in a marriage union, or an adult child who has their own child. Neither the Welfare Act nor the Anti-Domestic Violence Act excludes both heterosexual cohabitation and same-sex unions from the catalogue of entities defined as a family – both heterosexual cohabitation and same-sex relations.

In the European Union, with regard to the specification of the scope of "a family", among others, Directive 2004/38/EC applies.[47] According to Article 2 "'Family member' means:

[43] The Act of 25 February 1964 – the Family and Guardianship Code (consolidated text of Journal of Laws 2019, item 2809).

[44] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483, as amended).

[45] The Act of 12 March 2004 on welfare (consolidated text of Journal of Laws of 2019, item 1507, as amended).

[46] The Act of 28 November 2003 on family benefits (consolidated text of Journal of Laws of 2020, item 111).

[47] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30/04/2004 P. 0077-0123).

a) the spouse;
b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point b);
d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point b)."

The aforementioned definition is also referred to in Directive 2014/54/EU.[48] A benchmark for the analysis of the phenomenon of violence in Polish homes is provided for, among others, by constitutional norms. The Polish Constitution includes rules that should have an impact on the entire legal system. On the one hand, these are regulations, which due to the positive nature of the normative act – the Constitution – are directly applicable and have the highest legal force, which is provided for in Article 8. On the other hand, the Constitution includes a catalogue of basic ideas, values and principles of the law crucial for the entire legal system which should be expressed in the legislation as well as constitute a benchmark for entities exercising the law.[49] In the doctrine there is an opinion that taking into consideration by the government basic principles in state functioning establishes legal security. Furthermore, following and taking into account basic rules constitutes an expression of respect for each full member of the community, thus making them feel free, independent and responsible.[50] Moreover, it is also underlined in the subject literature that while separating a catalogue of basic values, the contents of the preamble to the Constitution cannot be omitted. The solemn introduction to the Constitution

[48] Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

[49] P. Ruczkowski, *Aksjologia Konstytucji RP, czyli od wartości do prawa pozytywnego*, "Political Dialogues" 2021, No. 30, p. 99.

[50] Z. Stawrowski, *Aksjologiczne podstawy konstytucji*, "Civitas. Studia z Filozofii Polityki" 2007, No. 10, p. 12.

provides a guideline for identifying the system of values on which the state's identity is based.[51] According to Bartosz Majchrzak, the concept of value should be understood as the state of affairs (past, present, future) assessed positively and constituting the pursuit of a given entity. By transferring the above onto a normative ground, states of affairs recognised by the legislator as valuable and thus protected with relevant legal regulations, are indicated.[52] This author distinguishes substantive and instrumental values. The former are states of affairs protected within substantive norms, direct implementation of which constitutes the basic motive of public administration activities (health, public order), whereas instrumental values materialise implementation of substantive values.[53] Herein, first of all, values included in the Constitution should be decoded and then, the manner of materialising them in specific normative solutions should be studied.

Apart from values included in the Constitution, this paper will also include axiology of human rights included in documents of an international range. The catalogue of main values constituting the basis for the protection of human rights will constitute a benchmark for solutions in the scope of counteracting family violence.[54] The term "human rights" is sometimes replaced with the term "fundamental rights", e.g., "Charter of Fundamental Rights of the European Union". However, regardless of the specification of the scope of rights vested in a human being, the key issue is to identify a human as a legal entity. As underlined in the subject literature, in the light of the normative understanding it is assumed that a human is a legal entity only in the scope in which legal norms vest legal personality with them. Whereas, their rights as a human are characterised with universality and inalienability. Furthermore, they cannot be conditioned with legal personality.[55] Thus, the essence of the above distinction seems

[51] P. Sobczyk, *Aksjologia Konstytucji RP w postulatach Episkopatu Polski*, "Seminare. Poszukiwania Naukowe" 2008, Vol. 25, pp. 160–161.

[52] B. Majchrzak, *Podstawy aksjologiczne regulacji prawnych dotyczących przeciwdziałania przemocy w rodzienie*, [in]: *Podstawy przeciwdziałania przestępczości oraz pomocy osobom pokrzywdzonym. Konkretyzacja i realizacja*, (ed.) P. Sobczyk, Warszawa 2020, pp. 129–130.

[53] *Ibidem*, p. 132.

[54] P. Zamelski, *Wybrane zagadnienia z aksjologii praw człowieka – wskazania propedeutyczne dla nauczycieli,* [in:] *Propedeutyka praw człowieka c.d. Człowiek a jego prawa i obowiązki*, (ed.) S.L. Stadniczeńko, Opole 2011, p. 195.

[55] A. Kociołek-Pęksa, J. Menkes, *Aksjologia praw człowieka*, "Zeszyty Naukowe SGP" 2018, No. 68, pp. 122–123.

to be the source of particular rights. In the first understanding, it is exclusively the will of the legislator who can, at his own discretion, determine the scope of rights vested in an individual, whereas the source of human rights should be in the inherent, inalienable and inviolable value which is human dignity.

The individual's protection from domestic violence is an object of interest of the national legislator and also appears in documents with an international range. Binding regulations have their sources in values included in the basic law as well as universal and regional catalogues of human rights. As shown by the results of the continuous monitoring of the phenomenon of "domestic violence", it has not been successfully eliminated from public space despite efforts to do so. Therefore, it seems legitimate to continuously search for solutions that will at least allow minimising the scale of domestic violence and contribute to the improvement of the situation of victims.

2. Constitutional model of family rights protection

The Polish Constitution refers to the need to protect the rights of a family and its members whereas constitutional norms based on human dignity become special due to the non-normative source thereof. In many areas the axiology of the binding basic law refers to catholic social science. The scope of the constitutional protection is reinforced due to the disposition expressed in Article 8, according to which the Constitution is the supreme law of the Republic of Poland, and provisions thereof apply directly, unless the Constitution stipulates otherwise. As underlined in the subject literature, the special binding force of the basic law has two aspects: positive and negative. In the positive aspect, the legislator is obliged to specify constitutional norms in acts of a lower order. While, the negative aspect is expressed in the ban on any statute that is not in compliance with the Constitution.[56]

[56] M. Florczak-Wątor, *Komentarz do art. 8 Konstytucji RP – Art. 8. Nadrzędność Konstytucji; bezpośrednie jej stosowanie*, [in]: *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* (ed.) P. Tuleja, Warszawa 2021, https://sip.lex.pl/#/commentary/587806602/650665/tuleja-piotr-red-konstytucja-rzeczypospolitej-polskiej-komentarz-wyd-ii?cm=URELATIONS (accessed on: 19.06.2023).

In Polish reality, the dispute concerning relations between international law, European Union law and national law gains a special meaning. Pursuant to Article 90 par. 1 of the Constitution: "The Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters." Article 91 par. 2 stipulates: "An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes." While, according to Article 91 par. 3: "If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws."

The Trybunał Konstytucyjny (Constitutional Tribunal) in the judgement of 11 May 2005 explicitly underlined that: "Therefore, the Constitution remains – due to its specific binding force – 'the supreme law of the Republic of Poland' with regard to all international agreements binding the Republic of Poland. It also applies to ratified international agreements on transferring competences 'in relation to certain matters'."[57] In the same judicial decision, the Constitutional Tribunal also observed that: "Neither Article 90 par. 1, nor Article 91 par. 3 can constitute a basis for authorising an international organisation (or a body thereof) to stipulate legal acts or make decisions that would be contrary to the Constitution of the Republic of Poland." Thus, it should be stated that in the binding juridical position, there cannot be a situation where a ratified agreement or law issued by an international organisation could violate constitutional norms and dispositions included therein. It is especially significant in the case of the model of marriage and family preferred by the Polish legislator. Pursuant to Article 18 of the Constitution, a marriage as a union of a woman and a man, motherhood and parenthood are protected and under care of the Republic of Poland. The provision is aimed at broadly understood power, both national and binding in a specific territory. According to Leszek Garlicki, this norm should be treated as a principle (objective, task) of state policy. Therefore, due to the nature of the aforementioned regulation, the government has a wide margin

[57] Judgement of the Constitutional Tribunal of 11 May 2005 (K 18/04 – OTK-A 2005/5/49).

of freedom in deciding on the forms and manners of undertaken measures.[58] Definition of the scope of protection and care was proposed by, among others, Anna Feja-Paszkiewicz. The author believes that protection and care of a family should be treated as the supreme system principle, which primarily consists in providing favourable conditions for durability of a family, protecting (emotional, material) ties between family members, as well as in prohibiting creation of legal construction encouraging to form so-called simulated one-parent families, in order to prevent the actual decline of a family.[59] Apart from a family, pursuant to Article 18 of the Constitution, a particular protection and care is provided for marriage as a heterosexual union, motherhood and parenthood. The rights of a mother and parents are explicitly distinguished. However, the issue of protecting fatherhood was omitted in the basic law at the stage of editorial work, which should be considered a negligence.

Together with a definition of a family (see notes in part I), the institution of motherhood and parenthood should also be specified. In the light of the Constitutional Tribunal's position expressed before entering into force of the Constitution of 1997, motherhood should be understood as a relationship between a mother and her child. Binding regulations cannot be aimed at actual breaking apart or even simulation of breaking apart this relationship.[60] Furthermore, as noticed by the Constitutional Tribunal, the relationship between a mother and a child occurs in many areas (biological, emotional, social and legal), and its function is proper development of human life in its initial period. Therefore, the Constitutional protection of motherhood cannot be understood solely in terms of the mother's interests. An equal subject of this protection must be the foetus and its proper development.[61] While parenthood, which is also covered with legislator's care in Article 18, means ties between a child and its parents and refers to the position of both parents. In the doctrine it is indicated that in

[58] L. Garlicki, *Komentarz do art. 18 Konstytucji RP*, [in]: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 1, (eds.) L. Garlicki, M. Zubik, Warszawa 2016, https://sip.lex.pl/#/commentary/587734536/531976/garlicki-leszek-red-zubik-marek-red-konstytucja-rzeczypospolitej-polskiej-komentarz-tom-i-wyd-ii?cm=URELATIONS (accessed on: 19.06.2023).

[59] A. Feja-Paszkiewicz, *Ochrona i opieka państwa w stosunku do rodzin – uwagi konstytucyjnoprawne,* "Przegląd Pawa Publicznego" 2020, No. 7, p. 192.

[60] Judgement of the Constitutional Tribunal of 28 May 1997 (OTK ZU 2/1997, item 19).

[61] *Ibidem*.

the first place, protection covers the procreation sphere and is expressed in the institution of parental authority and parents' duties toward a child.[62]

The parents' protection in the process of upbringing a child is also stipulated in Article 33 par. 1, which stresses the equal rights of a woman and a man in family, political, social and economic life. According to Piotr Tuleja, who refers to the judicial decisions of the Constitutional Tribunal, this provision constitutes a specification of the principle of equality expressed in Article 32 of the Constitution and mandates treating a woman and a man in the same way, when in an identical or similar situation, and in a different way when the situation is different. This author underlines that the difference between two regulations consists in the fact that contrary to Article 32, Article 33 of the Constitution limits the possibility of a deviation from the equal treatment mandate on the basis of the principle of proportionality. Therefore, it would be entirely admissible to differentiate treatment of women and men in the same situation.[63]

Family life protection is treated in the Constitution as an element of privacy protection and in Article 47 occurs next to such categories as private life, honour, and good name. The scope of the family life protection includes relations between members of a family broadly understood covering kin, relatives, and people living in formal and informal relationships.[64]

Relations between parents and a child were specified in Article 48 par. 1 and Article 53 par. 3 of the Constitution. Both regulations are devoted to upbringing issues. Pursuant to Article 48 par. 1, parents have the right to bring children up in compliance with their own beliefs. This upbringing should take into consideration the level of the child's maturity as well as their freedom of conscience and religion, and their beliefs. The second norm narrows the scope of parental rights to upbringing and moral and religious teachings. The legislator seems to notice the crucial role of parents in the upbringing process, however, this right is not unconditional and is secured with limitations in the form of rights vested in a child (level of maturity, freedom of conscience and religion, and freedom of

[62] L. Garlicki, *Komentarz do art. 18 Konstytucji RP* and literature referred to therein.

[63] P. Tuleja, *Komentarz do art. 33 Konstytucji RP – Zasada równouprawnienia płci*, [in]: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX/el. 2021, https://sip.lex.pl/#/commentary/587806627/650690/tuleja-piotr-red-konstytucja-rzeczypospolitej-polskiej-komentarz-wyd-ii?cm=URELATIONS (accessed on: 13.06.2023).

[64] *Ibidem*.

beliefs). In the light of the opinion of the Constitutional Tribunal, upbringing is a category of parental rights. The scope of this obligation covers not only the right to take care of a child, but also the right to take care of their assets and the right to represent them.[65] Furthermore, in the doctrine another aspect of upbringing is underlined. It is not only treated in the category of a right, but also a duty which is binding until a child is 18 years old, and thus a child can demand an upbringing from parents.[66]

Giving birth and bringing a child up are basic values in family life, therefore the protection of minor's rights constitutes a benchmark for state policy. Thus, the welfare of a child is intentionally the basic category protected by the legislator. Admittedly, this value is not explicitly articulated in the basic law, but it constitutes a benchmark for all regulations included in the broadly understood family law. Furthermore, the legislator did not provide a legal definition of this term and thus, doctrine and justice are trying to define the scope thereof. In one of its judicial decisions, the Sąd Najwyższy (Supreme Court) recognised it as a model situation of a child postulated in the light of the commonly-accepted moral doctrine and specified in legal provisions and judicature. According to the Supreme Court, this model assumes that a child is brought up in a family, preferably a natural family, which basically constitutes an optimal environment for their development, providing conditions allowing meeting their reasonable needs, develop their talents and the ability to act independently and creatively to the fullest, shape the child's character on the basis of a relevant axiology so that in the future they can establish their own conjugal and family community, and other indirect communities allowing social life to develop.[67] Nevertheless, it should be underlined that each case with a participation of a child should be recognised individually, since one cannot exclude a situation when a pathological family environment justifies the necessity of interfering in parental authority.

Guarantees of children's rights, including the protection from abuse against a minor, are included in Article 72 of the Constitution. In compliance with the disposition included therein, the Republic of Poland ensures protection of children's rights. Everyone has the right to demand public authority bodies

[65] Judgement of the Constitutional Tribunal of 21 January 2014 (SK 5/12 – OTK 2014/1/2).
[66] M. Florczak-Wątor, *op. cit.*
[67] Decision of the Supreme Court of 6 October 2021 (I NSnc 357/21 – OSNKN 2021/4/33).

to protect children from violence, cruelty, exploitation and demoralisation, whereas a child deprived of parental care has the right to care and assistance from public authorities. Moreover, this provision stipulates the obligation to listen to and, as far as possible, take into consideration the child's will in the process of determining their rights. Furthermore, this norm includes *actio popularis*, expressed in everyone's right to demand public authorities to protect a child. It is not necessary to refer to other subjective rights. As underlined in the subject literature, the contents of Article 72 par. 1, corresponds with Article 40, which prohibits the use of corporal punishment, also in family relations.[68]

Furthermore, the Constitution guarantees social protection of the family and its particular members. Pursuant to Article 71 par. 1, in its social and economic policy a state should include the good of a family. Families in a difficult financial and social situation, especially multi-child families and one-parent families, have the right to special assistance from public authorities. The subject literature in the scope of security studies uses the term "social security" to define the state's obligation regarding the economic situation of families. Social security is described as a freedom from threats resulting in a lack of or insufficient means of maintenance. In other words, it means actual guarantees of meeting social needs of individuals and their families. The scope of social security includes, among others: social insurance, mutual insurance, healthcare, social rehabilitation, welfare or other social benefits.[69] Article 71 par. 2 of the Constitution refers to the situation of mothers before and after giving birth to a child, who should be provided with special assistance by the government. In one of its judicial decisions, the Naczelny Sąd Administracyjny (Supreme Administrative Court) underlined the fact that implementation of values included in Articles 18 and 71 of the Constitution (protection of motherhood and parenthood, social security) consists not only in authorised entities receiving financial support in the form of a single allowance due to giving birth to a child, but also in implementing this protection when the mother of a conceived child is covered with medical care as soon as possible.[70] The Supreme Administrative Court emphasises the necessity

[68] M. Florczak-Wątor, *op. cit.*

[69] See: K. Bojarski, *Zadania samorządu terytorialnego w zakresie bezpieczeństwa społecznego i socjalnego*, "Studia Prawnicze KUL" 2014, No. 4, pp. 7–19.

[70] Judgement of the Supreme Administrative Court of 8 December 2016 (ISK 2047/16 – LEX No. 2299941).

of systematic protection with which a family, and especially family members who need it the most, should be covered. Whereas, the Supreme Court stresses that family ties between family members (the right to undisturbed family life), which constitute the foundation of a proper functioning of a family protected at a constitutional level (Articles 18 and 71 of the Constitution), should be understood in the category of personal interests.[71]

Provisions included in the Constitution give the possibility to counteract violence in a direct or indirect manner. Apart from norms, which refer to the institution of marriage and family, the basic law also includes other regulations which can apply in the discussed issues. The basic matter emphasised by the Polish legislator is the issue of common protection of life by public authorities (Article 38). It directly corresponds with the obligation to provide children as well as both parents with protection against domestic violence. By protecting life, the state also protects other values such as life or bodily integrity.

3. International standards in the scope of family protection and counteracting violence

Poland is obliged to adhere to the international legal standards constituting a part of the national law. The situation is similar in the case of law stipulated by international organisations in which Poland is a member. The basic benchmark for application of the aforementioned norms constitutes compliance thereof with the Polish Constitution. Having ratified a number of international agreements, Poland undertook to adopt in its legal system solutions and to apply practices that are compliant therewith. Due to the huge range of binding regulations, only those which seem to be crucial for the topic of family protection and counteracting family violence should be addressed.

In terms of binding human rights standards, the Universal Declaration of Human Rights (UDHR), which is the Resolution of the United Nations General Assembly, is of great importance. Despite the fact that it does not have the rank of a binding agreement, the impact of this document on later

[71] Judgement of the Supreme Court of 9 August 2016 (II CSK 719/15 – OSNC 2017/5/60).

regulations is indisputable. In the doctrine, however, the dispute on the nature of the UDHR is still pending. Opponents argue about, among others, the nature of the document and refer to the stenographic records of preparatory works, which supposedly provide evidence that it was not intended to be binding. On the other hand, supporters of its binding force in the system of sources of law, emphasise that the UDHR expresses the will of the international community and should be recognised as customary international law, and which should become a binding regulation.[72] Authors of the document noticed both the necessity to underline the role of a family and ensuring rights thereof. Article 12 of the UDHR stipulates the ban on interfering in anyone's privacy, family, home or correspondence. It is also forbidden to attack anyone's honour and reputation. Moreover, everyone has the right to legal protection against such interference or attacks. Article 16 was devoted to the institution of marriage. Pursuant to the disposition therein, men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. It was also underlined that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. The economic and social spheres of a family are reflected in Article 25 of the UDHR. On the basis of this norm, everyone has the right to a standard of living adequate for the maintenance of their health and well-being and that of their family. The scope of necessary guarantees includes, among others: food, clothing, housing, medical care, necessary social services, the right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of livelihood in circumstances beyond their control. Provisions have been made for special care and assistance for a mother and a child, regardless whether born in or out of wedlock.

An important stage in the evolution of human rights after World War II involved adopting the International Covenant on Civil and Political Rights (ICCPR)[73] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[74] Both documents were open for signature on 19 December

[72] T. Jurczyk, *Geneza rozwoju praw człowieka*, "Homines Hominibus" 2009, No. 1, p. 34.
[73] International Covenant on Civil and Political Rights of 19 December 1966 (Journal of Laws of 1977, No. 38, item 167).
[74] International Covenant on Economic, Social and Cultural Rights of 19 December 1966 (Journal of Laws of 1977, No. 38, item 169).

1966 and include provisions referring to family as well as counteracting broadly understood violence.

Dispositions included in the ICCPR refer to solutions proclaimed in the UDHR. Pursuant to Article 17 arbitrary interference with one's privacy, family, home or correspondence is forbidden. In case such interferences occur, everyone has the right to legal protection against such interference. The ICCPR also underlines the solemn role of a family in shaping a society by defining it as a fundamental group unit. It was also ensured that states should protect a family (Article 23). Every child, regardless of to race, colour, sex, language, religion, national or social origin, property or birth, should be provided with measures of protection on the part of their family, society and state (Article 24 (1) of the ICCPR).

Guarantees concerning family and its members are also included in the ICESCR. Pursuant to Article 10, a family should be provided with the widest possible protection both at the moment of its establishment and while it is responsible for the care and education of dependent children. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such a period working mothers should be accorded paid leave or leave with adequate social security benefits. Furthermore, the States Parties to the ICESCR were obliged to take appropriate steps to ensure protection and assistance to all children and youth without discrimination due to origin or otherwise. The document recognises the right of everyone to an adequate standard of living for themselves and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties should also take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent (Article 11 of the ICESCR).

Furthermore, norms included in the UN Convention on the Rights of the Child (UNCRC) are also of a universal nature. The document was adopted by the UN in 1989, and was initiated by Poland. In 1978, when our country presented a draft of the convention to the United Nations Commission on Human Rights, work on its final version started. The final text differed from the original, because various visions concerning final regulations were competing in the UN. In the subject literature it is stressed that finalising works at the end of the 1980s was possible due to the increasing tendencies toward freedom in Eastern

Europe.[75] The text of the UNCRC refers mainly to children's rights, however, it also includes regulations concerning parents and other family members. Article 5 of the UNCRC requires States Parties to respect the responsibilities, rights and duties of parents or, where applicable, members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the child's evolving capacities, appropriate direction and guidance in the exercise by the child of the rights recognised in the Convention. From the point of the topic discussed herein, solutions included in Article 9 of the UNCRC are of great importance. States Parties are enjoined to ensure in their legislations that a child is not separated from their parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a given case such as one involving abuse or neglect of the child by parents, or one when the parents are living separately and a decision must be made as to the child's place of residence. In situations when a child is separated from parents, the right of the child to maintain personal relations and direct contact with parents should be respected, except if it is contrary to the child's best interests. Directly related to the above situation, guarantees included in Article 20 of the UNCRC should be referred to. In compliance therewith, a child who is temporarily or permanently deprived of their family environment, or whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the state. In accordance with the national law of a given state, a child should be ensured alternative care. The type of care include, among others: foster placement, *kafalah* of Islamic law, and adoption or placement in suitable institution for the care of children, should take into consideration the ethnic, religious, cultural and linguistic background of the child.

According to Article 16 of the UNCRC, no child should be subjected to arbitrary or unlawful interference with the privacy of their family, home or correspondence, or unlawful attacks on their honour and reputation. In case such

[75] M. Kryński, *Geneza, problemy definicyjne i założenia prawa do edukacji w kontekście Konwencji o Prawach Dziecka*, [in:] *Dziecko w historii – między godnością a zniewoleniem*, t. 1: *Godność jako fundament praw człowieka*, (eds.) E.J. Kryńska, Ł. Kalisz, A. Suplicka, Białystok 2021, pp. 327–328.

guarantees are violated, the child has the right to the legal protection against such interference or attacks. The States Parties were also obliged to use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Moreover, the UNCRC emphasises that parents or legal guardians have the primary responsibility for the upbringing and development of the child. The best interests of the child must be their basic concern. By providing relevant guarantees state authorities should render appropriate assistance to parents and legal guardians in the performance of their childrearing responsibilities. Furthermore, the government is also obliged to ensure the development of institutions, facilities and services for the care of children. Child protection standards included in the UNCRC are reflected in provisions of particular states. However, it should be noted that the scope of guarantees depends on the culture and politics of any given country.

Apart from documents with a universal scope, family protection is also guaranteed at a regional level. Europe made the effort to draw up relevant regulations shortly after World War II ended. When the Council of Europe was founded in 1949, works on the treaty on human rights protection started. In the subject literature[76] it is underlined that the canon of regulations in this scope is made of, among others: the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[77] the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPTIDTP)[78] and the Framework Convention for the Protection of National Minorities (FCPNM).[79] Protection of a family and its rights was also guaranteed in other documents adopted by the Council of Europe,[80] among others: the European Social Charter (ESC),[81] the Revised European Social

[76] T. Jurczyk, *op. cit.*, p. 37.

[77] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Journal of Laws of 1993, No. 61, item 284).

[78] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987 (Journal of Laws of 1995, No. 46, item 238).

[79] Framework Convention for the Protection of National Minorities of 1 February 1995 (Journal of Laws of 2002, No. 22, item 209).

[80] More detail in: R. Andrzejczuk, *Ochrona rodziny na płaszczyźnie międzynarodowej*, Warszawa 2018, https://iws.gov.pl/wp-content/uploads/2018/08/IWS-Andrzejczuk-R.-Ochrona-rodziny-na (accessed on: 24.06.20234).

[81] European Social Charter of 18 October 1961 (Journal of Laws of 1999, No. 8, item 67).

Charter,[82] the European Convention on the Adoption of Children (ECAC),[83] the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CPCASE),[84] and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).[85]

The ban on subjecting anyone to torture, inhuman or degrading treatment or punishment is primarily addressed at states, however, it concerns situations when undesirable measures can be undertaken by broadly understood justice as well as interpersonal relations (Article 3 of the ECHR). In one of its judicial decisions, the European Court of Human Rights (ECtHR) underlined that a state is free to choose specific measures of protection of, among others, victims of domestic violence, which, however, must be effective.[86] In cases concerning violence against women, national authorities should take into consideration the victim's state of uncertainty and the special mental, physical or financial vulnerability and, in consequence, examine them in the shortest period possible.[87] Furthermore, the ECHR also includes everyone's right to respect for their private and family life, home and correspondence. Any interference by a public authority with the exercise of this right is inadmissible except for specified cases, among others: national security, public safety or the economic well-being of the country; prevention of disorder or crime; protection of health or morals, and protection of the rights and freedoms of others (Article 8 of the ECHR). As underlined by Marek Antoni Nowicki, the concept of respect is not precisely defined, especially in terms of positive duties that can be related to the necessity

[82] Unratified.

[83] European Convention on the Adoption of Children of 24 April 1967 (Journal of Laws of 1999, No. 99, item 1157).

[84] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007 (Journal of Laws of 2015, item 608).

[85] Council of Europe Convention on preventing and combating violence against women and domestic violence of 11 May 2011 (Journal of Laws of 2015, item 961).

[86] Judgement in the Case of Eremia v. The Republic of Moldova of 28 May 2013, Chamber (Section III), Application No. 3564/11 – cited as in: M.A. Nowicki, *Komentarz do Konwencji o ochronie praw człowieka i podstawowych wolności*, [in]: *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, ed. VIII, WKP 2021 – https://sip.lex.pl/#/commentary/587259724/664316/ (accessed on: 24.06.2023).

[87] Judgement in the Case of Talpis v. Italy of 2 March 2017, Chamber (Section I), Application No. 41237/14, § 130 – cited as in: M.A. Nowicki, *op. cit*.

of undertaking measures protecting the possibility of exercising vested rights. It can concern introduction of a relevant mechanism of making decisions and entering them into force, and undertaking specific measures.[88] The right to marry and found a family was guaranteed to men and women equally. However, the ECHR explicitly stipulates that the above must be done according to the national laws governing the exercise of this right (Article 12).

Equality between spouses in the scope of their rights and responsibilities of private law character, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution was guaranteed in Protocol No. 7 to the ECHR (Article 5).[89] The European Social Charter is mainly devoted to the issues of employment and related responsibilities of the state. Furthermore, it covers with protection the family, which as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development (part I point 16 of the ESC). Mothers and children, regardless of their marital status and family relations, have the right to appropriate social and economic protection (part I point 17 of the ESC).

The European Convention on the Adoption of Children is aimed at unifying procedures in Europe. According to the disposition that if the father or mother is deprived of his or her parental rights with respect to the child, or at least the right to consent to an adoption, the law may provide that it shall not be necessary to obtain his or her consent (Article 5 par. 3 of the ECAC). Authors of the Convention appreciate the role of marriage in the child's upbringing. Article 6 it is not recommended to apply for adoption by two people who are not married. The competent authority cannot grant an adoption unless it is satisfied that the adoption will be in the interest of the child. Particular attention should be paid to the fact that adoption should provide the child with a stable and harmonious home (Article 8 paras. 1 and 2 of the ECAC).

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse protects children's rights whether or not they are brought up in a family. Particular states have been obliged to establish effective social programmes and to set up multidisciplinary structures to provide

[88] M.A. Nowicki, *op. cit*.

[89] Protocol No. 7 drawn up on 22 November 1984 in Strasbourg to the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 2003, No. 42, item 364).

the necessary support for victims of sexual exploitation and sexual abuse. The scope of these programmes should cover both underage people as well as their close relatives and people responsible for their care. Moreover, necessary legislative or other measures should be ensured that when the age of the victim is uncertain and there are reasons to believe that the victim is a child, the protection and assistance measures are provided for children pending verification of their age (Article 11 of the CPCASE). Furthermore, the Convention recommends establishing relevant mechanisms of reporting sexual exploitation or sexual abuse of children. Any person who knows or, in good faith suspects sexual exploitation or sexual abuse of children should be encouraged to report these facts to the competent services (Article 11of the CPCASE).

Each state should adopt the necessary solutions to effectively provide victims with assistance. These measures should ensure their physical and psycho-social recovery (Article 14 par. 1 of the CPCASE). When the parents or persons who have care of the child are involved in his or her sexual exploitation or sexual abuse, the intervention procedures should include, among others: the possibility of removing the alleged perpetrator and the possibility of removing the victim from their family environment. The conditions and duration of such removal should be determined in accordance with the best interests of the child (Article 14 par. 3 of the CPCASE).

Proponents of the adoption of the document point out that gender-based violence is the biggest and unresolved problem in Europe. They consider the Istanbul Convention the most effective instrument of combating violence due to the fact that specific solutions have been imposed on particular states.[90] According to the opponents of the Istanbul Convention, its text is characterised by an ideological content that violates the system of values developed in our country. The Minister Sprawiedliwości (Ministry of Justice) expressed a belief that it is necessary for Poland to withdraw from this convention. The Ministerstwo Rodziny Pracy i Polityki Społecznej (Ministry of Family and Social Policy) received a motion for initiation of relevant works. The Ministry of Justice underlines

[90] Ł. Osiński, *Konwencja stambulska o zapobieganiu i zwalczaniu przemocy wobec kobiet. Parlament Europejski za ratyfikacją przez UE (opinia Łukasza Kohuta – Socjaliści i Demokraci)*, https://forsal.pl/swiat/unia-europejska/artykuly/8713419,konwencja-stambulska-o-zapobieganiu-i-zwalczaniu-przemocy-wobec-kobiet-parlament-europejski-za-ratyfikacja-przez-ue.html (accessed on: 25.06.2023).

ideological contents included in the text of the convention and stresses the fact that in Poland, the standards of protecting women's rights are at a higher level than those guaranteed in the document.[91] According to Piotr Mostowik, the Istanbul Convention is an expression of a certain ideology. He indicated error in the translation of certain concepts. He indicates, among others, the lack of translation of the term "gender", as its social attribute as opposed to its biological attribute is emphasised (Article 3 (c) of the Istanbul Convention). Furthermore, according to this author, Article 12 imposes on a state obligations which are questionable due to the constitutional norms. Article 12 stipulates that a state should undertake measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men. Doubts are also raised by Article 14, which imposes the obligation to introduce teaching material on non-stereotyped socio-cultural roles in the curricula at all levels of education adjusted to the stage of students' development.[92]

Poland ratified the Convention in 2015. Despite justified doubts, it is a binding normative act directly refers to the topic of domestic violence. Therefore, one should pay attention to regulations aimed at preventing undesirable behaviours. The enumerated purposes of the Convention were first and foremost the protection of women against all forms of violence, as well as prevention, prosecution and elimination of violence against women and domestic violence. States Parties should also develop general frameworks for policy and measures for protection and support for all victims of violence against women and domestic violence. Furthermore, international cooperation should be developed, and organisations and law enforcement agencies, the activity of which concerns elimination of undesirable phenomena, should be assisted (Article 1 (a), (b), (c) and (d) of the Istanbul Convention).

---

[91] Communication and Promotion Office of the Ministry of Justice, Wniosek w sprawie wypowiedzenia Konwencji Stambulskiej, https://www.gov.pl/web/sprawiedliwosc/ministerstwo-sprawiedliwosci-konwencja-stambulska-powinna-zostac-wypowiedziana-poniewaz-jest-sprzeczna-z-prawami-konstytucyjnymi (accessed on: 25.06.2023).

[92] A. Trzmiel, *Ekspert: konwencja stambulska nakłada na Polskę wątpliwe konstytucyjnie obowiązki*, Radio Kierowców, https://radiokierowcow.pl/artykul/2556580 (accessed on: 25.06.2023).

The Convention defined such concepts as, among others: violence against women (Article 3 (a) of the Istanbul Convention) or domestic violence (Article 3 (b) of the Istanbul Convention). States Parties have been obliged to take the necessary legislative and other measures to prevent all forms of violence covered by the scope of this Convention by any natural or legal person (Article 12 par. 2 of the Istanbul Convention). Furthermore, parties should take the necessary legislative or other measures to ensure that victims have access to services facilitating their recovery from violence. These measures should include, when necessary, services such as legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment (Article 20 par. 1 of the Istanbul Convention). It is also necessary for the states to ensure specialist support services for victims of violence (Article 22 par. 2 and Article 25 of the Istanbul Convention). Support should also be provided for underage witnesses of domestic violence. Therefore, they should be provided with psychological support and social assistance (Article 26 of the Istanbul Convention). In determining the custody of a child, solutions should be adopted ensuring that they do not pose a threat to the safety of victims (Article 31 of the Istanbul Convention). States were obliged to take the necessary legislative or other measures to ensure that victims of violence against women who are in need of protection, regardless of their status or place of residence, are under no circumstances returned to a country where their life would be in danger or where they might be subjected to torture or inhuman or degrading treatment or punishment – the principle of non-refoulement (Article 61 of the Istanbul Convention).

Adopted normative solutions those with both a universal and a regional scope are focused on the necessity to provide family violence victims with support. Undertaken measures should focus on three aspects. First, they should prevent abuse. Second, relevant mechanisms of reacting in a situation of an actual threat. And finally, comprehensive support should be provided for violence victims in order to ensure their fullest return to the society. Due to the fact that domestic violence usually affects children and women, legislative initiatives are usually undertaken in the interests of these groups. However, it is worth underlining that domestic violence victims also often affect the elderly and people with disabilities who due to their age or disease are put at risk of abuse. The condition for effective protection consists in implementing adopted obligations by particular states.

A lot of emotion, both in the doctrine and in the media, was triggered by Poland's ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, commonly known as the "Istanbul Convention". Supporters of the document's adoption emphasise that sex-related violence is the biggest

4. National solutions in the scope of counteracting domestic violence

As indicated by the aforementioned statistics, despite the introduced solutions, the phenomenon of domestic violence is still present in our country. The undertaken initiatives limit the occurrence of pathologies, however, complete elimination thereof seems to be unfeasible. Key solutions concerning domestic violence adopted in our country will be presented in this fragment. Due to the scope of the study, attention will be focused primarily on the basic assumptions of binding legal acts.

The basic normative act is the aforementioned Act on Counteracting Domestic Violence. According to the adopted assumptions, this Act stipulates: tasks in the scope of counteracting domestic violence, rules of proceeding with people affected by domestic violence and rules of proceeding with people using domestic violence. The rules stipulated in the Act also apply in the situation of a threat of domestic violence and in the case of a suspicion of using domestic violence (Article 1 paras. 1 and 2 of the Act on Counteracting Domestic Violence). This Act defines such concepts as: domestic violence, a person experiencing domestic violence, a person using domestic violence and a witness of domestic violence (Article 2 of the Act on Counteracting Domestic Violence). The legislator also imposes tasks in the scope of counteracting domestic violence on government administration authorities and territorial self-government units (Article 6 of the Act on Counteracting Domestic Violence). The Act amended several legal

acts, among others, the Act of 12 March 2004 on Social Welfare,[93] and the Act of 6 June 1997 – the Penal Code.[94]

On the basis of the Act on Counteracting Domestic Violence (previously the Act on Counteracting Family Violence), the Rada Ministrów (Council of Ministers of the Republic of Poland) issued a Regulation on the "Niebieska Karta" procedure and templates of "Niebieska Karta" forms.[95] The procedure is initiated by filling in the form by the authorised entity: a social worker of a social service organisational unit, a Police officer, a Military Police officer, an employee of a specialist social support centre for people experiencing domestic violence, a family assistant, a teacher, a teacher-tutor or a teacher aware of the domestic situation of the juvenile, people performing a medical profession including a doctor, nurse, midwife or paramedic, a representative of the municipal commission for solving alcohol problems, a pedagogue, a psychologist or a therapist (par. 2 of the Regulation of the Council of Ministers on the "Niebieska Karta" procedure and templates of "Niebieska Karta" forms in conjunction with Article 9d par. 2 of the Act on counteracting domestic violence). On 20 June 2023, the new Regulation on surveillance and supervision over implementation of tasks in the scope of counteracting domestic violence[96] was issued, amending the Regulation of 3 June 2011.[97] This Act stipulates, among others: organisation and mode of conducting surveillance and supervision over implementation of tasks in the scope of counteracting domestic violence, qualifications of inspectors authorised to perform surveillance and supervisory activities, qualifications of the Voivodeship Coordinator for the implementation of the Government Programme for the Prevention of Domestic Violence and a template of an identification document

[93] The Act of 12 March 2004 on social welfare (Journal of Laws of 2023, item 901, as amended).

[94] The Act of 6 June 1997 – the Penal Code (consolidated text of Journal of Laws of 2022, item 1138).

[95] Regulation of the Council of Ministers of 13 September 2011 on "Niebieskie Karty" procedure and templates of "Niebieskie Karty" forms (Journal of Laws of 2011, No. 209, item 1245).

[96] Regulation of the Minister of Family and Social Policy on surveillance and supervision over implementation of tasks in the scope of counteracting domestic violence (Journal of Laws of 2023, item 1165).

[97] Regulation of the Minister of Labour and Social Policy of 3 June 2011 on surveillance and supervision over implementation of tasks in the scope of counteracting family violence (Journal of Laws of 2011, No. 126, item 718).

authorising to perform surveillance and supervisory activities (par. 1 of the Regulation on surveillance and supervision over implementation of tasks in the scope of counteracting domestic violence). The supervision is conducted pursuant to the annual plan of supervision drawn up by the director relevant for social services of the voivodeship office, approved by the voivode. Whereas, the voivode can order supervision not provided for in the annual plan (par. 1 of the Regulation on surveillance and supervision over implementation of tasks in the scope of counteracting domestic violence).

In order to define proper quality of services provided for people affected by domestic violence, the Minister of Family, Labour and Social Policy issued its Regulation on the standard of basic services provided by specialist support centres for people experiencing domestic violence and requirements in terms of qualifications of people employed in such centres.[98] Therapeutic and supportive services provided by the centre are performed on the basis of an individual support plan. The plan is drawn up immediately upon accepting a person experiencing domestic violence at the centre by the centre's employee appointed by the director of the centre in agreement with the person experiencing domestic violence, and implemented with the latter's active participation (par. 2).

The advisory body of the minister relevant for social security is the Monitoring Team for Prevention of Domestic Violence. The tenure of the Monitoring Team for Prevention of Domestic Violence lasts 4 years, and its tasks include, among others: monitoring the situation and measures in the scope of domestic violence, initiating and supporting measures aimed at counteracting domestic violence, and giving opinions on legislative measures (Article 10a of the Act on counteracting domestic violence). The appointment procedure of the Monitoring Team for Prevention of Domestic Violence, organisation and scope of activities thereof, as well and the manner of participation of authorised entities in the work of the Monitoring Team for Prevention of Domestic Violence

[98] Regulation of the Minister of Family and Social Policy of 20 June 2023 on the standard of basic services provided by specialist support centres for people experiencing domestic violence and requirements in terms of qualifications of people employed in such centres (Journal of Laws of 2023, item 1158).

are stipulated in the Regulation of the Minister of Family, Labour and Social Policy of 20 June 2023.[99]

In the case of a threat to the child's life or health as a result of domestic violence, the social worker provides the child with protection by placing them with another loved one, who lives apart. The mode of placing children in foster families as well as in family-type children's homes or in institutional foster care is regulated by the provisions of the Act of 9 June 2011 concerning Family Support and Foster Care System[100] (Article 12a of the Act on Counteracting Domestic Violence). The procedure for performing the activities of taking a child away from a family in case of a direct threat to the life or health of the child due to family violence are regulated by the provisions of the Regulation of the Minister of Interior and Administration of 31 March 2011.[101]

Pursuant to the Regulation of the Minister of Health of 22 October 2010, a medical certificate template on the reasons for and a type of bodily injury related to family violence was stipulated.[102]

In order to provide conditions for effectively counteracting domestic violence, the Council of Ministers was obliged to adopt the Government Programme for Counteracting Family Violence. The binding programme for 2023 was adopted under the Resolution of the Council of Ministers of 9 December 2022.[103] The main objectives of the Government Programme for Counteracting Family Violence focus on issues such as: intensification of preventive measures in the scope of counteracting family violence, increasing the accessibility and effectiveness of protection and support of people affected by family violence, increasing the

[99] Regulation of the Minister of Family and Social Policy of 20 June 2023 on the Monitoring Team for Prevention of Domestic Violence (Journal of Laws of 2023, item 1161).

[100] The Act of 9 June 2011 on family support and foster care system (consolidated text of Journal of Laws of 2022, item 447).

[101] Regulation of the Minister of the Interior and Administration of 31 March 2011 on the procedure for performing the activities of taking a child away from a family in case of a direct threat to the life or health of the child due to family violence (Journal of Laws of 2011, No. 81, item 448).

[102] Regulation of the Minister of Health of 22 October 2010 on a medical certificate template on the reasons for and a type of bodily injury related to family violence (Journal of Laws of 2022, item 1759).

[103] Resolution No. 248 of the Council of Ministers of 9 December 2022 on the establishment of the National Programme for Counteracting Family Violence for 2023 (Official Gazette of the Republic of Poland of 2022, item 1259).

effectiveness of treatments for people using family violence and increasing the level of competences of representatives of institutions and entities implementing tasks in the scope of counteracting family violence in order to increase the quality and accessibility of provided services.[104]

The Social Assistance Act includes norms concerning domestic violence. One of the premises justifies providing social assistance to people and families (Article 7 par. 7 of the Social Assistance Act). Mothers with underage children and pregnant women experiencing domestic violence can, within a crisis intervention, find shelter and support at homes for mothers with underage children and pregnant women (Article 47 par. 4 of the Social Assistance Act).

Provisions of the Penal Code do not directly refer to the concept of domestic violence, however, acts that fulfil the criteria of this practice are penalised. Pregnant women are covered with protection pursuant to Article 153 par. 1 of the Penal Code, whereas Article 207 of the Penal Code provides for sanctions for physical or mental abuse of a loved one or another person dependant on the perpetrator.

Counteracting domestic violence is also regulated by provisions of the Family and Guardianship Code. Despite a lack of explicit reference of the legislator to this category, domestic violence can justify the court's interference in exercising parental authority. In a situation when a child's welfare is threatened, the guardianship court can issue the relevant order, among others, obliging parents and the minor to behave in a specific manner, subject exercising parental authority to permanent surveillance of the court-appointed curator, or order the minor's placement in a foster family, family-type children's home or institutional foster care (Article 109 paras. 1 and 2 of the Family and Guardianship Code).

Pursuant to the amendment of the Act on the Police,[105] provisions concerning the issue of interfering in cases of domestic violence were included in the Act. Among others, Police officers' rights with regard to domestic violence perpetrators were reinforced. Apart from the possibility of detaining the perpetrator (Article 15a of the Act on the Police) the Police officer has the right to issue, against the person using domestic violence pursuant to the provisions of the Act

[104] *Ibidem*.

[105] The Act of 6 April 1990 on the Police (consolidated text of Journal of Laws of 2023, item 171, as amended).

on counteracting domestic violence, who poses a threat to the life or health of a person experiencing this violence, a domestic violence protection order and a no-contact order, or a restraining order (Article 15aa par. 1 of the Act on the Police). The procedure of issuing the aforementioned orders, as well as hearing of reporting persons, with a particular consideration of a situation of a minor acting as a witness to the event, were regulated in detail (Article 15ab of the Act on the Police). The person, against whom a relevant order has been issued, has specific obligations, among others: inform the relevant organisational unit of the Police, where the Police officer who issued such an order serves, about the place of residence, as well as, if possible, the telephone number under which such a person will be available, and inform this unit of the Police of any change in the address or telephone number (Article 15af of the Act on the Police). The person using violence, against whom an order has been issued, should be instructed about the reasons for issuance thereof, the possibility and manner of lodging a complaint as well as informed of contact data of locally relevant facilities providing accommodation, and facilities conducting corrective-educational activities or psychological-therapeutic programmes for people using domestic violence. Such accommodation facilities cannot be the same as facilities providing accommodation for people experiencing domestic violence (Article 15ah of the Act on the Police). Furthermore, this person has the possibility of lodging a complaint within 3 days as of the day of serving the order to the district court competent for the co-occupied place of residence. The person using violence should be instructed of this possibility (Article 15aj of the Act on the Police).

In the order's binding period the Police at least three times verifies if the order is not infringed and undertakes necessary measures. The first verification is conducted on the day following the issuance of the order (Article 15ai of the Act on the Police). Although the above regulations do not exhaust the catalogue of solutions provided for in the provisions of the Penal Code, however, they seem to be the most important from the point of view of victims' rights.

A similar scope of rights vested with the Police was given to the Military Police, which has the right to detain an actively serving soldier who uses domestic violence and issue relevant orders against the soldier. The principles of protecting witnesses, the rights and obligations of the detained person and the

obligations of the Military Police are regulated in compliance with analogous rules (Articles 18a–18k).[106]

Pursuant to the Act of 21 June 2001 on the Protection of Tenants' Rights and Housing Resources of Communes and on the Amendment of the Civil Code, the rights of people using domestic violence were curtailed.[107] Among others, they do not have the right to conclude a rental agreement of social housing in the situation of issuing a domestic violence protection order, and the protection period does not apply (between 1 November and 31 March) in the situation of adjudicating eviction (Article 17 in conjunction with Articles 14 and 16).

The Act on Upbringing in Sobriety and Counteracting Alcoholism stipulates that tasks in the scope of counteracting alcoholism are performed by the relevant development of social policy, which especially contributes to counteracting domestic violence (Article 2 par. 7). Furthermore, the catalogue of the commune's own tasks was extended by providing families in which alcohol-related problems occur with psychological, social and legal support, especially regarding protection against domestic violence (Article 41). On the basis of the above characteristics, it should be stated that regulations adopted by the Polish legislator mainly focus on the aspect of an emergency relief to domestic violence victims, given at a moment of a threat, as well as mitigating physical and mental consequences thereof of people affected by domestic violence. Special protection is provided to minors due to their mental and physical conditions. Undoubtedly, development of methodologies of preventative measures, which was noted in the National Programme for Counteracting Family Violence, requires more in-depth analysis, however, relevant legislative measures should be undertaken in this scope.

[106] The Act of 24 August 2001 on the Military Police and Military Law Enforcement Bodies (consolidated text of Journal of Laws of 2021, item 1214).

[107] The Act of 21 June 2001 on the protection of occupants' rights, commune residential resources and amendment of the Civil Code (Journal of Laws of 2023, item 725).

5. Comparative perspective – models of family rights protection in selected countries

Domestic violence is a common phenomenon occurring at any longitude and latitude. States cope with these pathological behaviours more or less effectively by adopting various legal solutions. Selected models of family rights' protection functioning in various legal systems and different cultural traditions will be presented herein.

5.1. Austria

The Austrian model became a template for many states, among others: Denmark and the Czech Republic. The Federal Act of 1996 on the protection from family violence was the first one in Europe, thereof it is advisable to study solutions stipulated therein. The Act assumes that domestic violence infringes public safety and cannot be treated only as a private matter. Therefore, the state should accept the responsibility of combating occurring pathologies.

The system binding in Austria assumes a comprehensive approach to the phenomenon of domestic violence. To this end the Police, justice and non-governmental organisations are engaged. Cooperation is coordinated by the National Council for Crime Prevention acting at the Ministry of the Interior and Administration.[108] Detentions of domestic violence perpetrators are sporadic in Austria. Provisions of the Act on the Police, amended under provisions of the Act on Countreacting Domestic Violence, provide the Police with the possibility of applying a temporary protective measure against the perpetrator. In case of a threat to life, health or personal liberty, and if violence occurred in the past, the Police can issue against the perpetrator a domestic violence protection order and ban them from returning to the apartment for a period of up to 10 days.[109] The Police are obliged to, within 24 hours of issuing the order, inform

[108] J. Tracz-Dral, *Uregulowania prawne dotyczące przemocy w rodzinie na tle wybranych rozwiązań legislacyjnych*, Warsaw 2009, https://www.senat.gov.pl/gfx/senat/pl/senatopracowania/68/plik/ot-570.pdf (accessed on: 26.06.2023).

[109] P. Kruszyński, K. Wlaźlak, *Przeciwdziałanie przemocy w rodzinie na tle porównawczym*, "Prokuratura i Prawo" 2017, No 5, p. 44.

of this fact the institution dealing with providing support for family violence victims. Furthermore, a person affected or at risk of violence can submit to the court a motion for issuance of a domestic violence protection order and no contact order. The court can issue a domestic violence protection order, a no-contact order or a restraining order.[110]

Poland adopted a similar model of solutions in the scope of isolating the perpetrator by providing the Police with the possibility of issuing relevant orders.

5.2. Germany

In Germany, the Act on Civil Protection from Violence and Arrest was adopted on 11 December 2001 (and has been binding since 1 January 2002).[111] If a perpetrator deliberately violated bodily integrity, health or sexual freedom, upon the injured person's request, the court can undertake all necessary measures to prevent further violations. In particular, the court has the possibility to ban the perpetrator from: entering the injured person's home; staying at a specific distance from the injured person's home; staying in other places where the injured person is currently staying; contacting the injured person via means used for remote communication, or meeting the injured person (par. 1). The court can issue against the violence perpetrator an order to transfer the shared flat for exclusive disposition of the injured person. The duration of this order depends on the legal title to dispose of the premises held by the injured person. If the violence victim is the only owner of the flat, then the order to leave the flat by the perpetrator is final. If the perpetrator is the only owner of the flat, the order to leave it by the perpetrator is issued for a period not exceeding 6 months (par. 2).[112]

[110] J. Tracz-Dral, *op. cit.,* p. 19.

[111] "Gewaltschutzgesetz vom 11. Dezember 2001 (BGBl. I S. 3513), das zuletzt durch Artikel 2 des Gesetzes vom 10. August 2021 (BGBl. I S. 3513) geändert worden ist", https://www.gesetze-im internet.de/gewschg/BJNR351310001.html (accessed on: 26.06.2023).

[112] More: J. Tracz-Dral, *op. cit.*, p. 21.

5.3. Spain

Legal solutions concerning domestic violence adopted in Spain are related to particular protection of women. The patriarchal model of family contributed to the fact that for a long period of time the role of a woman in a Spanish family came down to serving her husband and taking care of her children. Murders of women are one of the most frequent in the European Union. Only in 1978 were women guaranteed equality before the law in the Spanish Constitution.[113] On 28 December 2004, the Act 1/2004 on measures providing women with comprehensive protection from violence was adopted.[114] The aim of the Act is to counteract pathologies resulting from differences between the situation of women and men. The Act is aimed at preventing crimes, punishing perpetrators, providing assistance to women and their underage children in the event of falling victim to domestic violence (Article 1). Basic principles on which statutory solutions are based concern, among others:

- reinforcing preventive measures in the scope of: education, raising social awareness, social services, health, advertising and the media;
- securing women's rights in relations with public administration;
- reinforcing services and institutions providing assistance to violence victims with simultaneous control of effectiveness thereof;
- economic guarantees for women who are violence victims;
- establishing a comprehensive institutional care system;
- improving procedures in order to ensure comprehensive assistance to violence victims;
- coordinating cooperation of governmental bodies in order to protect victims and punish perpetrators;
- promoting cooperation of social organisations operating in the area of counteracting violence effects (Article 2).

[113] K. Wlaźlak, *Hiszpański model prawnej ochrony przed przemocą domową*, "Prokuratura i Prawo" 2019, No. 11-12, p. 133 (133–156).

[114] Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, https://www.boe.es/buscar/act.php?id=BOE-A-2004-21760 (accessed on: 26.06.2023).

Furthermore, special courts for violence against women were established, which simultaneously examine penal and civil cases as stipulated in the Act.[115]

The Spanish model of protection is oriented on the selected issue of equality of women and men. It lacks the legislator's comprehensive approach that occurs in other states, among others in Poland. Other social groups are protected in national legislation and regional policies. It unquestionably affects assessment of existing solutions.

6. Conclusion

Legislative measures undertaken by the legislator should head in several directions. In the first place, victims should be provided protection. These initiatives should be conducted in a comprehensive manner and concern all victims. Secondly, legislative solutions should effectively deter potential perpetrators from committing a crime. Furthermore, it is extremely important to educate the society from an early age through properly adjusted curricula. A state should also support various types of organisations and initiatives, measures of which are targeted at combating domestic violence.

The findings herein allow drawing up the following conclusions:

- Exploitation of the weaker and enforcing one's will shows the most atavistic aspects of human nature. Dominance of the head of a family over other household members is rooted in the ancient juridical tradition. Christianity changed the optics of a family perception where a man and a woman play analogous roles in upbringing of children and satisfying basic needs.
- Children, as the weakest in a family, were and still are at a particular risk of any displays of aggression.
- Despite new initiatives of the legislator as well as various types of organisations, the problem still exists, which is explicitly confirmed by, among others, Police statistics.

[115] K. Wlaźlak, *op. cit.*, p. 138.

- In Poland and in other countries family violence is a social issue which requires broad measures that can prevent this phenomenon.
- Inheriting the model of violence from the person's background has a significant impact of using violence. While observing adults children learn from their example, at the same time believing that using violence is one of the ways to solve conflicts.
- The phenomenon of violence, regardless whom it affects – family members or household members, can take on various forms. In the subject literature usually physical, mental, sexual and economic types of violence are distinguished.
- The Constitution includes a catalogue of basic ideas, values and rules of law crucial for the entire legal system, which should be expressed both in legislation and constitute a benchmark for entities exercising the law. It will allow more comprehensive exercise of rights by domestic violence victims.
- While separating the catalogue of basic values, the contents of the preamble to the Constitution should not be omitted. The solemn introduction to the basic law constitutes a guideline for identification of the system of values on which the identity of the state is based. The principle of subsidiarity, which obliges broadly understood authorities to provide assistance to families affected by domestic violence, gains particular importance.
- Regardless of how the scope of rights with which a human vested is defined, the key issue constitutes identification of a human as a subject of the law. Therefore, all family members have equal rights and are subject to protection in compliance with analogous rules.
- Protection of an individual from domestic violence constitutes the matter of concern of the national legislator. Domestic violence is also fought against in documents of an international scope. Binding regulations stem from values included in the basic law, as well as universal and regional catalogues of human rights.
- Constitutional norms based on human dignity gain special character due to their non-normative source. The scope of constitutional protection is reinforced due to the disposition expressed in Article 8, in compliance with which the Constitution is the highest law of the Republic of Poland and provisions thereof apply directly, unless the Constitution stipulates

otherwise. It allows, among others, ensuring protection of the traditional model of family and marriage.

- Apart from family, pursuant to Article 18 of the Constitution, a special protection and care is provided for marriage as a heterosexual union, motherhood and parenthood. The rights of a mother and both parents are also explicitly distinguished therein. However, the issue of protecting fatherhood was omitted in the basic law at the stage of editorial work, which should be considered a negligence.
- The legislator seems to notice the crucial role of parents in the upbringing process, however, this right is not unconditional and is secured with limitations in the form of rights with which a child is vested (a level of maturity, freedom of conscience and religion, and freedom of beliefs). A child subject to pressure, mental violence or physical violence can effectively fight for their rights.
- Giving birth to and bringing a child up are basic values in family life, therefore protection of minor's rights constitutes a benchmark for state policy.
- Nevertheless, it should be underlined that each case featuring the participation of a child should be recognised individually, since one cannot exclude a situation when a pathological family environment justifies the necessity of interfering in parental authority.
- Provisions included in the Constitution protect the family and particular members thereof in a direct or indirect manner.
- Child protection standards included in the UNCRC are reflected in provisions of particular states. Regulations vesting the child with subjectivity in many issues (among others, the possibility of expressing their own opinions) come into play, however, it should be noticed that the scope of guarantees depends on the culture and politics of particular countries.
- Adopted normative solutions of both universal and regional scope are focused on the necessity to provide family violence victims with support.
- Undertaken measures should focus on three aspects. First, they should prevent abuse. Second, relevant mechanisms of reacting in a situation of an actual threat should be established. And finally, comprehensive support should be provided for violence victims in order to ensure their fullest return to the society.

- Poland adopted a model, similar to the Austrian one, of solutions in the scope of isolating the perpetrator by providing the Police and other services (among others, the Military Police) with the possibility of issuing relevant orders.
- The main postulate *de lege ferenda* concerns covering the elderly and people with disabilities with special protection from domestic violence. Due to their disabilities they are at a particular risk of domestic violence.

References

Normative acts

"Gewaltschutzgesetz vom 11. Dezember 2001 (BGBl. I S. 3513), das zuletzt durch Artikel 2 des Gesetzes vom 10. August 2021 (BGBl. I S. 3513) geändert worden ist", https://www.gesetze-im internet.de/gewschg/BJNR351310001.html (accessed on: 26.06.2023).

Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Journal of Laws of 1993, No. 61, item 284).

Council of Europe Convention on preventing and combating violence against women and domestic violence of 11 May 2011 (Journal of Laws of 2015, item 961).

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007 (Journal of Laws of 2015, item 608).

Decree of 22 January 1946 – the Family Law (Journal of Laws of 1946, No. 6, item 52).

Decree on the election ordinance to the Legislative Sejm of 28 November 1918 (Journal of Laws No. 18, item 46).

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30/04/2004 P. 0077-0123).

Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987 (Journal of Laws of 1995, No. 46, item 238).

European Convention on the Adoption of Children of 24 April 1967 (Journal of Laws of 1999, No. 99, item 1157).
European Social Charter of 18 October 1961 (Journal of Laws of 1999, No. 8, item 67).
Framework Convention for the Protection of National Minorities of 1 February 1995 (Journal of Laws of 2002, No. 22, item 209).
International Covenant on Civil and Political Rights of 19 December 1966 (Journal of Laws of 1977, No. 38, item 167).
International Covenant on Economic, Social and Cultural Rights of 19 December 1966 (Journal of Laws of 1977, No. 38, item 169).
Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género. – https://www.boe.es/buscar/act.php?id=BOE-A-2004-21760 (accessed on: 26.06.2023).
Protocol No. 7 drawn up on 22 November 1984 in Strasbourg to the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 2003, No. 42, item 364).
Regulation of the Council of Ministers of 13 September 2011 on the "Niebieskie Karty" procedure and templates of "Niebieskie Karty" forms (Journal of Laws of 2011, No. 209, item 1245).
Regulation of the Minister of Family and Social Policy of 20 June 2023 on surveillance and supervision over implementation of tasks in the scope of counteracting domestic violence (Journal of Laws of 2023, item 1165).
Regulation of the Minister of Family and Social Policy of 20 June 2023 on the standard of basic services provided by specialist support centres for people experiencing domestic violence and requirements in terms of qualifications of people employed in such centres (Journal of Laws of 2023, item 1158).
Regulation of the Minister of Family and Social Policy of 20 June 2023 on the Monitoring Team for Prevention of Domestic Violence (Journal of Laws of 2023, item 1161).
Regulation of the Minister of Health of 22 October 2010 on a medical certificate template on the reasons for and a type of bodily injury related to family violence (Journal of Laws of 2022, item 1759).
Regulation of the Minister of Labour and Social Policy of 3 June 2011 on surveillance and supervision over implementation of tasks in the scope of counteracting family violence (Journal of Laws of 2011, No. 126, item 718).
Regulation of the Minister of the Interior and Administration of 31 March 2011 on the procedure for performing the activities of taking a child away from a family in case of a direct threat to the life or health of the child due to family violence (Journal of Laws of 2011, No. 81, item 448).
Regulation of the President of the Republic of Poland of 11 July 1932 – the Penal Code (Journal of Laws of 1932, No. 60, item 571, as amended).
The Act of 12 March 2004 on Social Welfare (Journal of Laws of 2023, item 901, as amended).

The Act of 19 April 1969 – the Penal Code (Journal of Laws of 1969, No. 13, item 94, as amended).
The Act of 21 June 2001 on the Protection of Tenants' Rights and Housing Resources of Communes and on the Amendment of the Civil Code (Journal of Laws of 2023, item 725).
The Act of 24 August 2001 on the Military Police and Military Law Enforcement Bodies (consolidated text of Journal of Laws of 2021, item 1214).
The Act of 25 February 1964 – the Family and Guardianship Code (consolidated text of Journal of Laws 2019, item 2086).
The Act of 28 November 2003 on Family Benefits (consolidated text of Journal of Laws of 2020, item 111).
The Act of 29 July 2005 on Counteracting Family Violence (consolidated text of Journal of Laws of 2021, item 1249, as amended).
The Act of 6 April 1990 on the Police (consolidated text of Journal of Laws of 2023, item 171, as amended).
The Act of 6 June 1997 – the Penal Code (consolidated text of Journal of Laws of 2022, item 1138).
The Act of 9 June 2011 on Family Support and Foster Care System (consolidated text of Journal of Laws of 2022, item 447).
The Act of 9 March 2023 on amendment of the Act on Counteracting Domestic Violence and certain other acts (Journal of Laws of 2023, item 535).
The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483, as amended).

Judicial decisions

The Judgement of the European Court of Human Rights of 28 May 2013, Chamber (Section III), Application No. 3564/11.
The Judgement of the Constitutional Tribunal of 28 May 1997 (OTK ZU 2/1997, item 19).
The Judgement of the Supreme Administrative Court of 8 December 2016 (ISK 2047/16 – LEX No. 2299941).
The Judgement of the District Court in Wrocław of 25 October 2004 (XIII RC 2865/03 – unpublished.
The Judgement of the Constitutional Tribunal of 11 May 2005 (K 18/04 – OTK-A 2005/5/49).
The Judgement of the Constitutional Tribunal of 21 January 2014 (SK 5/12 – OTK 2014/1/2).
The Judgement of the Supreme Court of 9 August 2016 (II CSK 719/15 – OSNC 2017/5/60).

The Judgement of the European Court of Human Rights of 2 March 2017, Chamber (Section I), Application No. 41237/14, § 130.
The Decision of the Supreme Court of 6 October 2021 (I NSnc 357/21 – OSNKN 2021/4/33).

Other

Draft of the Marriage Law adopted by the Codification Commission on 28 May 1929, https://www.bibliotekacyfrowa.pl/dlibra/doccontent?id=35389 (accessed on: 27.07.2023).
Family violence – data as of 2012, https://statystyka.policja.pl/st/wybrane-statystyki/przemoc-w-rodzinie/201373,Przemoc-w-rodzinie-dane-od-2012-roku.html (accessed on: 30.12.2022).
Justification to the Bill on amendment of the Act on counteracting family violence and certain other acts, https://sip.lex.pl/#/act-project/105633488/1/zmiana-ustawy-o-przeciwdzialaniu-przemocy-w-rodzinie-oraz-niektorych-innych-ustaw?cm=URELATIONS (accessed on: 31.12.2022).
Opinion of the European Economic and Social Committee of 30 December 2006 on "Children as indirect victims of domestic violence" (OJ EU C 2006/C 325/15).
Resolution No. 248 of the Council of Ministers of 9 December 2022 on the establishment the National Programme for Counteracting Family Violence for 2023 (Monitor Polski, item 1259).
Central Statistical Office, *Ofiary gwałtu i przemocy domowej*, https://stat.gov.pl/obszary-tematyczne/wymiar-sprawiedliwosci/wymiar-sprawiedliwosci/ofiary-gwaltu-i-przemocy-domowej,1,1.html (accessed on: 31.12.2022).
The Communication and Promotion Office of the Ministry of Justice, *A Motion for Withdrawal from the Istanbul Convention*, https://www.gov.pl/web/sprawiedliwosc/ministerstwo-sprawiedliwosci-konwencja stambulska-powinna-zostac-wypowiedziana-poniewaz-jest-sprzeczna-z-prawami konstytucyjnymi (accessed on: 25.06.2023).

Literature

Andrzejczuk R., *Ochrona rodziny na płaszczyźnie międzynarodowej*, Warszawa 2018, https://iws.gov.pl/wp-content/uploads/2018/08/IWS-Andrzejczuk-R.-Ochrona-rodziny-na (accessed on: 24.06.2023).
Bojarski K., *Zadania samorządu terytorialnego w zakresie bezpieczeństwa społecznego i socjalnego*, "Studia Prawnicze KUL" 2014, No. 4, pp. 7–19.

Ciepły F., *Partnerstwo w rodzinie a prawnokarny kontratyp kształcenia małoletnich,* [in]: *Partnerstwo w rodzinie*, (ed.) J. Truskolaska, Lublin 2009, pp. 257–266.

Ciesielska M., *Rodzaje, formy i cykl przemocy w rodzinie*, "Zeszyty Naukowe Państwowej Wyższej Szkoły Zawodowej im. Witelona w Legnicy" 2014, No. 12, pp. 7–16.

Feja-Paszkiewicz A., *Ochrona i opieka państwa w stosunku do rodzin – uwagi konstytucyjnoprawne*, "Przegląd Prawa Publicznego" 2020, No. 7, pp. 182–195.

Florczak-Wątor M., *Komentarz do art. 8 Konstytucji RP – Art. 8. Nadrzędność Konstytucji; bezpośrednie jej stosowanie*, [in]: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, (ed.) P. Tuleja, Warszawa 2021, LEX/el.; 2021 – https://sip.lex.pl/#/commentary/587806602/650665/tuleja-piotr-red-konstytucja-rzeczypospolitej-polskiej-komentarz-wyd-ii?cm=URELATIONS, (accessed on: 19.06.2023).

Garlicki L., *Komentarz do art. 18 Konstytucji RP*, [in]: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 1, (eds.) L. Garlicki, M. Zubik, Warszawa 2016, https://sip.lex.pl/#/commentary/587734536/531976/garlicki-leszek-red-zubik-marek-red-konstytucja-rzeczypospolitej-polskiej-komentarz-tom-i-wyd-ii?cm=URELATIONS (accessed on: 19.06.2023).

Helios J., Jedlecka W., *Współczesne oblicza przemocy. Zagadnienia wybrane*, Wrocław 2017.

Herzberg S.D., *Przemoc wobec rodzeństwa*, "Niebieska Linia" 2003, No. 3.

Jedlecka W., *Formy i rodzaje przemocy*, "Wrocławskie Studia Erazmiańskie" 2017, Vol. 9, pp. 13–29.

Jurczyk T., *Geneza rozwoju praw człowieka*, "Homines Hominibus" 2009, No. 1, pp. 29–44.

Kiembłowski P., *Przemoc seksualna w okresie dzieciństwa i adolescencji – wyniki badania ankietowego młodzieży*, "Dziecko Krzywdzone. Teoria, Badania, Praktyka" 2002, No. 1, p. 1–28.

Kociołek-Pęksa A., Menkes J., *Aksjologia praw człowieka*, "Zeszyty Naukowe SGPS" 2018, Vol. 1, No. 68, pp. 119–134.

Kruszyński P., Wlaźlak K., *Przeciwdziałanie przemocy w rodzinie na tle porównawczym*, "Prokuratura i Prawo" 2017, No 5, pp. 37–55.

Kryński M., *Geneza, problemy definicyjne i założenia prawa do edukacji w kontekście Konwencji o Prawach Dziecka,* [in]: *Dziecko w historii – między godnością a zniewoleniem*, Vol.1: *Godność jako fundament praw człowieka*, (eds.) E.J. Kryńska, Ł. Kalisz, A. Suplicka, Białystok 2021, pp. 327–338.

Majchrzak B., *Podstawy aksjologiczne regulacji prawnych dotyczących przeciwdziałania przemocy w rodzinie*, [in]: *Podstawy przeciwdziałania przestępczości oraz pomocy osobom pokrzywdzonym. Konkretyzacja i realizacja*, (ed.) P. Sobczyk, Warszawa 2020, pp. 127–150.

Massachusetts Body of Liberties. Synopsis of the history of the Massachusetts Body of Liberties, available at: https://www.mass.gov/service-details/massachusetts-body-of--liberties (accessed on: 30.12.2022).

Mezglewski, A., Tunia A., *Wyznaniowa forma zawarcia małżeństwa*, Lublin 2007.

Michalska-Warias A., *Zgwałcenie w małżeństwie. Studium prawnokarne i kryminologiczne*, Warszawa 2015.

Mik C., *Opinia w sprawie Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej, podpisanej w Stambule 11 maja 2011 r., jej zgodności z Konstytucją RP oraz o niektórych konsekwencjach jej ratyfikacji dla Polski*, "Przegląd Sejmowy" 2015, No. 3, pp. 89–150.

Nowak A., *Pojęcie władzy ojcowskiej w rzymskim prawie kanonicznym*, "Studia Prawnoustrojowe" 2002, No. 1, pp. 30–54.

Osiński Ł., *Konwencja stambulska o zapobieganiu i zwalczaniu przemocy wobec kobiet. Parlament Europejski za ratyfikacją przez UE (opinia Łukasza Kohuta – Socialiści i Demokraci)*, https://forsal.pl/swiat/unia-europejska/artykuly/8713419,konwencja-stambulska-o-zapobieganiu-i-zwalczaniu-przemocy-wobec-kobiet-parlament-europejski-za-ratyfikacja-przez-ue.html (accessed on: 25.06.2023).

Pawłowska K., Zych I. (ed.), *Dlaczego Polska powinna wypowiedzieć Konwencję stambulską?*, Warszawa 2020.

Procner M., *Dzięki niej prawnie zakazano bicia dzieci. Kim była Alice Miller?*, https://twojahistoria.pl/2022/03/12/dzieki-niej-prawnie-zakazano-bicia-dzieci-kim-byla-alice-miller/ (accessed on: 30.07.2023).

Przemoc psychiczna, https://psychoterapiacotam.pl/przemoc-psychiczna/ (accessed on: 31.12.2022).

Ruczkowski P., *Aksjologia Konstytucji RP, czyli od wartości do prawa pozytywnego*, "Political Dialogues" 2021, No. 30, pp. 97–114.

Sobczyk P., *Aksjologia Konstytucji RP w postulatach Episkopatu Polski*, "Seminare. Poszukiwania Naukowe" 2008, No. 25, pp. 159–172.

Stawrowski Z., *Aksjologiczne podstawy konstytucji*, "Civitas. Studia z Filozofii Polityki" 2007, No. 10, pp. 9–28.

Tracz-Dral J., *Uregulowania prawne dotyczące przemocy w rodzinie na tle wybranych rozwiązań legislacyjnych*, Warszawa 2009.

Truszkowski B.K., *Karcenie dzieci na ziemiach polskich. Regulacje prawne od XIX w. do dziś*, "Miscellanea Historico-Iuridica" 2020, Vol. 19, No. 1, pp. 41–87.

Trzmiel A., *Ekspert: konwencja stambulska nakłada na Polskę wątpliwe konstytucyjnie obowiązki*, Radio Kierowców, 28.07.2020, https://radiokierowcow.pl/artykul/2556580 (accessed on 25.06.2023).

Twardziłowski T., *Zarys problematyki rodzinnej w Biblii*, [in]: *Instytucja rodziny wczoraj i dziś – Perspektywa interdyscyplinarna*, Vol. 2: *Społeczeństwo i kultura*, (eds) J.K. Stępkowska, K.M. Stępkowska, Lublin 2012, pp. 111–120.

Wlaźlak K., *Hiszpański model prawnej ochrony przed przemocą domową*, "Prokuratura i Prawo" 2019, No 11–12, pp. 133 –156.

Zamelski P., *Wybrane zagadnienia z aksjologii praw człowieka – wskazania propedeutyczne dla nauczycieli*, [in:] *Propedeutyka praw człowieka c.d. Człowiek a jego prawa i obowiązki*, (ed.) S.L. Stadniczeńko, Opole 2011, pp. 195–220.

ABOUT AUTHOR

Marek Bielecki – Polish lawyer, canonist, habilitated doctor at law. Specialises in ecclesiastical law, canon law and children's rights. Currently employed at the Faculty of Law and Administration, the War Studies University in Warsaw, where he holds the position of the Vice-Dean for Science, and at the Institute of Justice. A member of many scientific associations and societies. Since 2018 he has held the position of the President of Polskie Towarzystwo Prawa Wyznaniowego (Polish Ecclesiastical Law Society), and since 2011 – the position of the Vice President of the "Prawo na Drodze" Association (*"Law on the Road" Association*). The author of over one hundred scientific publications on law and canon law.
ORCID: 0000-0003-3880-017X

prof. dr hab. Łukasz Pohl
UNIVERSITY OF SZCZECIN, INSTITUTE OF JUSTICE

Countering domestic violence in criminal law

1. Introduction

The present chapter will be devoted to the analysis of domestic violence from the perspective of Polish substantive criminal law. This analysis will essentially focus on three separately identifiable issues. The first one will relate to the clarification of the content relationship between the statutory notion of domestic violence and the notion of violence as used in the language of Polish criminal law. As it turns out, the confrontation of the mentioned notions allows important corrections to be made to the notion of domestic violence, which is crucial for our deliberations and autonomous from the criminal law. The second issue will, in turn, revolve around the delimitation of the scope of criminal domestic violence – we should add at once that the delimitation is assumed to be only preliminary. Finally, the third and final issue will be devoted to answering the question of whether Polish substantive criminal law has a rationally developed system of criminal-law response measures to the criminal offence of domestic violence. Thus defined area for the analysis is motivated by a firm belief that to combat the social pathology of domestic violence, it is necessary to react in the most systemic way possible, based on a responsible interaction between solutions formally belonging to different sections of legal dogmatics, including the theory and dogmatics of substantive criminal law, i.e., the section that is particularly important in the indicated area.

2. The notion of domestic violence and the criminal law notion of violence

Without the risk of mistake being made, it can be stated that it is not easy to establish the relationship between the scope of the notion of domestic violence and the notion of violence as a component of the criminal-law language.[1] The difficulties that we face here are primarily due to two reasons.

The first of them, and let us add – undoubtedly the key one, is the fact that the second of the mentioned notions does not have a legal definition directly dedicated thereto, i.e., a definition which would undoubtedly allow to identify the scope of this notion more precisely, thus significantly facilitating the process of its interpretation.[2]

---

[1] Let us specify here that by the criminal-law language we shall mean in this study the language of the Polish Penal Code currently in force, i.e., the Code of 6 June 1997, Journal of Laws of 1997 No. 88 item 553 as amended, hereinafter also PC.

[2] Let us recall briefly, and in accordance with the science of legal text interpretation, that the definitions in the legal text: "(...) are generally regarded as an extremely valuable means of facilitating adequate contact between the legislator and the recipients of legal texts" – M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki,* Warszawa 2010, p. 198. As quoted Maciej Zieliński emphasises, there are: "(...) three main reasons for the use of legal definitions by the legislator. The first of them is related to the creation by the legislator of certain subjects, objects and actions of conventional nature. (...) The second reason for the introduction of legal definitions is the need to remove the dictionary ambiguity of general language phrases, which the legislator has to use" – M. Zieliński, *op. cit.*, pp. 198–199. The mentioned author immediately adds: Certainly, "(...) there would be no such need, if the legislator intended to use in the text such a term, which has one established meaning in the general language and this meaning is widespread, and also deemed by the legislator to be sufficiently precise (defined) to be considered as adequate for the legislator's purposes" – *ibidem*, p. 199 However, at the same time M. Zieliński argues lucidly that: "(...) cases such as the one mentioned above are very rare and the need to remove ambiguity is obvious to the editor of legal texts" – *ibidem,* p. 199. Within the derivational concept of legal interpretation, it is emphasised – quite rightly – that: "(...) the removal of ambiguity of general language phrases is done by editors of legal texts mainly using the linguistic context" – *ibidem,* p. 199. The situation is completely different – as M. Zieliński further explains – "(...) in the case of such phrases, which play the role of focal phrases in a legal text. And here the legislator – who prefers the precision of expression – generally resorts to a much more radical means of clarification – the definition" – *ibidem,* p. 199. At the same time, the mentioned author adds that: "(...) the use of definition with regard to an ambiguous term consists in selecting one of the possible meanings distinguished in the general-language dictionaries. Whether this choice alone is sufficient depends, moreover, on other properties of a given term (...) – M. Zieliński, *op. cit.*, p. 199. Lastly, the third and main reason for using a legal definition in a legal text is that: (...) the specific phrase used

The second reason, in turn, is the fact that the legal definition of the domestic violence – the one, which we will soon make the subject of a fairly detailed analysis – is characterised by a relatively large area of fuzziness, i.e., a feature generating the undesirable phenomenon of polysemy of its *definiens*. The legal definition of the notion of domestic violence – the one contained in the Act of 29 July 2005 on Counteracting Domestic Violence[3] – is in fact a definition that only reduces the fuzziness of the *definiendum*, and is not aimed at the complete elimination of the vagueness of the defined term.[4] According to Article 2(1)(1) of the mentioned Act, where this definition is contained: "Whenever the Act refers to domestic violence – it shall mean a single or recurring intentional action or omission, using physical, psychological or economic superiority, violating the rights or personal interests of a person suffering domestic violence (victim of domestic violence), in particular: (a) exposing that person to the risk of losing life, health or property, (b) violating that person's dignity, physical integrity or freedom, including sexual freedom, (c) causing damage to that person's physical or mental health, causing pain or harm to that person, (d) limiting or depriving that person of access to financial resources or the possibility to work or become financially independent, (e) significantly invading that person's privacy or arousing a feeling of threat, humiliation or anguish in that person, including actions undertaken by means of electronic communication." Thus, the *definiens* in the mentioned definition is undoubtedly burdened in many points with the semantic fuzziness of its individual components, although it should be emphasised that the legislator is indeed striving to reduce the scope of such fuzziness, which is

by the legislator is vague (indeterminate), while in a given case the legislator prefers not the flexibility of the text, but rather its precision, and therefore decided to eliminate this vagueness. What is more – adds M. Zieliński – the elimination of vagueness of a given phrase leads to the elimination (total or partial) of its fuzziness – M. Zieliński, *op. cit.*, p. 200.

[3] Journal of Laws of 2005 No. 180 item 1493 as amended.

[4] Indeed, M. Zieliński emphasises that legal definitions may be a result of two different decisions of the legislator, namely: "(...) the legislator may wish to completely eliminate the vagueness (fuzziness) of a given term; in such case he sets in his definition – the quoted author continues – the impassable limits for the scope, thus making the given term sharp and determinate (...). it may also be the case that the legislator will only wish to determine the given phrase to a certain extent (thus reducing also its fuzziness to a certain extent). In such a case – explains M. Zieliński – also the defining phrases are sometimes fuzzy, however less fuzzy than the defined phrase (...)" – *op. cit.*, p. 200.

most clearly confirmed by the legal definition – correct in all respects – of both terms a person suffering domestic violence (victim of domestic violence) and a person using domestic violence (perpetrator of domestic violence). As far as the first of the distinguished terms is concerned, pursuant to Article 2(1)(2) of this Act: "Whenever the Act refers to a person suffering domestic violence (victim of domestic violence) – it shall mean: (a) the spouse, including where the marriage has ceased or been annulled, and his or her ascendants, descendants, siblings and their spouses, (b) ascendants and descendants and their spouses, (c) siblings and their ascendants, descendants and their spouses, (d) a person in an adoption relationship and his or her spouse and their ascendants, descendants, siblings and their spouses, (e) a person currently or formerly living in cohabitation and their ascendants, descendants, siblings and their spouses, (f) a person sharing occupancy and housekeeping and his or her ascendants, descendants, siblings and their spouses, (g) a person currently or formerly in a lasting emotional or physical relationship regardless of shared occupancy and housekeeping, (h) a minor – subject to domestic violence"; it is necessary to add here that in the referred Act a partial definition of a person suffering domestic violence (victim of domestic violence) is also found in Article 2(2), according to which: "A person suffering domestic violence (victim of domestic violence) shall also mean a minor who witnesses domestic violence against persons referred to in paragraph 1(2)." In turn, with regard to the notion of a person using domestic violence (perpetrator of domestic violence), its definition is found in Article 2(1)(3) of the mentioned Act. According to this provision: "Whenever the Act refers to a person using domestic violence (perpetrator of domestic violence) – it shall be understood as an adult who commits domestic violence against persons referred to in point 2." Of course, saying that the intention to reduce the area of semantic fuzziness of the notion of domestic violence, as expressed by the mentioned definitions, is correct; we do not wish to fully approve the fragmentary explanations contained in these definitions. Without entering here into polemics regarding these explanations, let us just mention as an example that the solution – which is in a way preliminary since it eliminates minors from the notion of a perpetrator of domestic violence – should be already regarded as unconvincing: that solution, let us emphasise, is extremely inconsistent with the findings of the contemporary science of criminal law regarding the perpetrator of a prohibited act, findings which remove the question of age from the

prerequisites for committing a prohibited act, consequently shifting it to other levels of criminal-law evaluation – either guilt (which, however, seems ultimately to be a substantively inappropriate solution[5]), or formal prerequisites for criminal liability (criminal liability under the principles of the Penal Code).[6]

[5] It should once again be argued that adolescence is not a circumstance which excludes the possibility of attributing guilt to the perpetrator of a prohibited act in the substantive legal sense. In the context discussed here, the condition for attributing guilt is, after all, the ability of the perpetrator to rationally direct his or her own conduct at the time of committing the act – an ability which, by its very nature, is a property achieved by the person concerned in an individual manner in accordance with the pace of his or her own intellectual and emotional development, the pace – understandably – that is not conditioned by a generalised, rigid age limit. On this issue see, for example, Ł. Pohl, *Prawo karne. Wykład części ogólnej*, Warszawa 2019, p. 358, where, based on the above finding, it is stated that the view contested here is correct only in principle: "(...) because it can be easily demonstrated that there are juveniles who, given their level of intellectual and emotional development, can be fully expected to behave in a manner consistent with the demand contained in the sanctioned criminal, which is also addressed to them". The study in question also points out that: "(...) the position expressed here seems to be supported by Article 10(2) of the PC, which creates the possibility for the court to hold a juvenile liable under the rules set out in this Code. In fact, it should be assumed that the use by the court of the power expressed in this provision to hold a juvenile criminally liable under the principles set out in the Penal Code for his or her act prohibited under penalty is possible only if he or she could be required to behave in accordance with the law. Therefore, it should be recognised that the adolescence is only generally associated with the lack of capacity for meaningful self-determination, because the consequences of the lack of such capacity sometimes do not arise" – Ł. Pohl, *Prawo...*, p. 358. Let us add, however, that a different position prevails in the Polish literature on the subject, namely the view that the adolescence is a circumstance excluding guilt – so, *inter alia*, W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2010, p. 328, and A. Marek, *Prawo karne*, Warszawa 2009, p. 102, who directly links the issue of the age of criminal liability with the capacity to be guilty, writing that: "The general conditions on which the possibility of charging and attributing guilt to the perpetrator of any prohibited act depends are: 1) the subjective capacity to behave as required by the law, also known as the capacity to be guilty. It depends on the attainment of an adequate level of development (age of liability) and a mental state that allows one to recognise the meaning of the acts committed and to direct one's own conduct. Therefore, adolescence and insanity are treated as circumstances excluding guilt (arguments based on Article 10(1) and Article 31(1) of the PC)." – A. Marek, *Prawo...,* p. 135.

[6] Although – which is, unfortunately, indisputable – one can also find in the contemporary doctrine of criminal law an opinion convergent with the position adopted in Article 2(1)(3) of the Act in question. As convergent therewith one should regard the view that places the issue of the perpetrator's age among the so-called general features of a perpetrator of a prohibited act – a view, which in this way disregards the undoubtedly correct assumption that it is not justified to limit the scope of the notion of the prohibited act perpetrator using the condition that the perpetrator, at the time of committing the

In order to adequately achieve the objective, as expressed in the title of the present deliberations, of highlighting the relationship between the scope of the notion of domestic violence and the notion of violence used in the language of the Penal Code, it is first necessary to have a reconstruction-oriented analytical overview of all descriptive components of the mentioned legal definition of the notion of domestic violence. Given this intention, we will present this overview in a manner close to a criminal law reconstruction, in which – let us recall – the textual (descriptive) characteristics of the perpetrator of the prohibited act, the material side of the act and its subjective side[7] are subjected to an interpretative

act, must have reached a certain age – the so-called age of criminal liability (17 – as a rule, 15 – exceptionally). Włodzimierz Wróbel and Andrzej Zoll also write that this concept is inaccurate, when they argue that: "In every description of a type of prohibited act, the subject of the act, i.e., who may be its perpetrator, must be indicated. It is not a question of the general capacity of the perpetrator to bear criminal liability, which is often confused even in some criminal law textbooks, but a question of the characteristics required by the law of the perpetrator of a specific type of a prohibited act" – W. Wróbel, A. Zoll, *Polskie...*, p. 189. The other issue is that the position adopted in the quoted statement is also not accurate. For adolescence is merely a formal obstacle to being held criminally liable for committing a prohibited act – so, in particular, Ł. Pohl, *Prawo...*, p. 138 *et seq.*, and also J. Giezek, *Nieletniość*, [in]: M. Bojarski (ed.), *Prawo karne materialne. Część ogólna i szczególna*, Warszawa 2012, p. 227, in which it was quite rightly stated that: "The function of adolescence thus appears to be that this circumstance does not allow to prosecute a perpetrator of a prohibited act who has not reached the age of 17 or 15 years, regardless of whether the condition of being guilty or not has been fulfilled." To sum up the discussed issue, adolescence – as a merely formal obstacle to holding the perpetrator of a prohibited act criminally liable under the principles set out in the Penal Code – is in no way a condition for committing a prohibited act (because it is not an element limiting the scope of the addressee of the sanctioned criminal rule) nor a condition for committing it culpably; in the theoretical and legal sphere relating to the structure of the sanctioning legal rule, it is therefore a negative condition, different in this structure from the condition of not being guilty, limiting the scope of application of this legal rule.

[7] The mentioned method of reconstruction – as indicated in the literature on the subject – also shows a substantive relationship with the normative reconstruction method, i.e., a method determined by the internal structure of the sanctioned criminal rule, within which – let us recall – we should distinguish the scope of application of the indicated rule (including its addressee) and the scope of its regulation (including also the required form of the subjective side of the prohibited act) – on this issue see in particular Ł. Pohl, *Struktura normy sankcjonowanej w prawie karnym. Zagadnienia ogólne,* Poznań 2007, p. 88 *et seq.* In-depth remarks on the systematics of the features of the prohibited act type can be found in many studies – but see in particular I. Andrejew, *Ustawowe znamiona czynu. Typizacja i kwalifikacja przestępstw*, Warszawa 1978, and also R. Dębski, *Typ czynu zabronionego (typizacja)*, [in]: A. Marek, L. Paprzycki, R. Dębski (eds.), *System prawa*

dissection in order to determine the scope of criminalisation as accurately and, consequently, as precisely as possible.

Let us start with the person using the domestic violence (perpetrator of domestic violence) – obviously within the meaning imposed by the above mentioned legal definition. Let us therefore recall once again that the definition in question is contained in Article 2(1)(3) of the discussed Act on Counteracting Domestic Violence, i.e., in the provision according to which: "Whenever the Act refers to a person using domestic violence (perpetrator of domestic violence) – it shall be understood as an adult who commits domestic violence against persons referred to in point 2." A person using domestic violence (perpetrator of domestic violence) within the meaning of the aforementioned Act may therefore only be a person of legal age. As is well known, the age when a person becomes an adult is determined by the relevant civil law regulations. Currently, in Poland, these are the provisions of the Civil Code of 23 April 1964, hereinafter also CC, [8] and namely the provisions of Article 10(1) and 2 of the Code. According to the first of them: "An adult is a person who has attained eighteen years of age," while according to the second: "A juvenile becomes adult on marriage. He or she does not lose it if the marriage is annulled," as well as the complementary regulations of the Family and Guardianship Code of 25 February 1964,[9] and namely the provisions of Article 10(1)(2)(3) and (4) of the Code, reading as follows: Article 10(1). "A person under eighteen years of age may not enter into marriage. However, for important reasons, the guardianship court may permit a woman who has reached the age of sixteen years to marry, where the circumstances show that the marriage would be in the best interests of the newly established family," Article 10(2). "A marriage entered into by a man who has not yet reached the age of eighteen, and by a woman who has not yet reached the age of sixteen, or who has married between the ages of sixteen and eighteen without the consent of the court, may be annulled at the request of either spouse," Article 10(3). "It is not possible to annul a marriage for reasons of age if the spouse reached marriageable age before the claim is brought," Article 10(4). "If a woman becomes pregnant, her husband cannot claim the annulment of the marriage for reasons

karnego, Vol. 3: *Nauka o przestępstwie. Zasady odpowiedzialności*, Warszawa 2017, p. 371 *et seq*.

[8] Journal of Laws of 1964 No. 16 item 93 as amended.

[9] Journal of Laws of 1964 No. 9 item 59 as amended.

of age." Without going into the peripheral details of the current discussion, it is sufficient to note that the age of majority is generally attained at eighteen years, and the exception to this rule is the attainment of majority by a woman who, under the age indicated, has married with the consent of the guardianship court after reaching the age of sixteen. There is no doubt that such a close connection between the notion of a perpetrator of domestic violence and the civil law notion of the age of majority may raise fundamental objections. Explaining their content, attention should first be drawn to the fact that in view of the different ways of acquiring the age of majority by a woman and a man (connected with the fact that a man acquires it at the age of eighteen and a woman – through conditional marriage – at the age of sixteen), important doubts of a constitutional nature arise here, resulting, in the discussed case, from a far inappropriate, because devoid of convincing axiological justification, lack of respect for the constitutional principle of equality of citizens before the law – see Article 32(1) of the Constitution of the Republic of Poland of 2 April 1997,[10] according to which – let us recall – "All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities." It should be added that this objection cannot be effectively neutralised by the argument that the differentiation in the manner of acquiring the age of majority is the result of an exception to the rule. Of course, one could try to eliminate this objection through interpretation. As it turns out, however, this is not ultimately possible, and what stands in the way of this is the fact that the discussed definition of a perpetrator of domestic violence is undoubtedly one that is linguistically explicit. In such a case – as the science of legal interpretation (*ius interpretandi*) precisely instructs – "(...) the conflict of the content of the rule obtained therefrom [i.e., from the provision formulating the definition under consideration – note by Ł.P.] with the content of the rule of a hierarchically higher legal act – according to our legal system – must be resolved not as an interpretation problem (by adjusting the sense of the 'lower rule of law' to the 'higher rule', but as a validation problem – subject to the jurisdiction of the Trybunał Konstytucyjny (Constitutional Tribunal)".[11] M. Zieliński adds at this point that: "It may therefore be stated that without the Constitutional Tribunal this issue

[10] Journal of Laws of 1997 No. 78 item 483 as amended.
[11] M. Zieliński, *op. cit.,* p. 299.

would be resolved primarily by way of interpretation, whereas with the Constitutional Tribunal in place it must be resolved not by the interpreter, but by the Constitutional Tribunal – by depriving the 'lower rule of law' of the validity." "Undoubtedly" – the author continues – "this considerably prolongs the resolution of the problem in question, but at the same time gives a much greater sense of public security than if this resolution was entrusted to the interpreter."[12] Thus, it is not possible to remove the unquestionable inconsistency between the definition of the notion of a person using domestic violence (perpetrator of domestic violence) and the constitutional rule (formulating the principle of equality before the law) by application of a systemic directive aimed at maintaining the vertical coherence of the legal system.[13] It is also not possible to remove it at a further stage of interpretation, i.e., the stage characterised by the application of functional directives of interpretation, i.e., the directives being a consequence of approval of the dominant role of assumptions about the axiological rationality of the legislator,[14] and which, thanks to the mentioned approval, allow for overcoming the unambiguous result of linguistic interpretation. For it appears – as indicated by the science of legal interpretation – that the key functional directive (applicable when the linguistic meaning destroys the assumed rationality of the legislator[15]) cannot be applied here either, because it may not be used to overcome: "(...) the content of a linguistically unambiguous legal definition."[16] To sum up the topic raised, it should be stated that defining

[12] M. Zieliński, *op. cit*., pp. 299–300.

[13] Let us also recall – again following M. Zieliński – that: "Vertical consistency is the consistency of the content of rules of hierarchically lower legal acts with the content of rules of hierarchically higher legal acts. This assumption relates to the interpretation issues in such a way that it justifies the functioning of interpretative rules called systemic (here: systemic vertical rules). According to these rules, an ambiguous normative expression (or its individual ambiguous words) should be understood in such a way that the rule obtained from this expression is substantively consistent with the content of the rule of a hierarchically higher legal act" – M. Zieliński, *op. cit*., p. 299.

[14] More extensively on this issue see M. Zieliński, *op. cit.,* p. 304 *et seq*.

[15] And in our case, the discussed definition of a notion of a person using domestic violence (a perpetrator of domestic violence) undoubtedly destroys these assumptions, because it violates the principle of equality before the law.

[16] M. Zieliński, *op. cit.*, p. 343. M. Zieliński also emphasises this property of the legal definition in another place, writing: "(...) the second aspect of the importance of a legal definition manifests itself not only in the fact that it is able to overcome other meanings, but in the fact that the meaning formulated thereby is not overcome even in a situation

the notion of a perpetrator of domestic violence using the civil law approach to the age of majority raises objections of the most basic nature. There can be no consent to a solution whereby a man is treated more liberally than a woman with regard to this notion. A second objection that can be raised against restricting the analysed notion of a perpetrator of domestic violence by using a condition of the age of majority is the already-mentioned inconsistency of this restriction with criminal law findings concerning the subject (perpetrator) of a prohibited act – findings which are secondary to the nature of the matter. There can, after all, be no doubt that the actual perpetrator of domestic violence can also be a juvenile, and there are no convincing reasons to support the limiting juridical intervention applied here. Another issue is, of course, the fully admissible (because obviously sufficiently substantiated) differentiation of the institutional legal reaction to domestic violence perpetrated by an adult and by a juvenile.[17] Still remaining in the area of reflection on the accuracy of the discussed definition of the notion of a perpetrator of domestic violence, it should also be noted that it unfortunately uses the plural to designate the subjects against whom domestic violence is perpetrated (victims of domestic violence). Although in the normative act containing the said definition we are not dealing with rules of law determining the scope of criminalisation, i.e., with rules encoded in regulations, whose interpretation may never be carried out "from the plural to the singular" when determining the object of the executive act,[18] a more appropriate approach to the discussed issue would be, undoubtedly, to use the singular in the discussed definition, as it would make it much easier to obtain an adequate

where the linguistic content of this definition would undermine the assumed rationality of the legislator" – M. Zieliński, *op. cit.*, p. 215.

[17] After all, such differentiation is already present in the area of repressive law, where, on the one hand, we have a regime of criminal liability generally provided for adult perpetrators of prohibited acts and, on the other hand, a regime of liability dedicated to juvenile perpetrators of such acts. The first regime is shaped primarily by the rules of the Penal Code, while the second one is shaped by the regulations of the Act of 9 June 2022 on the Support and Rehabilitation of Juveniles (Journal of Laws of 2022 item 1700). The direction suggested here to move away from defining the notion of a perpetrator of domestic violence using the criterion of the age of majority would, of course, require certain amendments to the Act on counteracting domestic violence.

[18] It is because this would require broad interpretation to the detriment of the perpetrator, i.e., a procedure which – as is known – is absolutely unauthorised in the interpretation of criminal law – more extensively on this issue see, for example, Ł. Pohl, *Prawo*..., p. 77 *et seq*.

result of the interpretation, i.e., reaching the conclusion that domestic violence takes also place when its perpetrator uses it only against one of the persons listed in Article 2(1)(2) of the Act on Counteracting Domestic Violence.

The behaviour of the above-mentioned perpetrator – obviously – involves the use of domestic violence. As already indicated, the legislator has included its legal definition in the mentioned Act, namely in its Article 2(1)(1). Let us quote again the content of this provision: "Whenever the Act refers to domestic violence – it shall mean a single or recurring intentional action or omission, using physical, psychological or economic superiority, violating the rights or personal interests of a person suffering domestic violence (victim of domestic violence), in particular: (a) exposing that person to the risk of losing life, health or property, (b) violating that person's dignity, physical integrity or freedom, including sexual freedom, (c) causing damage to that person's physical or mental health, causing pain or harm to that person, (d) limiting or depriving that person of access to financial resources or the possibility to work or become financially independent, (e) significantly invading that person's privacy or arousing a feeling of threat, humiliation or anguish in that person, including actions undertaken by means of electronic communication." Let us also analyse the conduct included in the aforementioned definition in a manner appropriate to criminal law reflection.

First of all, it should be noted, without any doubt, that domestic violence can take the form of a single act or of multiple acts. In this case, one may have doubts whether there was any need to include the option of multiple behaviours in the definition, particularly as that option is subject to the restrictive and wholly unjustified condition that the behaviours of the perpetrator of domestic violence must be recurring; that condition – what must be added here – prevents two different (and thus non-recurring) acts by the same person from being considered as domestic violence, which is highly inappropriate and therefore extremely unacceptable. Thus, it should be concluded that including the option of perpetration of multiple acts (and even more so the condition of their recurring nature) in the discussed definition of domestic violence is unjustified.[19] The provision formulating the discussed definition should therefore be immediately amended

[19] To clarify the above position, it should therefore be said that the multiple-acts option is unnecessary because it is redundant in relation to the single-act option (it does not add any normative value), and the multiple-acts option is unjustified because it unduly restricts the domestic violence to identical behaviours repeated by the perpetrator.

in this respect, because in its current form it defines the domestic violence too narrowly, by limiting wrongly its scope to recurring acts in the case of multiple acts committed by the person using such violence.

It is also worth noting that, in the discussed statutory definition of domestic violence, the legislator has rightly emphasised that the behaviour consisting in the use of such violence may take the form of both action and omission. After all, there can be no doubt that the use of domestic violence can also consist in the omission of a legally required action. Touching upon the issue of legally relevant omission, it is also worth emphasising that also in the area of the discussed normative act, i.e., the Act on Counteracting Domestic Violence, omission is to be seen exclusively as the failure to perform (legally mandated[20]) feasible action.[21] The condition of feasibility of action (possibility/capability to perform action) is therefore very important, as its non-fulfilment by the non-performer precludes the acceptance of an omission, including an omission that is legally relevant from the point of view of the discussed regulation on counteracting domestic violence; and this even when – which must be emphasised – the failure to perform an action leads to a situation mentioned in the discussed statutory definition of the domestic violence.

In the light of the indicated definition, the behaviour involving domestic violence is to be the behaviour giving rise to at least one of two situations, namely a situation of violation of the rights of the person suffering domestic violence or

[20] It goes without saying that the condition of failure to perform a legally mandated action applies only to a normatively significant omission, i.e., when the omission can be considered as behaviour violating the rule of law.

[21] Regarding the condition of the feasibility of action (possibility/capability to perform action) not performed, which is indispensable in the structure of an omission, see in particular L. Kubicki, *Przestępstwo popełnione przez zaniechanie. Zagadnienia podstawowe*, Warszawa 1975, pp. 77–78, W. Patryas, *Zaniechanie. Próba analizy metodologicznej*, Poznań 1993, p. 43, and Ł. Pohl, *O niemożności wykonania nakazanego działania spowodowanej zachowaniem się zobowiązanego do działania (przyczynek do analizy zaniechania w prawie karnym)*, [in]: W. Cieślak, S. Steinborn (ed.), *Profesor Marian Cieślak – osoba, dzieło, kontynuacje*, Warszawa 2013, p. 447 *et seq.* It should also be noted at this point that there is no full consensus in the literature on whether this condition should be viewed in a generalised manner, i.e., in a manner that disregards the individual capabilities of the person who failed to perform the action, or rather in an individualised manner, i.e., in a manner that recognises this condition as fulfilled only if we can say about the person who failed to perform the action that at the moment when he or she did not perform the action, he or she could have performed it.

a situation of violation of the personal interests of that person. Unfortunately, such formulation of the mentioned situations again deserves a critical comment on the not-fully-reflexive use by the legislator of the plural, i.e., the form, which excludes from the scope of the statutory notion of domestic violence the behaviour effecting in a situation characterised by a violation of only one right or only one personal interest (of the person suffering *de facto* domestic violence). Therefore, also in this regard, an amendment to the provision formulating the definition in question seems more than urgent. Indeed, no reasons can be seen to support this limitation.

As regards the first situation, i.e., the situation of violation of rights of the person suffering domestic violence, it must be stated – and despite the full legitimacy of referring to all rights of the person concerned – that considering this situation as merely the violation of the rights in question is not entirely convincing. After all, an objectively violent behaviour in the discussed context is also the behaviour of a given person, which not so much infringes the rights of the victim of domestic violence as hinders the exercise of those rights by undertaking an act directly aimed at infringing them. Thus, considering the discussed situation, being a result of violent behaviour, according to the formula of effect – i.e., the situation of violation of rights – appears to be inadequate, as it removes from the field of domestic violence behaviours that are directly aimed at infringing the rights in question. A similar remark can also be made about the second situation, i.e., the violation of personal interests.[22]

[22] The literature on the issue of personal interests is extremely extensive. For the purposes of this study, it will suffice here to refer to the explanation by Zbigniew Radwański that: "An attribute of all natural persons are their personal interests. The provisions of civil law do not contain a synthetic definition of this notion, including merely their exemplary list (Article 23 of the CC). However, it can be assumed that it refers to values recognised by the legal system (i.e., highly valued states of affairs) encompassing a person's physical and mental integrity, individuality and dignity as well as position in society, constituting the premise for the self-realisation of the natural person. These are – continues Z. Radwański – interests inherent in a human being, regardless of the degree of his or her psychological sensitivity, of a non-financial nature; thus, they cannot be expressed in any economic categories, although they may indirectly affect economic situation of a person concerned (e.g., the opinion of a good employee may affect his or her earnings). (...) A closer delimitation of the scope of personal interests – explains the quoted author – is made by indicating their individual types. Their incomplete list is contained in Article 23 of the CC, indicating the following: health, freedom, dignity, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of home, and scientific,

Due to the use by the legislator of the phrase "in particular" to describe exemplary behaviours intended to cause the above-mentioned situations of violation of rights or personal interests of the person suffering domestic violence, the statutory definition of the notion of domestic violence is ultimately incomplete in terms of its scope[23] – and this is despite the fact that its first fragment is constructed according to the formula of the classical definition.[24] The exemplary behaviours mentioned in the law under consideration and directed against a person suffering domestic violence are the following: 1) exposing him or her to the risk of losing life, health or property, 2) violating his or her dignity, physical integrity or freedom, including sexual freedom, 3) causing damage to his or her physical or mental health, causing pain or harm to him or her, 4) limiting or depriving him or her of access to financial resources or the possibility to work or become financially independent, 5) lastly, significantly invading his or her privacy or arousing a feeling of threat, humiliation or anguish in that person. In spite of full approval of the general direction of the inclusion of the above-mentioned behaviours, one cannot, however, fail to note that the verbal form of the statutory description of some of them may raise far-reaching interpretative doubts, to note only as an example the occurrence of a relatively wide area of fuzziness with such terms as: "limiting the access to financial resources" or "significantly invading privacy." In spite of the polysemy, it should be, however, recognised that the use of examples (and thus the definition of incomplete scope) plays an important indicative role by directing the interpreter to the most important area of behaviour constituting domestic violence in the light of social

artistic, inventive or improvement achievements. The meaning of these terms – specifies Z. Radwański – is to a significant extent determined not only by the common rules of language, but also by whole sets of specific legal rules concerning the protection of the mentioned values (e.g., copyright law, press law, regulations concerning surname and name, etc.). They are also specified by judicial jurisprudence based, *inter alia*, on existing social evaluations. (...). Constitutional provisions on civil rights and freedoms, as well as international conventions formulating certain values to be realised, constitute an important basis for the recognition of further personal interests." – Z. Radwański, *Prawo cywilne – część ogólna,* Warszawa 1996, pp. 135–136.

[23] On this type of definition, see, for example, M. Zieliński, *op. cit.*, pp. 209–210, where the author very accurately points out that: "Definitions of incomplete scope are sometimes used to strengthen the classical definition in a situation where it was not diagnostic enough."

[24] On the issue of classical definition see in particular M. Zieliński, *op. cit.*, p. 206 *et seq*.

assessments. Hence, the proposal to give the statutory definition of the notion of domestic violence an exclusively classical character can hardly be regarded as fully convincing.

An extremely important element of the discussed definition, and at the same time an element narrowing the scope of its designations, is the condition formulated therein referring to the manner in which the act constituting domestic violence was committed. The discussed definition assumes that the behaviour violating the rights or personal interests of the person suffering domestic violence must be characterised by the use of physical, psychological or economic superiority. Without the risk of a mistake being made, it can be stated that the behaviour of the perpetrator of domestic violence expressed in this condition fully corresponds to the notion of violence in criminal law, which also draws attention to the need to make visible the manner of perpetrating violence, emphasising the superiority of the perpetrator over the victim. At this point, let us mention one of them – by the way, a particularly representative one, as it comes from a prominent expert on the issue – according to which violence in criminal law is: "(...) such influence with the use of physical means that is intended, by preventing or overcoming the resistance of the person compelled, to either prevent the wilful decision of that person to occur or be implemented, or to make that decision be made in the way desired by a perpetrator by exerting pressure on the motivational processes of the person compelled with the use of actually caused hardship".[25] In attempting at this point only to pre-characterise superiority of the perpetrator of domestic violence over its victim required by the indicated condition, it should be noted that it will, as a rule, be the result of a relatively permanent situation, although – understandably – it is also not possible to exclude a case of domestic violence arising against the background of a not-well-established relationship between the perpetrator of domestic violence and the victim of that violence. The definition under consideration points out that the superiority in question may vary in nature. Of course, one might therefore wonder whether the distinction in the Act of the varieties of this superiority in the form of physical, psychological and economic one is fully justified. Finally, taking into account the fact that it does not seem to have yet any other nature, calling for a statutory change in this respect appears to be insufficiently justified.

[25] T. Hanausek, *Przemoc jako forma działania przestępnego*, Kraków 1966, p. 65.

Closing the analysis of the statutory definition of the domestic violence in the context of the characteristics of its material (objective) dimension, one cannot, of course, disregard the issue of its victim, i.e., the issue which in criminal law is linked, on the one hand, to the object of the executive action and, on the other hand, to the issue of the aggrieved party. As has already been pointed out, the Act on Counteracting Domestic Violence defines a victim of domestic violence. It does it – let us recall once again – in Article 2(1)(2), which provides that: "Whenever the Act refers to a person suffering domestic violence (victim of domestic violence) – it shall mean: (a) the spouse, including where the marriage has ceased or been annulled, and his or her ascendants, descendants, siblings and their spouses, (b) ascendants and descendants and their spouses, (c) siblings and their ascendants, descendants and their spouses, (d) a person in an adoption relationship and his or her spouse and their ascendants, descendants, siblings and their spouses, (e) a person currently or formerly living in cohabitation and their ascendants, descendants, siblings and their spouses, (f) a person sharing occupancy and housekeeping and his or her ascendants, descendants, siblings and their spouses, (g) a person currently or formerly in a lasting emotional or physical relationship regardless of shared occupancy and housekeeping, (h) a minor subject to domestic violence." Let us also turn our attention once again to Article 2(2) of the discussed Act, for this provision includes an important – and, let us add, most pertinent – complement to the scope of the notion of a person suffering domestic violence: it includes a minor witnessing domestic violence perpetrated against (a) person(s) referred to by the legislator in the above-quoted provision. In view of the above, the scope of the statutory notion of a person suffering domestic violence appears to be sufficiently broad, to provide the statutory notion of domestic violence with adequacy, based on an undoubted correspondence with the social assessments relevant here as to when, from a social point of view, domestic violence occurs.

Conditions limiting the scope of the discussed statutory notion of domestic violence also include, in the light of its legal definition, the requirement that the violent behaviour must be intentionally committed by its perpetrator (i.e., by the person using domestic violence). Due to the fact that we do not find an explanation of this requirement in the Act on Counteracting Domestic Violence, the natural interpretative response is to refer in this regard to the normative act central in this area, which is undoubtedly the Penal Code. This Code regulates

this issue in Article 9(1) as follows: "A prohibited act is committed with intent when the perpetrator has the will to commit it, that is when he or she is willing to commit or foreseeing the possibility of perpetrating it, he or she accepts it. "Without going into the numerous details that characterise the problem of intentionality, it is sufficient to recall that, according to the doctrine of criminal law, the above-mentioned provision provides a basis for drawing from it two basic varieties of intention, namely the direct intention (dolus directus) and the possible intention (dolus eventualis), which we have to deal with in the case of the intention to commit a prohibited act (which is a direct intention) and in the case of the consent to its commission (which is a possible intention).It should also be recalled that each of the above-mentioned variants relates to the subjective side of the prohibited act, i.e., the intellectual and volitional attitude of the perpetrator towards committing the act. Each of them is therefore characterised by both the intellectual and volitional attitude of the perpetrator towards the indicated act. In the case of the above-mentioned initial variants of intentionality in which we are interested, the intellectual attitude of the perpetrator to the criminal act he or she is committing is uniformly presented as the perpetrator's anticipation of the possibility of committing the mentioned act. This means that the distinction between them is grounded in a different volitional orientation. In criminal law, the constitutive volitional disposition for direct intention is the perpetrator's intention to commit the prohibited act, whereas the constitutive volitional disposition for possible intention is the perpetrator's consent to commit the act in question. Looking closer at the essence of the possible intention, it could be only added here that in Polish criminal law doctrine, the constitutive consent to the commission of a prohibited act is most often interpreted following the guidelines, of the so-called theory of indifference of the will, by Władysław Wolter, i.e., the theory according to which – to put it succinctly – the analysed consent to the commission of the prohibited act should take place when the perpetrator neither wants the prohibited act to be committed nor wants it not to be committed. In view of the above, it must be concluded that domestic violence within the meaning of the Act on Counteracting Domestic Violence can only be described as such when the objectively violent behaviour is carried out by the perpetrator in pursuance of the above-mentioned intention. This circumstance is very important as it makes it clear that it is not possible to speak of domestic violence in a situation in which the above-mentioned situations of violation

of rights or personal interests were not caused by an intention to cause them. In other words, causing the situations in question by unintentional conduct may never be regarded as domestic violence within the meaning of the Act on Counteracting Domestic Violence.

Having in view an outline of the notion of domestic violence within the meaning of the Act on Counteracting Domestic Violence,[26] it is possible to proceed to highlighting the ways of understanding violence in the criminal law – ways that are formulated in the science of criminal law for the purposes of that law. Due the fact that in the Polish literature on the subject the most profound analysis in this respect was undoubtedly presented by Tadeusz Hanausek in his habilitation dissertation, let us begin with reporting – in some detail – the position of this author.

Thus – once again, let us recall – that according to T. Hanausek, violence is: "(...) such influence with the use of physical means that is intended, by preventing or overcoming the resistance of the person compelled, to either prevent the wilful decision of that person to occur or be implemented, or to make that decision be made in the way desired by a perpetrator by exerting pressure on the motivational processes of the person compelled with the use of actually caused hardship".[27] Before proceeding with the explanation of all the components of the above-mentioned criminal law approach to violence, it is worth recalling that, according to T. Hanausek, violence is a behaviour that creates a coercive situation in the person suffering violence.[28] In the Author's opinion – we should add, the fully convincing one: "Violence is a form of behaviour designed to cause coercion, and coercion is the result of this (or other) behaviour. Thus" – T. Hanausek continues – "whether one defines violence in terms of the perpetrator's behaviour or its result, violence cannot be equated with coercion. After all, violence is used by the perpetrator, while coercion affects the victim (the per compelled). While recognising the close relationship between the two, it is difficult to deny that these are two different sides."[29] As regards the violence itself, the author argues that it should be given a narrower meaning, i.e., a meaning

[26] A detailed analysis of the notion in question definitely exceeds the framework imposed on this study.
[27] T. Hanausek, *op. cit.*, p. 65.
[28] *Ibidem*, p. 93 *et seq*.
[29] *Ibidem*, p. 93.

that does not allow the notion of violence to include the threat (*metus*).[30] In this narrower sense – according to T. Hanausek – violence is *vis*, within which two varieties can be distinguished, namely *vis compulsiva* (compulsive force/violence) and *vis absoluta* (absolute force/violence).[31] In view of the fact that in the conceptual system referred to it is assumed that violence gives rise to a coercive situation for the person compelled, T. Hanausek consistently – and again it should be added: fully correctly – indicates that *vis compulsiva* gives rise to compulsive coercion and *vis absoluta* to absolute coercion.[32] In order to be fully clear in understanding the referred components of T. Hanausek's concept, let us indicate the following – following the author: "Coercion consists in the violation of the freedom of a wilful decision concerning the external behaviour of the person compelled so understood, with the proviso that, since the notion of freedom of a wilful decision includes all the stages of its formation, coercion may violate not only the freedom of the wilful decision formed and then implemented, directing it by imposing motives (compulsive coercion), but also the ability to make such a decision or the possibility of implementing it (absolute coercion). In the last two cases (absolute coercion), the external behaviour of the person compelled can only be understood in an objective sense, as it is not directed by the will. By using *vis absoluta*" – T. Hanausek further elaborates – "the external behaviour of a human being can therefore be coerced also when it has objective features of unlawful behaviour, but is not an 'unlawful act,' as it is not directed by the will of the person compelled. By using *vis compulsiva*" – the author continues – "one may coerce the external behaviour directed by the will of the person compelled, both legally irreproachable and bearing the features of an unlawful act."[33] It is also worth mentioning – as this will allow us to fully understand T. Hanausek's concept – that the author based it on the notion of the will developed by S. Rubinsztejn, according to whom the will is an organised set of desires, expressed in behaviour, in the regulation of actions, which falls within the area of the so-called stimulating rather than so-called executive regulation.[34] This approach also points out that acts of will can be

[30] *Ibidem*, p. 95.
[31] *Ibidem*, p. 96.
[32] *Ibidem*.
[33] T. Hanausek, *op. cit.*, pp. 88–89.
[34] S. Rubinsztejn, *Byt i świadomość*, Warszawa 1961, p. 362.

simple, when – as T. Hanausek puts it – "the motive passes almost directly into action,"[35] and complex, when "a complex conscious process comes between the impulse and the action, which also exerts its influence thereon".[36] In complex arbitrary action – as T. Hanausek explains, following S. Rubinstejn – "four main stages or phases can be distinguished: 1) the emergence of a motive and the setting of some goal, 2) the stage of reflection and the struggle of motives, 3) determination, 4) implementation".[37] As a consequence of the approval of S. Rubinsztejn's approach, T. Hanausek assumed that freedom of a wilful decision – the freedom that is violated by the use of violence – is a structure within which three chronological aspects should be distinguished: "1) the freedom to make a wilful decision, 2) the freedom of the motivational processes shaping such a decision, and 3) the possibility of executing (implementing) the wilful decision either 'generally' or in a certain direction or manner".[38] Based on the indicated concept of S. Rubinsztejn, T. Hanausek – as already indicated – assumed that violence may take two forms: compulsive (*vis compulsiva*) and absolute (*vis absoluta*). Compulsive violence is supposed to evoke compulsive coercion, which – as the author puts it – "(...) occurs when the freedom of motivating processes is violated by imposing on the person compelled motives directing this process towards forming a wilful decision regarding the external behaviour, which suits the compelling person",[39] while absolute violence is supposed to evoke absolute coercion, i.e., coercion which, according to T. Hanausek takes place: "(...) when the capacity to make a wilful decision is impaired, or: (...) when the ability to implement a wilful decision is violated either 'in general' or in a certain direction or manner".[40] Transposing T. Hanausek's concept of violence into the language of the modern theory of criminal law, we would thus say that compulsive violence is a behaviour that significantly restricts the so-called controlling will of

[35] T. Hanausek, *op. cit.*, p. 72.
[36] *Ibidem.*
[37] *Ibidem.*
[38] *Ibidem*, p. 75. On the other hand, in the case of a so-called simple act of will, T. Hanausek argues that: "(...) the notion of its freedom will be limited to two elements, namely the first and the third of the mentioned above. This is because in this case the realised objective passes almost directly into an action, not preceded by any complex and longer conscious process, and the achievement of this objective takes place by means of habitual actions that are carried out almost automatically under an impulse" – T. Hanausek, *op. cit.*, p. 75.
[39] T. Hanausek, *op. cit.*, p. 80.
[40] *Ibidem.*

the person compelled, which determines the possibility of directing (arbitrarily) his or her behaviour, the juridical consequence of which in the field of criminal law is the impossibility of ascribing to the person compelled any guilt in the material sense of the law – however, what needs to be emphasised, there is at the same time the possibility of recognising his or her behaviour as prohibited under penalty and, moreover, as illegal. In turn, as regards absolute violence, it would have to be said that in the situation when it excludes the freedom to make wilful decisions, it is a circumstance excluding the existence of the so-called determining will, which results in the impossibility to recognise the behaviour of the person compelled as an act within the meaning of criminal law.[41] The assessment of absolute violence excluding the ability to execute a wilful decision is slightly more complicated. And here also, the majority of those analysing this issue would probably be in favour of excluding the act. Nevertheless, it is worth noting that the problem seems to be somewhat deeper in this case. If the violence in question were to result in the non-performance of an action being the subject of the obligation, then – as it seems – a more adequate solution would be an option excluding omission;[42] after all – as it was already mentioned above – an omission is nowadays only considered to be such non-performed action which was not performed by the person concerned in a situation in which he or she could have performed it.

Let us proceed to a brief explanation of the individual components of the definition of violence developed by T. Hanausek.

Violence in the author's view – let us recall – is first of all an influence with the use of physical means. T. Hanuasek proposes to interpret such means as broadly as possible and with the necessary consideration of their significance in the context of defining violence; after all, in his opinion, they are supposed

[41] This is because in the vast majority of approaches to the act in criminal law, it is emphasised that the condition for the occurrence of an act understood in this way is precisely the need for the so-called determining will. This is emphasised with particular force in the causal (naturalistic, naturalistic-causal) approach, when it is argued that an act is only such behaviour of its perpetrator which is caused by his or her will.

[42] Certainly, if one were to accept the variant which places the omission at the level of the first condition in the dogmatically viewed structure of the offence, i.e., at the level of human behaviour. This reservation is important because one could just as well transfer the discussed issue to the level of the act, considering that human behaviours in the form of action and omission must be caused by the will of the person concerned.

to be: "(...) relevant to violence and not to coercion, i.e., not prejudicial to the type of coercion induced".[43] Consequently – as has been said – T. Hanausek defines the means in question relatively broadly, indicating that this type of physical means includes: "(...) any phenomenon capable of directly inducing an objective change".[44] At the same time, the quoted author adds – which is worth emphasising here – that: "This, probably as wide as possible formulation has, on the one hand, the value of flexibility, allowing a certain freedom in the practical operation of the definition of violence adopted here. This is not possible" – he continues – "with quite rigid criteria of 'bodily harm or 'use of physical force.' On the other hand, in spite of its flexibility, it retains" – he adds – "a much greater degree of certainty than the 'open' notion of any conduct', including conduct that is to a very large extent conditioned by its subjective 'perception' by the person compelled."[45]

The second and equally important element of violence, as proposed by T. Hanausek, is the subjective conditionality of violence. The author puts it as follows: "Violence in the criminal law sense can only be understood as a means to an end. This is because it is a particular way of behaving chosen by the perpetrator to achieve his or her goal in the by means of coercion. The use of this way" – as T. Hanausek explains – "thus means an incorporation of the perpetrator's mental processes. In this sense, 'violence'" – he further explains – "as a feature characterising this way can thus be classified as a subjective feature. This is because it is precisely the particular direction in the attitude of the perpetrator (the goal) that gives meaning to acting violently and it is only in this sense that the action is prohibited. The use of violence to induce coercion" – as the author states – "must therefore be covered by the direct intention of the perpetrator."[46] Also relevant in the context of the subjective conditioning of violence discussed here is the observation of T. Hanausek that the identical "(...) external behaviours of the perpetrator, depending on the content or subjective conditioning, can constitute either *vis absoluta* or *vis compulsiva*. For example" – the author explains the difference – "when the perpetrator locks person A in a room in order to prevent him or her from collecting a letter from the postman,

[43] T. Hanausek, *op. cit.*, p. 98.
[44] *Ibidem.*
[45] *Ibidem.*
[46] *Ibidem,* p. 99.

this will be *vis absoluta*. On the other hand, when the perpetrator locks person A up in order to force him or her to sign an authorisation to collect money, and keeps him or her locked up for as long as he or her does not yield to perpetrator's will – this will be *vis compulsiva*. Whenever" – concludes T. Hanausek – "with identical, external courses of action the perpetrator's intention is thus to exert a motivating influence, we are then dealing with *vis compulsiva*. On the other hand, when the perpetrator intends by his or her action to prevent the emergence or implementation of a wilful decision – this is *vis absoluta*."[47]

Certainly – as the mentioned author emphasises elsewhere – "A feature of coercive violence, no less important than the subjective orientation of the perpetrator's intention, is the objective capability of this violence to produce coercion. Both these features" – explains T. Hanausek – "are inextricably linked in the sense that each of them constitutes a necessary condition for the existence of violence. Because of this close connection, an attempt was made to reflect both features in the proposed (...) definition of violence by means of the phrase 'is intended to', which is perhaps not the best in stylistic terms (generally speaking: violence is an influence that is intended to induce coercion). Just as the lack of subjective orientation of violence towards inducing the coercion, even though it is objectively induced, will not allow the recognition of coercive violence, the lack of objective capability of the course of action chosen as a means of inducing the coercion intended by the perpetrator prevents the act from being considered as committed, but at most (under further conditions) justifies the finding of an ineffective attempt (using means incapable of producing the intended effect). The capability of violence to induce coercion by no means implies that all violence must be effective, i.e., that all violence must induce coercion."[48] The area related to the objective capability of violence to induce coercion, also encompasses the problematic issue of the possibility of realising violence by failure to act (omission). T. Hanausek firmly rejects such a possibility and justifies his position in this respect by arguing that omission is not causal, that – in other words – it is a form of human behaviour unsuitable to be regarded as the cause of any effect. He writes in this regard: "One's own view of the problem under discussion here will only be the consequence of supporting the view that rejects the existence

[47] *Ibidem*, pp. 102–103.
[48] *Ibidem*, p. 132.

of any causality of omission. For in the case of an omission there is no causality, but only the failure to prevent an effect caused by other circumstances, that is to say, the absence of a counter-causality. Since causality is a matter in motion, and an act of omission is an inhibition of motion while the situation is in motion, it is difficult to perceive a causal, immanent link to matter in motion where there is no motion (...). If, therefore, violence is to be a means capable of inducing coercion, it must be qualified to be a cause of coercion, and it can have such qualifications only as active behaviour in the form of action, since only action can become a cause for an effect."[49]

Violence, as perceived by T. Hanausek, is a behaviour which, as already indicated, can take the form of either *vis absoluta* or *vis compulsiva*.

The author comments on the first of them as follows: "(...) an influence with the use of physical means that, by preventing or overcoming the resistance of the person compelled is intended to prevent the wilful decision of that person to occur or be implemented. In this sense" – as T. Hanausek explains – "the notion of *vis absoluta* characterises an attack on the freedom of decision of both a simple and a complex act of will, consisting in harming either: (a) the ability to make a wilful decision, or (b) the possibility of implementing such a decision. Thus" – the author clarifies – "behaviour described as *vis absoluta* afflicts the first or last stage of the process of free formation of the wilful decision. And common to both forms of attack is the resignation from obtaining a wilful decision of the person compelled through a motivating influence on those mental processes which precede the taking of such a decision."[50] At the same time, however, T. Hanausek lucidly observes that: "If in the case of the first form of *vis absoluta* (i.e., an attack on the ability to make a wilful decision) this scope, which includes influence such as hypnosis, intoxication, stupor, is generally undisputed, the determination of the scope of *vis absoluta* as an attack on the possibility of implementing a wilful decision is by no means uniform."[51] Regarding the latter scope, T. Hanausek ultimately favours the view that: "*Vis absoluta*, as an attack on the possibility of implementing a wilful decision, should therefore be understood in a sufficiently broad sense, i.e., as: (a) mechanically

[49] *Ibidem*, p. 135.
[50] *Ibidem*, p. 104.
[51] *Ibidem*, p. 106.

preventing the person compelled from using his or her muscles in accordance with his or her will or: (b) causing such changes in the environment of the person compelled that prevent him or her from implementing a wilful decision concerning the external behaviour imagined thereby." The author adds that "the phrase 'causing changes in the environment' adopted here still requires some clarification. In the sense used here, the discussed phrase will include not only the impact directly on the thing or the means, consisting in their taking away, destroying or otherwise preventing their use, but also the direct impact on a third person and the creation of obstacles preventing the person compelled from implementing his or her wilful decision."[52] It should also be mentioned that an important role in the structure of absolute violence – which is also accurately emphasised by T. Hanausek – is played by its irresistibility, although in the author's opinion this does not mean: "(...) that with this form of violence all resistance must be absolutely prevented. The *vis absoluta* should not be considered irresistible only when the person compelled has no possibility, even in theoretical sense, of avoiding a violation of his or her ability to make or implement a wilful decision, but already when, according to average practical assessments, it cannot be assumed that he or she could have removed him – or herself from the forced situation or avoided it."[53]

In turn, as regards *vis compulsiva*, T. Hanausek states that in his opinion it is: "(...) such an influence with the use of physical means that is intended, by preventing or overcoming the resistance of the person compelled, to have the wilful decision of that person be made in the way desired by a perpetrator, by exerting pressure on the motivational processes of the person compelled with the use of actually caused hardship. The behaviour of the person compelled being the result of *vis compulsiva*" – T. Hanausek further explains – "is thus based on his or her own wilful decision and thus corresponds to the requirements of the criminal law notion of an act. This circumstance" – the author continues – "is of decisive importance for distinguishing *vis compulsiva* as a separate form of violence, which – as a means capable of causing compulsive coercion, precisely thanks to this circumstance – is closer to a threat than to the other form of violence, i.e., *vis absoluta*. In contrast to *vis absoluta*" – as T. Hanausek

[52] *Ibidem*, pp. 107–108.
[53] *Ibidem,* p. 108.

explains – "in the case of *vis compulsiva*, the perpetrator uses the ability of the person compelled to consciously shape his or her will by analysing motives and counter-motives and by making a choice from among them that is reflected in the act of will. In the case of *vis compulsiva*, the use of this ability consists in the imposition by the perpetrator of motives causing the outcome of the motivational process to turn in the direction he or she desires. *Vis compulsiva* is thus an attack on the freedom of the motivational courses shaping the wilful decision and, as such an attack, it can harm the freedom to shape only a complex act of will."[54] The mentioned author also emphasises that the hardship caused by compulsive violence must be objectively significant and at the same time: "(...) capable, by overcoming resistance, of impinging on the motivational courses of an average person, such as the person compelled and being in a situation like his or hers."[55] In characterising compulsive violence, T. Hanausek also points out that: "*Vis compulsiva* differs significantly from a threat in that the violent action in this form causes hardship at the very moment in which it is directed against the freedom to make a wilful decision, whereas a threat only 'announces' such hardship is to occur in the future."[56]

In the definition of violence developed by T. Hanausek, it is assumed that violence: "(...) in all its forms is subjectively aimed at preventing or overcoming the resistance, while objectively fit for this purpose".[57] The author proposes to understand the resistance of the person compelled, being a key element of the quoted statement, as: "(...) the external expression of his or her will contrary to the desires of the compelling person. According to this approach" – T. Hanausek continues – "in order to establish the resistance, it is not sufficient to establish the mere existence of the will opposing the desires of the compelling person, but it is necessary to establish that this will found its expression in the external behaviour of the person compelled. This behaviour" – the Author explains – "need by no means consist in a corporal resistance in the form of some muscular movement, it should only constitute any external incorporation of this will. The form of this incorporation" – T. Hanausek states – "is to a large extent determined by

[54] *Ibidem*, pp. 109–110.
[55] *Ibidem*, p. 113.
[56] *Ibidem*.
[57] *Ibidem*, p. 118.

the elements of the given situation, and in particular by the nature and intensity of the violence."[58]

Finally, an element related to the condition of resistance discussed above is the lack of consent of the person compelled. This lack, in view of T. Hanausek, should be understood as a negative element of the subjective attitude of the person compelled.[59] T. Hanausek is in principle right to emphasise that: "Without such an element, every objective action only subjectively aimed at inducing coercion would have to be considered as the committed violence, even if the person against whom the action was used fully accepted it. Then" – the Author continues – "every type of 'coercion' would have to be reworded as a type of action to compel, constituting *a priori* a case of ineffective attempt (in view of the acceptance of this action by the victim)."[60] At this point T. Hanausek also emphasises that: "(...) the negative element of lack of consent of the person compelled should play a role as a factor appearing in these types not instead of the element of preventing or overcoming resistance, but alongside it, as an essential feature implicite included in these types".[61]

Let us emphasise once again that the definition of violence developed by T. Hanausek is undoubtedly the result of a significantly in-depth scientific analysis. For this reason, it can be considered by far the leading one in the Polish criminal law literature and, for this reason, an almost ideal point of reference. However, other approaches to criminal violence can also be found in the Polish criminal law literature. Due to the limited framework of this study, let us mention only some of them.

According to Jarosław Majewski, who expressly refers to the approach of T. Hanausek – "(...) an offence committed with the use of violence within the meaning of Article 115(3) [of the PC of 1997 – Ł.P.] is an offence which involves the use of force (physical means) by the perpetrator in order to overcome or prevent the resistance of the other person or to influence the development of

[58] *Ibidem*, pp. 118–119.
[59] *Ibidem*, p. 125.
[60] *Ibidem*.
[61] *Ibidem*, p. 126.

his or her will or motivational processes in a certain direction with the use of actually caused hardship (...)".[62]

In turn, in the opinion of Paweł Daniluk: "Violence within the meaning of Article 115(3) of the PC is physical force by means of which the perpetrator influences another human being (directly or indirectly), and therefore offences committed with the use of violence are those offences during the commission of which the perpetrator influenced – directly or indirectly – another human being with muscular force, i.e., with energy (power) based on muscular work. The condition for a given behaviour of the perpetrator to be considered as acting with violence, covered by Article 115(3) PC, is not that the physical force used has reached a certain degree of intensity. In particular" – P. Daniluk explains – "based on the provision under comment, there are no grounds to formulate a view that one can speak of violence only when there is at least a breach of the personal inviolability of the victim (...)."[63] "Violence within the meaning of Article 115(3) of the PC – the mentioned author continues – is both direct violence, aimed directly at the body of the victim, and indirect violence, consisting in influencing the victim through physical force directed at another human being, animal or thing."[64]

A statement by Andrzej Marek also falls within the course of discussion referring to the approach by T. Hanausek. According to this statement: "Violence is understood as an influence with the use of physical means that is intended to prevent or overcome the resistance of the person compelled or to set his or her will in the direction desired by the perpetrator (...)."[65] The author also adds that: "(...) violence can be either irresistible (*vis absoluta*) or relative, compulsive (...)",[66] and furthermore he emphasises that: "(...) the Penal Code in force uses the narrower term 'violence against a person' (e.g., Articles 191, 280 and 281) and the general term 'violence' (e.g., in Article 282), which also allows indirect violence, aimed at a thing in order to exert coercion on a person (...)".[67]

---

[62] J. Majewski, *Objaśnienie art. 115 § 3 k.k.*, [in]: A. Zoll (ed.), *Kodeks karny. Część ogólna*. Vol. 1: *Komentarz do art. 1–116 k.k.*, Warszawa 2012, p. 1364.

[63] P. Daniluk, *Objaśnienie art. 115 § 3 k.k.*, [in]: R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2023, p. 793.

[64] P. Daniluk, *op. cit.*, p. 793.

[65] A. Marek, *Kodeks karny. Komentarz*, Warszawa 2006, p. 253.

[66] *Ibidem*.

[67] *Ibidem*, p. 254.

In Genowefa Rejman's assessment, however, violence: "Is associated with coercion as a negation of freedom and implies 'coercive force', rape, 'brute force', superiority and other forms that affect the will of the human being."[68]

Extremely interesting and at the same time scientifically valuable observations on the understanding of violence in criminal law can be found in studies by Krystyna Daszkiewicz.[69] In particular, this author emphasises that it is a good Polish tradition to conceive violence in such a way as to include both so-called direct violence and so-called indirect violence.[70] However, according to K. Daszkiewicz, this tradition was unnecessarily abandoned,[71] which in her opinion: "(...) resulted in the introduction into the Penal Code of regulations favourable to perpetrators of offences committed with the use of violence and unfavourable to their victims".[72] In the quoted study, K. Daszkiewicz also shares her important comments on the distinctions between the Code terms "violence against a person," "violence" and "rape of a person," force against a person,[73] at the same time formulating a critical and, what is particularly important, systemic evaluation of the legislative decision regarding the introduction of the first of the distinguished terms into the Penal Code.[74] The author writes, *inter alia*, as follows: "During the period of validity of both the 1932 Penal Code and the 1969 Penal Code, 'violence' was traditionally associated with either direct or only indirect influence on the person compelled. This 'indirect' influence could take place by means of a thing or another person. (...) Examples of influencing a person by means of a thing (referred to as indirect violence') have been mentioned many times in various commentaries. Already J. Makarewicz" – K. Daszkiewicz continues – "used the example of bandits shooting at the tyres of a car they wanted to stop. It was also pointed out, *inter alia*, that windows

[68] G. Rejman, *Objaśnienie art. 115 § 3 k.k.*, [in]: G. Rejman (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa 1999, p. 1428.

[69] K. Daszkiewicz*, Kodeksowy zamęt dotyczący przestępstw z użyciem przemocy. Stanowisko Sądu Najwyższego*, [in]: K. Daszkiewicz, *Kodeks karny z 1997 roku. Uwagi krytyczne,* Gdańsk 2001, p. 154 *et seq.*

[70] This is also emphasised in case law – see in particular the resolution of the Supreme Court of 10.12.1998 (I KZP 22/98), OSP 1999 No. 2, item 39, as well as the decision of the Supreme Court of 16.03.1999 (I KZP 32/98), OSP 2000 No. 3, pp. 162–165.

[71] K. Daszkiewicz, *op. cit.*, p. 154.

[72] *Ibidem*, p. 155.

[73] *Ibidem*, p. 162 *et seq.*

[74] *Ibidem*, p. 154 *et seq.*

were removed from someone's flat in winter, the roof was taken off, the door was bricked up in order to influence motivational processes and human decisions through such actions. A meaningful and repeated example was indirect violence against a disabled person moving on crutches, whom the perpetrator of the offence deprived of mobility by taking away those crutches. The consideration of violence in its various manifestations and forms, both direct and so-called indirect, is of the utmost importance both in terms of the correct assessment of the *modus operandi* of the perpetrator of the offence and the safeguarding of interests of his or her victims. Currently, due to the regulations introduced in the 1997 Penal Code, i.e., this distinction between 'violence' and 'violence against a person,' this tradition is to be abandoned, also with regard to very serious offences."[75]

Having in mind approaches to violence in criminal law, in particular T. Hanausek's notion of violence, which has been discussed in detail, let us try to answer the question of their possible differences from the previously analysed definition of domestic violence laid down in the Act on Counteracting Domestic Violence.

Following the analysis of this definition carried out above, we should start with restating the fact that the definition in question is clearly too narrow in describing the perpetrator of domestic violence. This is because the legislator used the condition of the age of majority to define the perpetrator of domestic violence – a condition which, as already mentioned, raises justified doubts as to its constitutionality. Therefore, at this point it is necessary to call once again for considering a fundamental change in this respect. The question of differentiating the jurisprudential consequences in the case of domestic violence committed by an adult and a juvenile is – and again let us emphasise – an issue of a different kind.

If we continue along these lines, it is undoubtedly worth noting that the discussed statutory definition of domestic violence does not limit such violence solely to human behaviour in the form of an action, thereby also allowing it to be committed in the form of omission of a legally required action. Meanwhile, the criminal law approaches, and in particular the approach developed

[75] *Ibidem*, pp. 162–163.

by T. Hanausek, assume that violence can only take the form of action.[76] It seems that the legislator is right in this regard. Thus, the argumentation which in fact tries to solve the whole problem with the assumption of the non-causality of omission does not seem to be fully convincing here. In other words, this assumption seems to be deficient in argumentation, because the criminal-law concept of consequential violence can easily be linked to the possibility of its perpetration also by omission of a legally required action – an omission, whose perpetrator can only be, of course, the so-called "guarantor of effect non--occurrence," i.e., a person who is required by law – on the basis of an obligation addressed thereto – to act in order to prevent an effect.[77]

The difference between the statutory definition of domestic violence and the understanding of violence in criminal law also occurs in the approach to the perpetrator's intellectual-volitional relation to the violent behaviour. In the context of criminal law, it is emphasised that this type of conduct can only be regarded as such if it is committed in the exercise of direct intent, not to say in the exercise of its qualified form, namely in the form of directional intention (dolus coloratus). In short, this definition describes this relationship in much broader terms, because in addition to the aforementioned direct intention, it also allows for the possibility of committing violent behaviour in the exercise of possible intention.[78] In view of the *ratio legis* underlying the Act on Counteracting Domestic Violence, the broadened formulation of the relationship in question in the case of domestic violence undoubtedly deserves a positive assessment. After all, there can be no doubt that violent behaviour can also

[76] However, in the case law one can also find a different position, see, e.g., the judgement of the Supreme Court of 6 September 1994 (II KRN 159/94), OSNKW 1994 No. 9–10 item 61.

[77] On the issue of the guarantor of effect non-occurrence in criminal law see, for example, Ł. Pohl, *Artykuł 2 Kodeksu karnego w roli wyznacznika podmiotu przestępstwa skutkowego popełnionego przez zaniechanie*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2008, No. 3, p. 87 *et seq.,* and the literature mentioned therein, which points to the sources of the obligation of the said guarantor.

[78] On the subject of *dolus eventualis*, see in particular M. Kowalewska-Łukuć, *Zamiar ewentualny w świetle psychologii*, Poznań 2015, as well as further literature on the subject mentioned there. See also the judgement of the Supreme Court of 27.07.1973 (IV KR 153/73), OSNKW 1974 No. 1 item 5, the judgement of the Supreme Court of 26.09.1985 (I KR 250/85), OSNPG 1986 No. 5 item 57, as well as the judgement of the Supreme Court of 17.12.1987 (II KR 333/87), OSNPG 1989 No. 2 item 5, and the judgement of the Supreme Court of 17.12.1987 (II KR 333/87), OSNPG 1989 No. 2 item 5.

take place when its perpetrator commits it under conditions of indifference of its will to commit it. In the case of violence committed under the conditions of the perpetrator's indifference, which is due to his or her extremely high level of demoralisation, the response under this law is at least as desirable as in the case of violence with direct intention. As a consequence, the approach taken by the Act on Counteracting Domestic Violence should be regarded as a legitimate departure from the significantly narrower criminal law concept in this area.

While still searching for possible differences between the statutory definition of domestic violence and the criminal law definition of violence, one could risk the view that the said definition was constructed disregarding the element of lack of consent of the person compelled. The reasoning behind this view is that limiting the notion of domestic violence to cases of lack of consent would not take into account the existence of not so rare situations in which the victims of such violence are children, i.e., persons who, by definition, are not fully aware of their rights. Thus, the different structure of the notion of domestic violence in relation to the construction of violence understood in criminal law is determined by an insight into the *ratio legis* of the Act on counteracting domestic violence, or, more precisely and directly, by the understanding of the purpose of this Act, which is a consequence of this insight.

3. Domestic violence as a behaviour prohibited under penalty, analysis and evaluation of the current legal situation

The behaviour that constitutes domestic violence within the meaning of the Act on Counteracting Domestic Violence is undoubtedly also relevant with respect to criminal matters. Briefly and at the same time in general terms, it can be said at the outset that in many different provisions of the criminal law, the legislator codifies sanctioned rules, which prohibit its commission under penalty. This – of course – should not be understood as a situation of redundancy of normative information. For such a phenomenon would be – as is well known – an undoubted praxeological defect in the legal system. The multiple regulations related to domestic violence in criminal law, as indicated, are due to the fact that the behaviour constituting this violence can take very different forms, which

results – by way of example and, of course, in general terms – both from the fact that it is committed in different circumstances and that its commission may result in different consequences. In other words, the different evaluation of violent behaviour is determined by the fact that the legislator associates different criminal law assessments with the indicated different variants of its perpetration, which is expressed in the level of punishability that is different for each of them. The situation is similar with regard to the criminal law evaluation of violence. To our own opinion on the matter we would like to add several statements from the established doctrine on the matter, which are, of course, only exemplary.

Thus, a relatively pedantic list of types of prohibited acts related to violence can be found in the above-mentioned study by K. Daszkiewicz. The author first puts it this way: "There is a very wide range of problems concerning the action 'with the use of violence highlighted in the provisions of the Penal Code. As far as its special part is concerned, the following groups of issues deserve attention: 1) The first includes those provisions of the Penal Code in which 'violence' has been introduced as a statutory feature of the offence. They include: Article 127(1) (activity aimed at changing by force (i.e., with the use of violence) the constitutional system of the Republic of Poland); Article 128(1) (activity aimed at removing by force a constitutional authority of the Republic of Poland); Article 197(1) (subjecting another person by force to sexual intercourse); Article 197(2) (making another person by force submit to other sexual act or to perform such an act); Article 197(3) (subjecting another person by force to sexual intercourse or to submit to another sexual act or to perform such an act, or making another person by force submit to other sexual act or to perform such an act, if the perpetrator acts with particular cruelty or jointly with another person); Article 203 (subjecting another person by force to practise prostitution); Article 224(1) (using violence to affect the official acts of a government authority, other public authority or local government); Article 224(2) (using violence with the purpose of forcing a public official or a person called upon to assist him, to abstain from a lawful official activity); Article 224(3) (using violence with the purpose of forcing a public official or a person called upon to assist him, to abstain from a lawful official activity if the act results in very grievous bodily harm or bodily injury) (i.e., definition of Article 156(1) and Article 157(1)); Article 232 (influencing by using violence the official functions of a court of justice); Article 245 (using violence with a purpose of influencing a witness, expert witness, translator, prosecutor or the accused);

Article 246 (using force by a public official or anyone acting under his orders for the purpose of obtaining specific testimony, explanations, information or a statement); Article 249 (obstructing by using violence the activities related to elections and referendum); Article 250 (influencing by using violence the way of voting by an eligible person); Article 260 (preventing by using violence the holding of, or dispersing, a meeting, gathering, or march); Article 264(2) (crossing the border of the Republic of Poland by a perpetrator using violence); Article 282 (extortion with the use of violence); Article 289(3) (taking a motor vehicle that belongs to someone else, with the purpose of using it for a short period of time by a perpetrator using violence); Article 346(1) (use of violence by a soldier to obstruct a superior in an official action or to force a superior to undertake or to abandon an official action); Article 346(2) (use of violence by a soldier acting jointly with other soldiers or in the presence of assembled soldiers to obstruct a superior in an official action or to force a superior to undertake or to abandon an official action)."[79] "The second group of provisions of the Penal Code" – K. Daszkiewicz continues – "(...) includes those in which not 'violence' but 'violence against a person' has been introduced as a statutory feature. They include: Article 191(1) (use of violence against a person with the purpose of compelling another person to conduct himself in a specified manner, or to resist from or to submit to a certain conduct); Article 191(2) (use of violence against a person with the aim of extorting a debt); Article 280(1) (robbery with the use of violence against a person); Article 281 (aggravated theft/larceny with the use of violence against a person)."[80] To this group – the Author completes – "(...) one should probably also include: Article 119(1) (use of violence towards a group of person or a particular individual because of their national, ethnic, political or religious affiliation, or because of their lack of religious beliefs); Article 153(1) (use of violence (force) against a pregnant woman by a perpetrator who, thereby, without her consent, terminates the pregnancy orinduces her by force to terminate the pregnancy); Article 153(2) already amended (use of violence against a pregnant woman by a perpetrator who thereby, without her consent, terminates a pregnancy or induces her by force to terminate the pregnancy after the conceived child has become capable of living outside the

[79] K. Daszkiewicz, *op. cit.*, pp. 159–160.
[80] *Ibidem*, p. 160.

pregnant woman's body)."[81] Finally, the author adds: "This group also includes provisions in which not 'violence' (in Polish: *przemoc*), or 'violence against a person' (in Polish: *przemoc wobec osoby*) has been introduced as a statutory feature, but (the Polish) term (*gwałt na osobie*) has been used [which is translated into English – in this context – as 'violence against a person' – a note by the translator]. They include: Article 166(1) use of violence (in Polish: *gwałt na osobie*) by the perpetrator who takes control of a ship or an aircraft; Article 166(2) use of violence (in Polish: *gwałt na osobie*) by the perpetrator who takes control of a ship or an aircraft, which brings about a direct danger to the life or health of many persons; Article 166(3) use of violence (in Polish: *gwałt na osobie*) by the perpetrator who takes control of a ship or an aircraft, if the consequence of the act is death of a person or grievous bodily harm to many persons."[82] K. Daszkiewicz aptly emphasises that this group of offences includes "(...) violence as a method of committing such an offence, where it is not a statutory element of the offence"[83], and then indicates, only by way of example, that such an offence may be murder, manslaughter, causing grievous bodily harm or battery.[84]

Arguments by K. Daszkiewicz, presented *in extenso*, clearly show that violence is a component of many different types of prohibited acts. At the same time, it is obvious that some of them have little connection to the domestic violence we are interested in, while others show a very close connection thereto.

The occurrence of violence in the structure of various types of prohibited acts has also been pointed out by, *inter alia*, G. Rejman, who stated that within the Penal Code: "Such offences characterised by violence may therefore include offences of active assault (Article 136, Article 222); forcing a state authority (Article 252); committing a violent assault (Article 140); murder with particular cruelty (Article 148(2)(1)); in connection with rape (Article 148(2)(3)); interruption of the life of a conceived child (Article 153); taking part in the beating of a human being (Article 158, as well as 159); terrorist attack (Article 166), as well as Article 167 and Article 170 of the PC, then all offences against freedom (Article 189 to 193 of the PC); offences against sexual freedom, in particular the offences under Articles 197, 199, 200, 204. Under offences against the

[81] *Ibidem*, p. 161.
[82] *Ibidem*.
[83] *Ibidem*.
[84] *Ibidem*.

activities of state institutions and local self-government, in addition to the above-mentioned offence of active assault, is the offence specified in Article 223 of the PC. In Article 223 of the PC forcing a public official to perform official acts (Article 224). Within offences against elections, the above characteristics refer to offences specified in Articles 249 and 250, and against public order in Article 252. This offence consists in detaining a hostage with the purpose of forcing a state or local government authority, an institution or organisation, legal or natural person, or a group of persons to act in a specified manner, and finally, within offences against property, we deal with violence or threats within the offences of robbery (Article 280), aggravated theft/larceny (Article 281), and extortion racket (Article 283)."[85]

Domestic violence, in the meaning given to this notion by the Act on Counteracting Domestic Violence, is thus subject to rules under many provisions of the criminal law, although it should be emphasised once again that only some of the provisions indicated in the above-quoted arguments of the legal doctrine, which is understandable, include it in their scope of criminalisation. Limiting the following reflection to the area of criminalisation delimited by the wording of the provisions of the Penal Code currently in force in Poland, the regulations contained in the following articles of the Penal Code can be considered as closely related to the domestic violence we are interested in – and without the risk of making a significant mistake:

1. Article 148(1) and Article 148(2), (1) and (3), Article 148(3) sentence 1 (murder in the basic type; murder with particular cruelty; murder with motives deserving particular condemnation; murder of more than one person by one act);
2. Article 151 (inducing suicide);
3. Article 153(1) and (2) (termination of pregnancy with violence and without the consent of the pregnant woman; inducing a pregnant woman under the indicated conditions to terminate her pregnancy);
4. Article 154(2) (qualified types of behaviour mentioned in the previous point due to the death of the pregnant woman as a consequence of the act);

[85] G. Rejman, *op. cit.*, p. 1430.

5. Article 156(1) and (3) (causing grievous bodily harm; qualified form of causing the indicated harm due to the death of a human being as a consequence of the act);
6. Article 156a(2) (using the violence to force another person to cause grievous bodily harm in the form of excision, infibulation or other permanent and substantial mutilation of a female genital organ);
7. Article 157(1) and (2) (causing a bodily injury or an impairment to health other than specified in Article 156(1); causing the above for a duration of not more than seven days);
8. Article 158 (1), (2) and (3) (battery; battery with the consequence of grievous bodily harm; battery with the consequence of the death of a person);
9. Article 159 (battery with a firearm, knife or other similarly dangerous object);
10. Article 160(1) and (2) (exposing a person to direct danger of loss of life or grievous bodily harm; an aggravated form of the indicated conduct due to the perpetrator's duty to take care of the person exposed to danger);
11. Article 162(1) (failure to render assistance);
12. Article 189(1), (2), (2a) and (3) (imprisonment and its qualified variants);
13. Article 190(1) (criminal threat);
14. Article 190a(1) and (3) (persistent harassment; an aggravated variant of persistent harassment due to the consequence of the victim's attempting to take his or her own life);
15. Article 191(1) and (1a) (coercion; compelling another person to conduct himself in a specified manner, or to resist from or to submit to a certain conduct by using violence [force] of another kind persistently or in a manner that substantially impedes another person's use of the occupied dwelling);
16. Article 191b(1) (inducing another person by violence to enter into a marriage or union that corresponds to a marriage within the religious or cultural circle of the perpetrator);
17. Article 194 (restricting a person's rights for the reason of this person affiliation to a certain faith or his or her religious indifference);
18. Article 197(1), (2), (3), (4) and (5) (rape and its aggravated forms; leading another person by violence, unlawful threat or deceit to submit to

another sexual act or to perform such an act and aggravated forms of such behaviour);

19. Article 198 (leading another person to have sexual intercourse or to submit to another sexual act or to perform such an act while taking advantage of that person's helplessness or incapacity to recognise the meaning of the act or to direct one's own proceedings as a result of mental disability or mental illness);
20. Article 199(1), (2) and (3) (leading another person to have sexual intercourse or to submit to another sexual act or to perform such an act by abuse of a relationship of dependence or by taking advantage of a critical situation, as well as qualified variations of such conduct);
21. Article 200(1) (sexual intercourse with a juvenile under 15 years of age or committing, or leading a juvenile to submit to or perform another sexual act with such a person);
22. Article 201 (incest);
23. Article 203 (1) and (2) (subjecting another person to practise prostitution by exploiting that person's relationship of dependence or critical position; subjecting another person to practise prostitution by violence, unlawful threat or deception);
24. Article 207 (1), (1a), (2) and (3) (abuse and its qualified variants);
25. Article 210 (1) and (2) (abandonment of a juvenile under 15 years of age or of a person who is helpless by reason of his or her mental or physical condition; qualified form of the indicated behaviour due to the death of the abandoned person as a consequence of the act);
26. Article 216 (1) and (2) (insult and its qualified variant);
27. Article 217(1) (breach of the personal inviolability);
28. Article 267 (1), (2), (3) (unlawful access to information not intended for him or her; unlawful access to the whole or part of an information system; setting up or using an eavesdropping, visual or other device or software to gain access to information not intended for him or her);
29. Article 268 (1), (2) and (3) (unlawfully destroying, damaging, deleting or altering a record of essential information or otherwise preventing or making it significantly difficult for an authorised person to obtain knowledge of that information);
30. Article 280 (1) and (2) (robbery and its qualified variants);

31. Article 281 (aggravated theft/larceny);
32. Article 282 (1) and (2) (extortion racket);
33. Article 284 (1) and (2) (misappropriation; embezzlement of entrusted property);
34. Article 288(1) (destruction, damaging of another's property or rendering it unusable).

An important piece of information – which, moreover, must necessarily be kept in view – is also that the scope of the criminalisation under the provisions in question is supplemented by a very important additional area of criminalisation, which is in turn the result of the provisions coding the sanctioned rules underlying the criminalisation of attempted offences (Article 13(1) of the PC) and forms of criminal cooperation (Article 18(1), (2) and (3) of the PC).

As can be seen from the above – and let us emphasise: fragmentary – list, many provisions of the PC in fact serve to counteract domestic violence. This state of affairs should, of course, be regarded as largely satisfactory, although – understandably – one can and should consider the correction of the details. In view of the intended framework of this study, there is – of course – no room for such considerations. Nevertheless – by way of a representative example only – let us point out that it is certainly possible to consider amending, for example, the provision that typifies behaviour described as abuse. This provision, i.e., Article 207 of the PC, prohibits only physical and psychological abuse. However, the Act on Counteracting Domestic Violence also points to a third type of superiority of the person over the victim of that violence, namely economic superiority. It could therefore be the subject of in-depth consideration as to whether this provision is not, in view of the above, framed too narrowly. On the other hand, however, and thus defending the *status quo*, the current wording of the provision under consideration could be defended by arguing – quite sensibly and thus convincingly – that the economic superiority in question is nevertheless covered by the scope of the sanctioned rule reproducible from the provision in question, because it falls within the notion of mental abuse, which, after all, is dealt with – and most unquestionably – by the descriptive and, consequently, normative layer of that provision.[86] However, as has already been mentioned, it

[86] Such a position is taken, *inter alia*, by J. Kluza – see J. Kluza, *Przestępstwo przemocy ekonomicznej*, "Prokuratura i Prawo" 2019, No. 9, p. 110. On this issue, see also Konrad Burdziak's

is not really possible to reach a thorough settlement of the outlined issue here. It requires an in-depth, extensive, even monographic analysis, for which there is not enough space in this study due to the assumed framework.

4. Measures of criminal law response to an offence of domestic violence – analysis and evaluation of the current legal situation

As revealed by the above-mentioned provisions of the PC, which can be used to combat domestic violence, the overwhelming majority of the sanctions for the commission of the behaviour stipulated therein are the so-called fixed-term penalty of imprisonment. They understandably vary in size, which is a consequence of the varying degree of *in abstracto* understood social harm of these behaviours. Therefore it can be said that the remaining penalties, i.e., other penalties of imprisonment, restricted liberty and fines, are almost exceptional sanctions in the context of domestic violence, which can be applied in cases of either the most serious domestic violence (murder in the basic type and the indicated qualified murders) or domestic violence of the lowest degree of social harm indicated (restriction of a person's rights for the reason of this person affiliation to a certain faith or his or her religious indifference; insult; breach of personal inviolability). The sanctions in question are, of course, only threatening ones, i.e., sanctions the size of which is a result of the legislator's assessment of the social harmfulness of entire classes of specific types of behaviour.[87] This

comments included in this book, which, however, ultimately go in the direction of amending the provision under consideration. At this point, it can be pointed out that there are important reasons behind both options, which are opposed in this respect.

[87] The legislator – as is well-known – uses in the Penal Code certain patterns of relatively marked sanctions. As regards the so-called term penalty of imprisonment that interests us, let us point out that in the case of the domestic violence under consideration here, the legislator uses the following ranges of this penalty: 1) from 10 to 30 years – Article 148(1); 2) from 15 to 30 years – Article 148(2) (1) and (3) and Article 148(3) sentence 1; 3) from 3 months to 5 years – Article 151; 4) from 6 months to 8 years – Article 153(1); 5) from 1 to 10 years – Article 153(2); 6) from 2 to 15 years – Article 154(2); 7) from 3 to 20 years – Article 156(1); 8) from 5 to 30 years – Article 156 par. 3; 9) from 3 months to 5 years – Article 156a(2); 10) from 3 months to 5 years – Article 157(1); 11) from 1

reservation is of paramount importance, as it also explains why the indicated sanctions function in the criminal law system as relatively marked sanctions, i.e., range sanctions, thus characterised by lower and upper limits. It is obvious that individual behaviours falling within the scope of a given class may differ significantly in the degree of punishability (social harmfulness *in concreto*). The aforementioned range of sanctions creates conditions for imposing a penalty adequate to the case in question, which is not created – obviously – by a punitive sanction without borders, i.e., a sanction which, for this very reason, is fully justifiably avoided in modern criminal law systems based on axiological rationality.

In contrast, the penalty imposed on the perpetrator for committing the offence of domestic violence is already, as is well known, an absolute penalty, i.e., is specified by the court in the conviction in a strictly specified absolute

---

month to 2 years – Article 157(2); 12) from 3 months to 5 years – Article 158(1); 13) from 1 year to 10 years – Article 158(2); 14) from 2 years to 15 years – Article 158(3); 15) from 6 months to 8 years – Article 159; 16) from one month to 3 years – Article 160(1); 17) from 3 months to 5 years – Article 160(2); 18) from one month to 3 years – Article 162(1); 19) from 3 months to 5 years – Article 189(1); 20) from one year to 10 years – Article 189(2); 21) from 2 years to 15 years – Article 189(2)a; 22) from 5 years to 25 years – Article 189(3); 23) from a month to 3 years – Article 190(1); 24) from 6 months to 8 years – Article 190a(1); 25) from 2 to 15 years – Article 190a(3); 26) from a month to 3 years – Article 191(1); 27) from a month to 3 years – Article 191(1)a; 28) from 3 months to 5 years – Article 191b(1); 29) from a month to 2 years – Article 194 ; 30) from 2 to 15 years – Article 197(1); 31) from 6 months to 8 years – Article 197(2); 32) from 3 to 20 years – Article 197(3); 33) from 5 to 30 years – Article 197(4); 34) from 8 to 30 years – Article 197(5); 35) from 6 months to 8 years – Article 198; 36) from 1 month to 3 years – Article 199(1); 37) from 3 months to 5 years – Article 199(2); 38) from 3 months to 5 years – Article 199(3); 39) from 2 to 15 years – Article 200(1); 40) from 3 months to 5 years – Article 201; 41) from 1 to 10 years – Article 203(1); 42) from 2 to 15 years – Article 203(2); 43) from 3 months to 5 years – Article 207(1); 44) from 6 months to 8 years – Article 207(1)a; 45) from 1 to 10 years – Article 207(2); 46) from 2 to 15 years – Article 207(3); 47) from 3 months to 5 years – Article 210(1); 48) from 2 to 15 years – Article 210(2); 49) from one month to one year – Article 216(2); 50) from one month to 2 years – Article 267(1); 51) from one month to 2 years – Article 267(2); 52) from one month to 2 years – Article 267(3); 53) from one month to 2 years – Article 268(1); 54) from one month to 3 years – Article 268(2); 55) from 3 months to 5 years – Article 268(3); 56) from 2 to 15 years – Article 280(1); 57) from 3 to 20 years – Article 280(2); 58) from 1 to 10 years – Article 281; 59) from 1 to 10 years – Article 282(1); 60) from 1 year to 10 years – Article 282(2); 61) from 1 month to 3 years – Article 284(1); 62) from 3 months to 5 years – Article 284(2); 63) from 3 months to 5 years – Article 288(1).

value. In the Penal Code – let us briefly remind – the indicated court sentence[88] is not – understandably – a completely arbitrary one. It is, in fact, subject to important limitations resulting from the applicable directives governing the penalty to be imposed, mentioned by the legislator in particular in Article 53 of the PC.[89] Looking at the normative content of this Article from the perspective

[88] On the subject of the judicial assessment of the penalty see first of all A. Marek, L. Paprzycki, T. Kaczmarek (eds.), *System Prawa Karnego*, Vol. 5: *Nauka o karze. Sądowy wymiar kary*, Warszawa 2017, as well as the further literature on the subject provided therein, in particular T. Kaczmarek, *Ogólne dyrektywy wymiaru kary w teorii i praktyce sądowej*, Wrocław 1980.

[89] Let us recall the wording of this highly relevant article:

"Article 53(1). The court shall impose the penalty according to its own discretion, within the limits prescribed by law, considering the degree of social harmfulness of the act, aggravating and mitigating circumstances, the objectives of the penalty in terms of social impact, as well as the preventive objectives it is intended to achieve with regard to the sentenced person. The harshness of the penalty must not exceed the degree of guilt. Article 53(2). In imposing the penalty, the court shall above all take into account the motivation and the manner of conduct of the perpetrator, especially when an offence has been committed against a person who is vulnerable on account of age or health condition, committing the offence together with a juvenile, the type and degree of transgression against obligations imposed on the perpetrator, the type and dimension of any adverse consequences of the offence, the characteristics and personal conditions of perpetrator, his or her way of life prior to the commission of the offence and his or her conduct thereafter, and particularly his or her efforts to redress the damage or to compensate the public perception of justice in another form; the court shall also consider the behaviour of the injured person.

Article 53(2a). Aggravating circumstances include, in particular: 1) previous criminal record for an intentional or similar unintentional offence; 2) taking advantage of the victim's helplessness, disability, illness or old age; 3) a course of action intended to humiliate or torment the victim; 4) the commission of a premeditated offence; 5) the commission of the offence as a result of a motive deserving of particular condemnation; 6) the commission of an offence motivated by hatred because of the victim's national, ethnic, racial, political or religious affiliation or because of the victim's religious indifference; 7) acting with particular cruelty; 8) the commission of an offence while under the influence of alcohol or a drug, where that state was a factor in the commission of the offence or materially increased the effects of the offence; 9) the commission of an offence in association with or with the involvement of a juvenile.

Article 53(2b). Mitigating circumstances are, in particular: 1) committing the offence as a result of a motivation deserving consideration; 2) committing the offence under the influence of anger, fear or agitation justified by the circumstances of the incident; 3) committing the offence in response to an emergency situation, the correct assessment of which was significantly impeded by the personal circumstances, extent of knowledge or life experience of the perpetrator 4) taking action to prevent or limit the damage or harm resulting from the offence; 5) reconciliation with the victim; 6) reparation for the damage caused by the offence or compensation for the harm resulting from the offence;

of the discussed offence of domestic violence, it can be concluded that the rule in this case, resulting from the fact that its features are fulfilled in the conditions of domestic violence, will be the presence of undoubtedly aggravating circumstances. Article 53(2)a of the PC includes in such circumstances, *inter alia*, taking advantage of the victim's helplessness, disability, illness or old age, further – a course of action leading to humiliation or anguish of the victim, then – committing the offence as a result of a motivation deserving particular condemnation, and finally – committing the offence while intoxicated or under the influence of alcohol or drugs, if this state was a factor leading to the commission of the offence or significantly increased its effects, i.e., circumstances that very often occur in the commission of the offence in question. Their presence will therefore, in principle, support the idea of adhering to statutory limits when imposing a penalty, thus approaching with great caution the possibility of its being imposed below this range. The justified reserve in this case towards the possibility of applying the institution of extraordinary mitigation of penalty[90] (after all, its justifiable *usus* should take place only when the penalty for the offence ascribed to the perpetrator turns out to be too severe at its lower limit) should also, on the same grounds, go hand in hand with far-reaching caution towards the possibility of applying – with respect to a perpetrator of an offence

7) committing the offence with significant contribution from the victim; 8) voluntarily disclosing the offence committed by oneself to an authority established for the prosecution of offences.

Article 53(2c). A circumstance referred to in Article 53(2a) and (2b) shall not constitute a circumstance which is a feature of the offence committed by the perpetrator, unless it has occurred with particularly high intensity.

Article 53(2d). A circumstance referred to in Article 53(2) shall not constitute a circumstance which is not a constituent element of the offence if it forms the basis for an aggravation of criminal responsibility applied to the perpetrator.

Article 53(2e). A circumstance referred to in Article 53(2) shall not constitute a circumstance which is not a constituent element of the offence if it forms the basis for a mitigation of criminal responsibility applied to the perpetrator.

Article 53(3). In imposing the penalty, the court shall also take into consideration the positive results of the mediation between the victim and the perpetrator, or the settlement reached by them in the proceedings before the state prosecutor or the court.

[90] With regard to the grounds for extraordinary mitigation of penalty and the principles governing extraordinary mitigation of penalty, see in particular Article 60(1), (2), (6), (7) and (7a) of the PC On the grounds indicated see in particular Ł. Pohl, *Propozycja zmian w art. 60 Kodeksu karnego (o właściwe ujęcie podstawy nadzwyczajnego złagodzenia kary),* "Prawo w Działaniu" 2022, No. 51, p. 137 *et seq.,* and the further literature listed therein.

of domestic violence – a probationary measure in the form of conditional suspension of the execution of his or her penalty of imprisonment.[91]

Still remaining in the circle of issues related to the imposition of penalty, it is impossible not to mention the institution of "special basic recidivism," extremely important in the context of legally relevant domestic violence. This institution – in accordance with the provision of Article 64(1) of the PC[92] – is based on the condition that the same perpetrator commits similar offences. We mention this because one of the criteria adopted by the legislator for similarity of offences is that they were committed with the use of violence (see Article 115(3) of the PC[93]). Thus, a return by the perpetrator of an offence of domestic violence to such an offence – of course, with the fulfilment of the temporal conditions for the occurrence of the discussed recidivism – will in principle be a return to the offence within the meaning of the aforementioned provision and thus, in short, will be a special basic recidivism. On the other hand, this circumstance is – as

[91] It should be recalled that in the PC currently in force, in accordance with its Article 69 (1): "The court may conditionally suspend the execution of a penalty of imprisonment of up to 2 years or execution of a fine adjudicated as a one-off penalty, if it is regarded as sufficient to attain the objectives of the penalty with respect to the perpetrator, and particularly to prevent him/her from relapsing into crime" and pursuant to Article 69(2): "In suspending the execution of a penalty, the court shall primarily take into consideration the attitude of the perpetrator, his/her personal characteristics and conditions, his/her way of life to-date and his/her conduct after the commission of the offence." On the subject of the conditional suspension of the penalty of imprisonment see A. Kordik, *Warunkowe zawieszenie wykonania kary w systemie środków probacyjnych i jego efektywność*, Wrocław 1998, as well as the further literature on the subject provided therein, in particular M. Leonieni, *Warunkowe zawieszenie wykonania kary w polskim prawie karnym. Analiza ustawy i praktyki sądowej*, Warszawa 1974 and J. Skupiński, *Warunkowe skazanie w prawie polskim na tle porównawczym*, Warszawa 1992.

[92] Let us recall: pursuant to this provision "If a perpetrator sentenced to the penalty of imprisonment for an offence committed with intent, during the 5 year period after having served at least 6 months of the penalty, commits an intentional offence similar to the offence for which he or she had been sentenced, the court shall impose the penalty prescribed for the offence above the lower limit of the statutory penalty, and may impose it up to the upper limit of the statutory penalty increased by half." On the subject of special recidivism in criminal law see above all B. Janiszewski, *Recydywa wielokrotna w prawie karnym*, Poznań 1992.

[93] Let us recall: pursuant to this provision "Similar offences are offences of the same type; the offences committed with the use of violence or with the threat of its use, or the offences committed with an intent to secure financial or material benefits shall be regarded as similar offences." On the subject of similarity of offences, see in particular P. Daniluk, *Przestępstwa podobne w polskim prawie karnym*, Warszawa 2013, p. 476.

we know – of significant importance in the context of the scope of the possible penalty – after all, as indicated in the provision of Article 64(1) of the PC, the court may impose a penalty up to the upper limit of the statutory threat increased by half, while it must impose it above the lower limit of the statutory threat.

Among the measures of the criminal law response to the crime of domestic violence, penal measures (or – to use an old and no longer relevant nomenclature for them) – so-called additional penalties – are of major importance. The following in particular deserve special mention here: (1) an interdiction to stay in certain environments or places, (2) an interdiction to contact certain persons, (3) an interdiction to approach certain persons, and (4) an order to leave the premises occupied jointly with the victim. According to Article 41a, which is worth quoting here *in verbatim*: "Article 41a(1). The court may order an interdiction to stay in certain environments or places, to contact certain persons, to approach certain persons or to leave a certain place of residence without the court's consent, as well as an order to temporarily leave the premises occupied jointly with the victim, in the event of a conviction for an offence against sexual freedom or morality to the detriment of a juvenile or other offence against freedom, and in the event of a conviction for an intentional offence with the use of violence, including in particular violence against a person close to the victim. The interdiction or order may be combined with an obligation to report to the police or other designated authority at specified intervals, and the interdiction to approach certain persons may also be controlled by electronic surveillance. Article 41a(1a): "The court shall, at the request of the victim, order an interdiction of staying in certain environments or places, contacting certain persons, approaching certain persons or leaving a certain place of residence without the court's consent, as well as an order to temporarily leave the premises occupied jointly with the victim, in the event of a conviction for an offence against sexual freedom or morality. The interdiction or order may be combined with an obligation to report to the police or other designated authority at specified intervals, and the interdiction to approach the victims may also be controlled by electronic surveillance." Article 41a(2): "The court shall order an interdiction of staying in certain environments or places, contacting certain persons, approaching certain persons or leaving a certain place of residence without the court's consent, as well as an order to temporarily leave the premises occupied jointly with the victim, in the event of a conviction to the deprivation of penalty without conditional

suspension of its execution for an offence against sexual freedom or morality. The interdiction or order may be combined with an obligation to report to the police or other designated authority at specified intervals, and the interdiction to approach certain persons may also be controlled by electronic surveillance." Article 41a(3): "The court may order an interdiction of staying in certain environments or places, contacting certain persons, approaching certain persons or leaving a certain place of residence without the court's consent, for life if the perpetrator is convicted again under the terms of paragraph (2)." Article 41a(3a): "In the event of an order to temporarily leave the premises occupied jointly with the victim for the offences specified in Chapters XXV and XXVI, the court shall impose an interdiction of approaching the victim for the same period." Article 41a(4): "When imposing an interdiction of approaching certain persons, the court shall indicate the distance from protected persons that the convicted person is obliged to keep." Article 41a(5): "When issuing an order to temporarily leave the premises occupied jointly with the victim, the court shall set a time limit for its enforcement." Article 41a(6): "The interdiction of contacting a specified person includes any act of attempting to make contact with a protected person, including contact by the convicted person through another person or using an ICT network." The shape of the mentioned regulation therefore clearly indicates the great potential of the listed measures in the fight against criminal domestic violence. Of course, here, too, some adjustments could be considered, such as one that would extend the grounds for the mandatory application of the indicated criminal measures on the basis of Article 41a(1)a also to other offences against liberty. *Prima facie*, such an extension seems absolutely justified – justified in particular when we engage in responsible reflection on an adequate criminal law response to the offence of domestic violence. Nevertheless, also in this respect, a responsible response should be preceded by an in-depth analysis of the issue, for which there is unfortunately not enough space in this study, due to the framework set up for it. Let us also point out, for the sake of completeness, that the criminal measures mentioned – in accordance with Article 43(1) of the PC – shall be adjudicated in years, from one year to 15 years, while under Article 43(1) a of the PC, the obligation referred to in Article 41a(1) second sentence and (2) second sentence shall be adjudicated in months, the shortest being 3 months and the longest being 12 months.

It is also necessary to mention, in the context of the offence of domestic violence, the relevance of the obligation to redress the damage and compensate for the harm suffered (see Article 46(1) of the PC[94]), as well as about the supplementary payment, equally important in this case[95] (see Article 47(1) of the PC[96]), which according to Article 48 of the PC is up to PLN 100,000 (unless the law provides otherwise in this respect).

As can be seen from the above, also in the field of substantive legal measures of criminal response to the offence of domestic violence, Polish criminal law provides the judicial authorities with numerous possibilities to respond with rational and firm crime repression to the indicated manifestation of social pathology. And in this respect, therefore, it deserves a generally positive assessment.

5. Conclusion

The analysis presented above actually dealt with three issues. The first of them focused on answering the question about the definition of domestic violence in the Act on counteracting domestic violence, and about its relation to violence defined in criminal law. The insight into this issue resulted in a conclusion

[94] According to this provision: "In the case of conviction, the court, upon a motion from the injured person or from another person so entitled, applying the provisions of civil law, may impose the obligation to redress, in whole or in part, the damage caused or compensate for the harm suffered; the provision of civil law on statutes of limitation regarding claims and the possibility to adjudge an annuity, shall not be applied." If, on the other hand, as is stipulated in Article 46(2) of the PC – "(...) If it is considerably difficult to adjudicate the obligation referred to in paragraph (1), the court may decide, instead of this obligation upon a supplementary payment in the amount of up to PLN 200,000 to the injured, and in the event of his or her death as a result of the offence committed by the convicted person, a supplementary payment for the closest person whose life situation has been considerably worsened as a result of the injured party's death. Where more than one such person has been identified, the supplementary payment shall be ordered in favour of each of them."

[95] On the subject of the supplementary payment see above all W. Cieślak, *Nawiązka w polskim prawie karnym*, Gdańsk 2006.

[96] In turn, according to this provision: "In the case of conviction for an intentional offence against life or health, or for any other intentional offence which has resulted in the death of a person, serious detriment to health, disturbance to the functioning of a bodily organ or disturbance to health, the court may impose a supplementary payment for the benefit of the Fund for Victims' Aid and Post-Penitentiary Assistance."

about the incompatibility of the scopes of the notions indicated. It also made it possible to critically assess the definition of domestic violence formulated in the said Act, which in turn led to constructive postulates for substantively justified changes to the definition in order to point out the inadequacy of the definition in terms of defining the circle of perpetrators of domestic violence within the meaning of the said Act. The second issue raised was, in turn, the scope of criminalisation of domestic violence. The observations made in this area made it possible to perform preliminary identification(s). Thus identified scope was assessed positively. Indeed, it was pointed out that a great many provisions of the substantive criminal law serve to counteract domestic violence. Finally, the last issue consisted in an assessment of whether Polish substantive criminal law allows for a rational and firm response to criminal domestic violence. As it has been acknowledged, the criminal law provides the criminal justice system with a wide range of criminal law response measures with a high potential for effective impact both in the field of justice (retributive) and preventive. Once again, however, it should be strongly emphasised that the generally positive assessment of the Polish regulations covered by the above analysis does not mean, of course, that the current state of affairs could not be significantly improved in this respect. In any case, the social importance of the issue of criminal domestic violence is undisputedly so serious that it sets – and this *a limine* – the search for criminal law solutions with a higher degree of efficiency in terms of its prevention as a permanently fundamental subject of inquiries of the criminal law doctrine.

References

Sources of law

The Act of 25 February 1964 – the Family and Guardianship Code (Journal of Laws of 1964 No. 9 item 59 as amended).

The Act of 23 April 1964 – the Civil Code (Journal of Laws of 1964 No. 16 item 93 as amended).

The Act of 6 June 1997 – the Penal Code (Journal of Laws of 1997 No. 88 item 553 as amended).

The Act of 29 July 2005 on Counteracting Domestic Violence (Journal of Laws of 2005 No. 180 item 1493 as amended).
The Act of 9 June 2022 on the Support and s Rehabilitation of Juveniles (Journal of Laws of 2022 item 1700).

Case law

The Judgement of the Supreme Court of 27 July 1973, I KR 153/73 (OSNP of 1974, No. 1, item 5).
The Judgement of the Supreme Court of 26 September 1985, I KR 250/85 (OSNP of 1986, No. 5, item 57).
The Judgement of the Supreme Court of 17 December1987, II KR 333/87 (OSNP of 1989, No. 92, item 18).
The Judgement of the Supreme Court of 06 September1994, II KRN 159/94 (OSNP of 1994, No. 9–10, item 61).
The Judgement of the Supreme Court of 10 December1998, I KZP 22/98 (OSNP of 1999, No. 2, item 39).
The Judgement of the Supreme Court of 16 March1999, I KZP 32/98 (OSNP of 2000, No. 3, item 162).

Literature

Andrejew I., *Ustawowe znamiona czynu. Typizacja i kwalifikacja przestępstw*, Warszawa 1978.
Cieślak W., *Nawiązka w polskim prawie karnym*, Gdańsk 2006.
Daniluk P., *Objaśnienie art. 115 § 3 k.k.*, [in]: *Kodeks karny. Komentarz,* (ed.) R.A. Stefański, Warszawa 2023, pp. 790–794.
Daniluk P., *Przestępstwa podobne w polskim prawie karnym*, Warszawa 2013.
Daszkiewicz K., *Kodeks karny z 1997 roku. Uwagi krytyczne*, Gdańsk 2001, pp. 154–169.
Dębski R., *Typ czynu zabronionego (typizacja)*, [in:] *System prawa karnego*, Vol. 3: *Nauka o przestępstwie. Zasady odpowiedzialności*, (eds.) A. Marek, L. Paprzycki, R. Dębski, Warszawa 2017, pp. 371–444.
Giezek J., *Nieletniość,* [in:] *Prawo karne materialne. Część ogólna i szczególna*, M. Bojarski (ed.), Warszawa 2012, pp. 226–227.
Hanausek T., *Przemoc jako forma działania przestępnego*, Kraków 1966.
Janiszewski B., *Recydywa wielokrotna w prawie karnym*, Poznań 1992.
Kaczmarek T., *Ogólne dyrektywy wymiaru kary w teorii i praktyce sądowej*, Wrocław 1980.

Kluza J., *Przestępstwo przemocy ekonomicznej*, "Prokuratura i Prawo" 2019, No. 9, pp. 99–113.
Kordik A., *Warunkowe zawieszenie wykonania kary w systemie środków probacyjnych i jego efektywność*, Wrocław 1998.
Kowalewska-Łukuć M., *Zamiar ewentualny w świetle psychologii*, Poznań 2015.
Kubicki L., *Przestępstwo popełnione przez zaniechanie. Zagadnienia podstawowe*, Warszawa 1975.
Leonieni M., *Warunkowe zawieszenie wykonania kary w polskim prawie karnym. Analiza ustawy i praktyki sądowej,* Warszawa 1974.
Majewski J., *Objaśnienie art. 115 § 3 k.k.,* [in:] *Kodeks karny. Część ogólna*, Vol. 1: *Komentarz do art. 1–116 k.k.,* (ed.) A. Zoll, Warszawa 2012, p. 1357–1365.
Marek A., *Kodeks karny. Komentarz*, Warszawa 2006.
Marek A., Paprzycki L., Kaczmarek T. (eds.), *System Prawa Karnego.* Vol. 5: *Nauka o karze. Sądowy wymiar kary,* Warszawa 2017.
Marek A., *Prawo karne,* Warszawa 2009.
Patryas W., *Zaniechanie. Próba analizy metodologicznej*, Poznań 1993.
Pohl Ł., *Artykuł 2 Kodeksu karnego w roli wyznacznika podmiotu przestępstwa skutkowego popełnionego przez zaniechanie*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2008, No. 3, pp. 87–96.
Pohl Ł., *O niemożności wykonania nakazanego działania spowodowanej zachowaniem się zobowiązanego do działania (przyczynek do analizy zaniechania w prawie karnym)*, [in:] *Profesor Marian Cieślak – osoba, dzieło, kontynuacje,* (eds.) W. Cieślak, S. Steinborn, Warszawa 2013, pp. 447–455.
Pohl Ł., *Prawo karne. Wykład części ogólnej*, Warszawa 2019.
Pohl Ł., *Propozycja zmian w art. 60 Kodeksu karnego (o właściwe ujęcie podstawy nadzwyczajnego złagodzenia kary)*, "Prawo w Działaniu" 2022, No. 51, pp. 137–144.
Pohl Ł., *Struktura normy sankcjonowanej w prawie karnym. Zagadnienia ogólne*, Poznań 2007.
Radwański Z., *Prawo cywilne – część ogólna*, Warszawa 1996.
Rejman G., *Objaśnienie art. 115 § 3 k.k.*, [in:] *Kodeks karny. Część ogólna. Komentarz,* (ed.) G. Rejman, Warszawa 1999, pp. 1420–1431.
Rubinsztejn S., *Byt i świadomość*, Warszawa 1961.
Skupiński J., *Warunkowe skazanie w prawie polskim na tle porównawczym*, Warszawa 1992.
Wróbel W., Zoll A., *Polskie prawo karne. Część ogólna*, Kraków 2010.
Zieliński M., *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2010.

ABOUT AUTHOR

Łukasz Pohl – professor of legal sciences specialising in substantive criminal law. He is a scientific and didactic worker at the University of Szczecin, where he heads the Criminal Law Research Team, and a scientific worker at the Institute of Justice, where he heads the Section of Criminal Law and Process. He is the author of more than a hundred scientific works, including three monographs and numerous articles in the most important Polish law journals. The author's textbook on the general part of criminal law also occupies an important position in his scientific output – *Prawo karne. Wykład części ogólnej* (*Criminal law. Presentation of the general part*). He has repeatedly acted as a reviewer in proceedings for the awarding of doctoral, post-doctoral and professorial degrees and titles. He had promoted five doctors of law, three of whom have been awarded the academic degree of *doctor habilitated*. He is deputy editor-in-chief and scientific editor of a national law journal "Prawo w Działaniu" ("Law in Action"). His scholarly activity focuses primarily on the analysis of the theoretical and dogmatic dimensions of substantive criminal law, and a particular focus of his research is the dogmatic structure of an offence. He is a strong advocate of the responsible integration of legal reflection with the findings of other sciences, in particular the findings of logic, ontology and analytic philosophy.
ORCID: 0000-0003-0530-1569

dr hab. Bartosz Majchrzak, prof. ucz.
CARDINAL STEFAN WYSZYŃSKI UNIVERSITY IN WARSAW
INSTITUTE OF JUSTICE

Countering domestic violence in administrative law

1. Introductory remarks and the scope of the administrative-legal regulation

Statistical data relating to the phenomenon of domestic violence in Poland justify the statement that in recent years we have observed a systematic decrease in the intensity of this type of behaviour.[1] However, this does not apply to its most serious manifestations, which result in criminal proceedings for the offence of abuse – the number of which is not decreasing.[2] Therefore, we are still facing a serious problem, which is an expression of extremely negative interpersonal relations in society,[3] leading to one of the most serious forms of human rights violation.[4] Coping with the phenomenon of violence in the community, both as a whole and in relation to its individual symptoms, and counteracting its occurrence, requires multifaceted and systemic measures, among which one

[1] See P. Ostaszewski, *Przemoc domowa w świetle danych statystycznych procedury "Niebieskiej Karty"*, Warszawa 2022, p. 15, https://iws.gov.pl/wp-content/uploads/2022/11/IWS_Ostaszewski-P._Przemoc-domowa-w-switle-danych-statystycznych-procedury-_Niebieskiej-Karty.pdf (accessed on: 6 July 2023).
[2] *Ibidem*, p. 13.
[3] *Ibidem*, p. 5.
[4] A. Kiełtyka, *Wstęp*, [in:] *Przeciwdziałanie przemocy w rodzinie. Komentarz*, A. Kiełtyka, A. Ważny, Warszawa 2015, p. 13.

must undoubtedly highlight the design and application of appropriate legal instruments. An important role in this respect is played by administrative-legal regulations, which are related to the so-called non-negligibility of public administration itself, resulting from its systemic indispensability and necessity.[5] This is because of continuous validity of J. Łętowski's thesis that "[t]he modern state is a state of administration (...). Indeed, administration is omnipresent: in practical terms, there is no sphere of life in which it would not make its presence and power felt. When one speaks of the state, law, freedom, democracy, the conditions and prospects of human life, even in its personal, even intimate aspects – sooner or later it will become apparent that the matter involves management, planning, administering."[6]

The analysis of the administrative-legal instrumentarium for regulating social relations in a particular sphere first of all requires the material scope of this impact to be clarified. In the present case, this should refer in particular to the definition of the term "domestic violence" on the grounds of the Act of 29 July 2005 on Counteracting Domestic Violence,[7] as the regulation which organises activities of governmental administration bodies, local self-government units and other administrative entities in the indicated area. This Act, as amended by the Act of 9 March 2023 amending the Act on Counteracting Domestic Violence and some other Acts[8] effective in principle from 22 June 2023, replaced the term "family violence" with the term "domestic violence". The *ratio legis* of the changes was perceived by the drafters as a consequence of the stigmatisation of the family as a result of the previous terminological convention and the wrongful suggestion that "only the family is the environment where acts of violence take place".[9] At the same time, the terminology has been also aligned with the Council of Europe Convention on preventing and combating violence against women and domestic violence, ratified by the Republic of Poland, drawn

[5] See P. Lisowski, *Między niepomijalnością administracji publicznej a deadministrowaniem*, "Acta Universitatis Wratislaviensis. Prawo" 2020, No. 331, pp. 186 and 188.

[6] J. Łętowski, *Administracja. Prawo. Orzecznictwo sądowe*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1985, p. 7.

[7] Journal of Laws of 2021 item 1249, as amended; hereinafter: UPPD Act.

[8] Journal of Laws item 535; hereinafter: Amending Act.

[9] Uzasadnienie projektu ustawy – o zmianie ustawy o przeciwdziałaniu przemocy w rodzinie oraz niektórych innych ustaw, Druk sejmowy No. 2799 of 24 November 2022, 9th term of office of the Sejm, p. 2.

up in Istanbul on 11 May 2011[10] (see Article 3(b) of the Istanbul Convention, which, however, is narrower in meaning than the definition of Article 2(1)(1) of the UPPD Act).

According to the statutory meaning, domestic violence is a single or recurring intentional action or omission, using physical, psychological or economic superiority, violating the rights or personal interests of a person suffering domestic violence (victim of domestic violence), in particular: (a) exposing that person to the risk of losing life, health or property, (b) violating that person's dignity, physical integrity or freedom, including sexual freedom, (c) causing damage to that person's physical or mental health, causing pain or harm to that person, (d) limiting or depriving that person of access to financial resources or the possibility to work or become financially independent, (e) significantly invading that person's privacy or arousing a feeling of threat, humiliation or anguish in that person, including actions undertaken by means of electronic communication (Article 2(1)(1) of the UPPD Act). According to the intention of the drafters, this definition covers five basic types (forms) of violence: physical, psychological, sexual, economic, and Internet violence,[11] which clearly refers to the standards of the Istanbul Convention and corresponds to the development trends of communications and the spread of the Internet. Nevertheless, however, the drafters have not avoided certain weaknesses in the formulation of the above definition, which were pointed out in the context of the previously applicable meaning of the term "family violence" (for example, the faulty identification of breach of personal rights or goods with endangering them, and therefore with putting personal rights or goods at risk[12] – *cf.* Article 2(1)(1) *in principio* and letter (a) of this provision of the UPPD Act).

In the context of considering Article 2(1)(1) of the UPPD Act as a prerequisite for the application of administrative-legal measures, it is further worth noting the difficulties involved in the interpretation of the concept of "intentionality" of an action or omission as one of the basic elements of the definition of domestic violence. Indeed, in the doctrine of law it is pointed out that the meaning of the

[10] Journal of Laws of 2015 item 961; hereinafter: Istanbul Convention.

[11] *Uzasadnienie projektu*..., pp. 2–3.

[12] See L. Bosek, *Opinia na temat legislacyjnej spójności oraz zgodności z Konstytucją RP projektu ustawy o zmianie ustawy o przeciwdziałaniu przemocy w rodzinie oraz niektórych innych ustaw*, "Zeszyty Prawnicze BAS" 2010, No. 2, p. 138.

"intentionality" ("unintentionality") criterion in legal and juridical language differs significantly from its intuitive and colloquial understanding. In the latter understanding, the scope of the concept of intentionality is narrower, as it corresponds in fact only to a direct intention. In penal and civil law, this traditional meaning has been extended also to include recklessness (*dolus eventualis*).[13] Against the background of Article 2(1)(1) of the UPPD Act, one may point out both to arguments in favour of the necessity of a colloquial understanding of "intentionality" (as part of a linguistic interpretation, it is accepted that, in the absence of a legal definition of terms, the directive of colloquial language should be applied[14]) and to reasons supporting the view of providing this concept with a meaning defined within the framework of penal and civil law science (the other elements of the definition of domestic violence refer to legal categories – violation of the law and personal goods, which justifies the interpretation of the concept of intentionality also with reference to normative acts of penal and civil law referring to this terminology). However, the problems are exacerbated, in particular, by the fact that the mentioned doubt must be resolved by public administration bodies, which in many cases do not have legal training and knowledge of the rules of law interpretation, facts assessment and their subsumption under legal standards. This increases the probability of arbitrariness of actions of representatives of administrative entities, especially since even common courts quite often have problems with determining, in given circumstances, the degree of fault of an entity committing a criminal offence or a tort under civil law.[15]

The subjective scope of the administrative-legal regulation of the UPPD Act, in terms of the addressees of the public administration actions, is primarily determined by the concepts of a "person suffering domestic violence (victim of domestic violence)" and a "person using domestic violence (perpetrator of domestic violence)". The former includes the following persons subject to domestic violence: (a) the spouse, including where the marriage has ceased or

[13] M. Budyn-Kulik, *Zamiar – pojęcie i rodzaje. Uwagi wprowadzające*, [in:] *Umyślność w prawie karnym i psychologii. Teoria i praktyka sądowa*, Warszawa 2015, LEX/el.

[14] *Cf.* L. Morawski, *Zasady wykładni prawa*, Toruń 2010, pp. 98–100.

[15] B. Majchrzak, *Problem nieprecyzyjności przesłanek wszczęcia procedury "Niebieskiej Karty"*, [in:] *Prawa i obowiązki członków rodziny*, (ed.) M. Gołowikin-Hudała, P. Sobczyk, A. Wilk, Vol. 2, Lublin 2018, pp. 96–97.

been annulled, and his/her ascendants, descendants, siblings and their spouses, (b) ascendants and descendants and their spouses, (c) siblings and their ascendants, descendants and their spouses, (d) a person in an adoption relationship and his/her spouse and their ascendants, descendants, siblings and their spouses, (e) a person currently or formerly living in cohabitation and their ascendants, descendants, siblings and their spouses, (f) a person sharing occupancy and housekeeping and his/her ascendants, descendants, siblings and their spouses, (g) a person currently or formerly in a lasting emotional or physical relationship regardless of shared occupancy and housekeeping, (h) a minor (Article 2(1)(2) of the UPPD Act). In addition, a person suffering domestic violence (victim of domestic violence) is a minor who witnesses domestic violence against the above-mentioned persons (Article 2(2) of the UPPD Act) and thus a minor who has knowledge of or has seen an act of domestic violence (see Article 2(1)(4) of the UPPD Act). This definition shows that the following criteria have been used to specify its designators: kinship ties, legal ties and factual ties, including ties arising only from shared occupancy and housekeeping (independent of cohabitation or any other – unfortunately unspecified – permanent emotional or physical relationship[16]), or even amounting only to a relationship of a violent nature if it relates to a minor. Shared housekeeping means in other words the joint satisfaction of the vital needs characterised by permanence, consisting in particular in participation and mutual cooperation in the handling of the daily matters of housekeeping, or not earning and being wholly or partly dependent on the person with whom the household is shared.[17]

In turn, the provisions of the UPPD Act include adults who are perpetrators of behaviour defined by law as domestic violence against persons listed in Article 2(1)(2) of the UPPD Act. Therefore, minors who are perpetrators of

[16] See criticism of this provision in: Uwagi Sądu Najwyższego do rządowego projektu ustawy z dnia 24 listopada 2022 r. o zmianie ustawy o przeciwdziałaniu przemocy w rodzinie oraz niektórych innych ustaw (Druk Sejmu RP IX kadencji nr 2799), 27 December 2022, pp. 13–15, https://orka.sejm.gov.pl/Druki9ka.nsf/0/836CD3138D43D329C125892E004A43CA/%24File/2799-005.pdf (accessed on: 6 July 2023).

[17] *Uzasadnienie projektu...*, p. 4; in the same way also, e.g., judgement of the Supreme Administrative Court (*Naczelny Sąd Administracyjny*, hereinafter: the *NSA Court*) of 13 June 2018, file II GSK 573/18, Central Database of Judgments of Administrative Courts (*Centralna Baza Orzeczeń Sądów Administracyjnych*, hereinafter: CBOSA).

violent behaviour, e.g., towards their peers, may not be the addressees of public administration actions in the discussed sphere.

2. Sources of administrative law on counteracting domestic violence

As regards the sources of administrative-legal regulation on counteracting domestic violence, its considerable dispersion can be observed. This is because it is contained in a number of normative acts, in the first place with the Constitution of the Republic of Poland.[18] However, the Basic Law determines first of all the "field of axiological choices of the legislator",[19] and constitutional values are then subject to further specification in Acts of Parliament and other sources of law, including international law (as no state authority has the power to introduce into the national legal order an act that would be axiologically inconsistent with the Constitution of the Republic of Poland). In acts hierarchically subordinated to the Basic Law, the legislator specifies the values contained therein, operationalising their realisation, in particular by means of mechanisms inherent in administrative law. On the one hand, it specifies the content of constitutional values,[20] and on the other, it introduces detailed regulations for their implementation. On the ground of legal regulations relating to domestic violence, this particularly concerns such values of the Basic Law as: human dignity (preamble and Article 30 of the RP Constitution); human freedom (preamble and Article 31(1)(2) of the RP Constitution); human life (Article 38 of the RP Constitution); freedom from torture, cruel, inhuman or degrading treatment and punishment and corporal punishment (Article 40 of the RP Constitution); personal inviolability and freedom of everyone (Article 41(1) of the RP Constitution); health of the individual (Article 68(1) of the RP Constitution); marriage, family, maternity and parenthood (Article 18 and

[18] The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483, as amended; hereinafter: RP Constitution, Basic Law.

[19] Z. Cieślak, *Modele układów administracyjnych i ich usprawnianie*, [in:] *Nauka administracji*, (ed.) Z. Cieślak, Warszawa 2017, p. 183.

[20] *Ibidem*, p. 185.

Article 71 of the RP Constitution); respect for property and other property rights (Article 21 and Article 64 of the RP Constitution); individual privacy (Article 47 of the RP Constitution); upbringing of children according to their parents' convictions (Article 48(1) of the RP Constitution); inviolability of the home (Article 50 of the RP Constitution) informational autonomy of the individual (Article 51 of the RP Constitution); freedom of movement within the territory of the Republic of Poland and of choice of residence and domicile (Article 52(1) of the RP Constitution); freedom to choose and pursue a profession (Article 65 of the RP Constitution); or freedom of the child from violence, cruelty, exploitation and demoralisation (Article 72(1) of the RP Constitution).[21]

In addition, it can be assumed that combating domestic violence is the subject of a number of international agreements ratified by the Republic of Poland, referring thereto generally through the prism of human rights protection. The above-mentioned issue is clearly regulated by the Istanbul Convention, implying the adoption by the States Parties of necessary and therefore also administrative-legal measures to ensure the implementation of objectives of the Convention.[22]

The national legislation in this respect includes in particular the provisions of the UPPD Act, which predominantly use administrative-legal instruments, supplemented only with judicial protection measures (Articles 11a, 12b and 12d of the UPPD Act). This Act is general in the sense that it seeks to organise the system of counteracting domestic violence. At the same time, it refers to several other acts of administrative law that complete this system. These are the following normative acts: the Act of 12 March 2004 on Social Assistance[23] and the Act of 26 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism[24] (see Article 6(1) of the UPPD Act), the Act of 24 April 2003 on Public Benefit Activity and Voluntary Work[25] (Article 9(2) of the UPPD Act),

[21] B. Majchrzak, *Podstawy aksjologiczne regulacji prawnych dotyczących przeciwdziałania przemocy w rodzinie*, [in:] *Podstawy przeciwdziałania przestępczości oraz pomocy osobom pokrzywdzonym. Konkretyzacja i realizacja*, (ed.) P. Sobczyk, Warszawa 2020, pp. 140–141.

[22] The issues of international sources of counteracting domestic violence are analysed more extensively by Professor Marek Bielecki in the first chapter of this monograph. It seems pointless to discuss them here, especially given the essentially very limited scope of administrative law instruments used in these sources.

[23] Journal of Laws of 2023 item 901; hereinafter: UPS Act.

[24] Journal of Laws of 2023 item 165, as amended; hereinafter: UWWT Act.

[25] Journal of Laws of 2023 item 571.

the Act of 14 June 1960 – Code of Administrative Procedure[26] (Article 9a para. 7h of the UPPD Act), Act of 19 July 2019 on the Implementation of Social Services by a Social Service Centre[27] (Article 9a(9) of the UPPD Act), Act of 21 May 1999 on Arms and Ammunition[28] (Article 9g of the UPPD Act), Act of 6 April 1990 on the Police[29] and the Act of 24 August 2001 on Military Police and Military Law Enforcement Units[30] (Articles 11a(3) and 11b of the UPPD Act), the Act of 9 June 2011 on Family Support and the Foster Care System[31] (Article 12a(2) of the UPPD Act).

In addition, the provisions of the UPPD Act contain ten authorisations to issue implementing regulations (see Article 3(2), Article 5, Article 5a, Article 5b, Article 7(3), Article 9b(7), Article 9d(5), Article 10f, Article 12a(7), Article 12c(3) of the UPPD Act), as well as the empowerment for the municipal council to adopt a local act[32] specifying the procedure and manner of appointing and dismissing members of the interdisciplinary team (Article 9a(15) of the UPPD Act). All the aforementioned sub-statutory acts are the sources for reconstructing the rules of administrative law for counteracting domestic violence.

Against the background of the above-mentioned catalogue of sources, one can notice a great dispersion of administrative-legal bases for counteracting the analysed negative social phenomenon. This impedes the reconstruction of the system of these rules, and thus their application in combination. Moreover, it appears that the Act on Counteracting Domestic Violence is only one element of this extended structure of legal acts, and not the most important one, because the tasks arising therefrom are – in accordance with Article 6(1) of the UPPD Act – implemented in principle on the basis of the UPS Act and the UWWT

[26] Journal of Laws of 2023 item 775; hereinafter: KPA.
[27] Journal of Laws item 1818.
[28] Journal of Laws of 2022 item 2516, as amended.
[29] Journal of Laws of 2023 item 171, as amended.
[30] Journal of Laws of 2021 item 1214, as amended.
[31] Journal of Laws of 2022 item 447, as amended; hereinafter: UWR Act.
[32] See, e.g., the judgement of the Supreme Court of 11 January 2012, file No. II OSK 1922/11, CBOSA; A. Ważny, [in:], *Przeciwdziałanie przemocy...*, A. Kiełtyka, A. Ważny, p. 105; K. Wlaźlak, *Przeciwdziałanie przemocy w rodzinie w orzecznictwie sądów administracyjnych*, "Prokuratura i Prawo" 2017, No. 10, p. 103; *eadem*, *Problemy funkcjonowania zespołów interdyscyplinarnych ds. przeciwdziałania przemocy w rodzinie*, "Samorząd Terytorialny" 2012, No. 4, p. 66.

Act. In this way, the assumed organising value of the indicated "general" law has been lowered.

3. Axiology of the UPPD Act provisions as the essence of the impact of the public administration

An analysis of the issue of counteracting domestic violence in administrative law is not possible without at least a general reference to the perspective of the axiology of the statutory regulation of this sphere of social relations by the mentioned area of law. To strengthen this thesis, an argument can be made referring to the problem of defining public administration itself, as well as the set of legal regulations governing its operation. According to one of the already "classic" definitions of public administration, it means a structure staffed with people (specific personnel), which is to realise the common good directly, in an active, planned, constant, systematic manner and equipped with authority. Respectively, administrative law is "an ordered set of legal rules whose *raison d'être* is the direct realisation by administrative entities of values distinguished in terms of the common good".[33] At the same time, the latter concept means the set of all values distinguished in the RP Constitution, Acts of Parliament and other normative acts, for the implementation of which the rules contained in these acts have been established.[34] Therefore, such situations, objects, facts or events (past, present or future) may be regarded as values in law, which are subject to the legislator's approval and for this reason are protected by the legislator by means of the relevant legal rules (in particular of administrative law). In particular, public administration bodies carrying out tasks related to counteracting domestic violence must be aware of importance of the "proper inventory of values embedded in the law, a broad knowledge of their content and functional relations, identification of areas of values collision and the definition

[33] See I. Lipowicz, *Istota administracji*, [in:] *Prawo administracyjne. Część ogólna*, (ed.) Z. Niewiadomski, Warszawa 2002, pp. 21 and 27–28; Z. Cieślak, *Istota i zakres prawa administracyjnego*, [in:] *ibidem*, p. 56.

[34] Z. Cieślak, *Istota i zakres...*, p. 57.

of their boundaries",[35] optimal resolution of axiological conflicts, and all this must be referred to existing factual situations against which administrative action is taken.

The decoding of the catalogue of substantive values to be realised on the grounds of legal provisions on counteracting domestic violence is possible primarily on the basis of: the explanatory note on the draft Act on Counteracting Domestic Violence,[36] the repealed preamble of the UPPD Act[37] (which, however, remains valid for the definition of the objectives of the Act[38]), the legal definitions contained in Article 2 of the UPPD Act, and a number of specific provisions of the UPPD Act and its implementing acts. These provide the basis for distinguishing the following catalogue of values: (a) respect for human dignity; (b) human life and health; (c) security of the individual; (d) the family; (e) respect for the rights (including property), freedoms and personal interests of the individual; (f) freedom of persons from pain and harm; (g) physical integrity of the person; (h) freedom of occupation; (i) freedom from forced labour; (j) freedom to decide on the place of residence; (k) equality of treatment of citizens; (l) adequate care and educational competences of parents with regard to children; (m) life and health of minors; (n) non-use of corporal punishment of children; (o) personal safety of the child-victim (both physical and psychological); (p) public awareness of the causes and consequences of domestic violence; (q) confidentiality (secrecy) of personal data; (r) individual's access to personal data concerning him/her; (s) privacy of the domestic sphere. These values, in turn, are to be realised by the instrumental (efficiency) values also indicated in the provisions of the UPPD Act, i.e.: (a) efficiency of action; (b) joint realisation of the objective by the public authorities (their cooperation); (c) speed of proceedings; (d) correctness of the public authority's decision; (e) judicial review of the handling of an individual's case; (f) professionalism of persons providing assistance to victims of domestic violence.[39]

---

[35] *Idem*, *Podstawy aksjologiczne administracji publicznej w Polsce – próba oceny*, "Studia Iuridica" 2000, No. 38, p. 59.

[36] Druk sejmowy, No. 3639 of 28 December 2004, 4th term of office of the Sejm.

[37] See Article 1(2) of the Amending Act.

[38] *Cf. Uzasadnienie projektu...*, p. 2.

[39] For a broader axiological analysis see: B. Majchrzak, *Podstawy aksjologiczne...*, pp. 127–150.

As the above findings show, the axiological structure justifying counteraction of domestic violence is extremely rich. Within this framework we first of all see so-called sequences of co-protected values, where the realisation of one value supports the achievement of another (e.g., respect for human dignity – human life and health – security of the individual). However, conflicts between values also emerge when the realisation of one value is at the expense of another (e.g., life and health of the child – privacy of the domestic sphere, or the efficiency of action – speed of proceedings). In particular, resolving these conflicts on the basis of specific factual situations poses a real challenge for public administration bodies acting in the field of counteraction of domestic violence.

4. The scope of public "tasks" comprising the counteraction of domestic violence

According to K. Bandarzewski, a public task means the scope of legally permissible activity of the administering entity, performed in the interest of an external entity, situated outside the structure of the administering entity. This activity is aimed at satisfying the needs of the community by means of certain behaviours, either in the interest and for the benefit of a single entity or a larger group of people.[40] In turn, R. Stasikowski argues that public tasks are those tasks whose performance is of interest to the legislator and the administrative entities due to socially valid objectives (values) at a given place and time.[41] Thus, public tasks (as well as public objectives) are closely related to the axiology of a given legal system. This is because their establishment is based on values focused on the common good, satisfying individual, social or public interests. Moreover, in simplified terms, it may be assumed that a public task is a commitment to and/

[40] K. Bandarzewski, *Prywatyzacja zadań publicznych*, [in:] *Koncepcja systemu prawa administracyjnego. Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego Zakopane 24–27 Września 2006,* (ed.) J. Zimmermann, Warszawa 2007, pp. 331–332.

[41] R. Stasikowski, *Funkcja regulacyjna administracji publicznej. Studium z zakresu nauki prawa administracyjnego oraz nauki administracji*, Bydgoszcz–Katowice 2009, p. 57; *idem*, *O pojęciu zadań publicznych (studium z zakresu nauki administracji i nauki prawa administracyjnego)*, "Samorząd Terytorialny" 2009, No. 7–8, p. 11.

or an action undertaken to maintain or achieve certain states of affairs affecting the realisation of values focused around the common good.

Applying the above premises to the sphere of counteracting domestic violence, we can see that its rich and meaningful axiology has become the basis for distinguishing an extensive catalogue of "tasks" imposed on the entire system of public administration bodies. It is composed of both governmental administration bodies – both at central and local level, bodies of all local self-government units – municipal, poviat and self-governmental voivodeship, bodies of other administrative entities (non-governmental organisations, churches and religious associations), which were commissioned to perform the tasks specified in the UPPD Act (see Article 9(2) of the UPPD Act), as well as specific institutional forms for the implementation of tasks of the aforementioned bodies (interdisciplinary teams, diagnostic and support groups, Monitoring Team for Counteracting Domestic Violence, Coordinators for the Implementation of the Government Programme for Counteracting Domestic Violence.

The government administration tasks are assigned, firstly, to the Council of Ministers, which pursues administrative policy by creating conditions for counteracting domestic violence in an effective way through the adoption of the Government Programme for Counteracting Domestic Violence (Article 10(1) of the UPPD Act). Secondly, a number of tasks are charged to the minister competent for social security (currently the Minister of Family, Labour and Social Policy[42]). They include: 1) commissioning and funding of research, experts' opinions and analyses relating to domestic violence; 2) carrying out activities promoting social awareness of origins and effects of domestic violence; 3) appointing and recalling the National Coordinator for the Implementation of the Government Programme for Counteracting Domestic Violence in the rank of Secretary or Undersecretary of State in the office of the minister competent for social security; 4) monitoring the implementation of the Government Programme for Counteracting Domestic Violence with the assistance of this Coordinator; 5) developing and publishing, at least once every two years, guidelines for conducting trainings in the field of counteracting domestic violence, including mandatory trainings for members of the interdisciplinary team and diagnostic

[42] Regulation of the Prime Minister of 18 December 2023 on the detailed scope of activities of the Minister of Family, Labour and Social Policy, Journal of Laws item 2715.

and support groups; 6) developing and financing protection programmes in the field of counteracting domestic violence; 7) financial support of programmes in the field of counteracting domestic violence (Article 8 of the UPPD Act). The Minister is assisted by the Monitoring Team for Counteracting Domestic Violence, as a consultative and advisory body. The tasks of the Team include: 1) initiating and supporting activities aimed at counteracting domestic violence; 2) monitoring activities in the field of counteracting domestic violence; 3) expressing opinions on matters related to the application of the UPPD Act; 4) initiating changes in the legislation in the field of counteracting domestic violence; 5) giving opinions in the event of disputes between public administration bodies and non-governmental organisations performing tasks related to counteracting domestic violence; 6) giving opinions in matters of public tasks related to counteracting domestic violence and in matters of commissioning these tasks for implementation by non-governmental organisations or churches and religious associations; 7) developing standards for providing assistance to victims of domestic violence and working with perpetrators of domestic violence; 8) establishing, in cooperation with non-governmental organisations, churches and religious associations, of mechanisms for providing information on standards for providing assistance to victims of domestic violence and working with perpetrators of domestic violence; 9) giving opinions on projects in the field of counteracting domestic violence developed under the protection programmes financed by the minister competent for social security (Article 10a(3) of the UPPD Act). Thirdly, to a narrow extent, the provisions of the UPPD Act refer to the Public Prosecutor General, whose tasks include the development and publication at least every two years of guidelines on the rules of conduct for general organisation units of the prosecutor's office in the field of counteracting domestic violence (Article 8a of the UPPD Act). Fourthly, the governmental tasks are carried out by the voivod, who: 1) develops instructions, recommendations, procedures for intervention in crisis situations related to domestic violence for persons performing these tasks; 2) monitors the phenomena of domestic violence; 3) appoints and recalls the Voivodship Coordinator for the implementation of the Government Programme for Counteracting Domestic Violence; 4) monitors the implementation of the Government Programme for Counteracting Domestic Violence by the Voivodship Coordinator for the Implementation of the Government Programme for Counteracting Domestic

Violence; 5) supervises performance of tasks related to counteracting domestic violence by the municipal, poviat and voivodship self-governments; 6) controls the implementation of the tasks related to counteracting domestic violence by non-public entities on the basis of agreements with the governmental and self-governmental administration bodies (Article 7(1) of the UPPD Act). Fifthly, the provisions of the UPPD Act establish the Coordinators for the Implementation of the Government Programme for Counteracting Domestic Violence – National and Voivodship Coordinators, whose task is to implement this programme – respectively – at the central and voivodship level (Article 10(2) and (3) of the UPPD Act).

Tasks related to counteracting domestic violence fall to a significant extent to the self-government units. Thus, the municipality's own tasks include, in particular, the creation of a municipal domestic violence counteracting system, including: 1) development and implementation of the municipal programme for counteracting domestic violence and protecting its victims; 2) counselling and intervention on counteracting domestic violence in particular by means of educational measures strengthening caretaking and upbringing skills of parents in families at risk of domestic violence; 3) providing places in support centres for victims of domestic violence; 4) establishing interdisciplinary teams (Article 6(2) of the UPPD Act). In turn, among the poviat's own tasks, the Act mentions: 1) development and implementation of the poviat programme for counteracting domestic violence and protecting its victims; 2) development and implementation of programmes oriented at preventive measures, which are aimed at specialised support, in particular regarding the promotion and implementation of correct upbringing methods for children at risk of domestic violence; 3) providing places in support centres for victims of domestic violence; 4) providing places in crisis intervention centres for victims of domestic violence (Article 6(3) of the UPPD Act). In addition, some tasks of the poviat have been defined as tasks of government administration and thus are financed directly from the state budget (Article 6(5) of the UPPD Act). Such tasks are the following: 1) establishment and operation of specialised support centres for victims of domestic violence; 2) development and implementation of programmes for corrective and educational measures for perpetrators of domestic violence; 3) development and implementation of psychological and therapeutic programmes for perpetrators of domestic violence; 4) issuing certificates on the

reporting of a perpetrator of domestic violence for participation in corrective and educational or psychological and therapeutic programmes and on their completion (Article 6(4) of the UPPD Act). In turn, own tasks of the voivodship self-government include in particular: 1) development and implementation of voivodship programme for counteracting domestic violence; 2) inspiring and promoting new solutions on counteracting domestic violence; 3) development of framework protection programmes for victims of domestic violence and framework corrective and educational programmes for perpetrators of domestic violence as well as framework psychological and therapeutic programmes for perpetrators of domestic violence; 4) organising training for persons implementing tasks related to counteracting domestic violence, including obligatory trainings for members of the interdisciplinary team and diagnostic and assistance groups.

Interdisciplinary teams, appointed by the mayor or the president of a city (Article 9a(1–2) of the UPPD Act), are an important institutional form of undertaking actions by the municipality to counter domestic violence. The teams are not, however, internal bodies of the municipal council, subsidiary bodies of heads of municipalities (mayors, city presidents) or municipal organisational units. They are separate from the municipal authorities, performing statutorily defined tasks[43] on the basis of cooperation of entities with powers relevant to the achievement of a common objective.[44] In the case law of administrative courts, interdisciplinary teams are considered as collegial administrative bodies in the functional sense.[45] Their tasks consist in: 1) diagnosing the problem of domestic violence at the local level; 2) initiating preventive, educational and informational activities aimed at counteracting domestic violence and entrusting their implementation to relevant entities; 3) initiating actions towards victims of domestic violence and perpetrators of domestic violence; 4) drafting municipal programme for counteracting domestic violence and protecting victims of domestic violence; 5) disseminating information on institutions, persons and possibilities of providing assistance in the local environment; 6) establishing diagnostic and assistance groups and monitoring of their tasks on an ongoing

[43] A. Ważny, [in:] *Przeciwdziałanie przemocy...*, A. Kiełtyka, A. Ważny, p. 105; K. Wlaźlak, *Przeciwdziałanie przemocy...*, p. 102; *idem*, *Problemy funkcjonowania...*, p. 67.

[44] *Cf.* K. Wlaźlak, *Problemy funkcjonowania...*, p. 65.

[45] The decisions of the Supreme Court of: 20 October 2020, file I OSK 1714/20; 12 February 2020, file I OSK 137/20; 25 November 2015, file I OSK 2896/15; all published in CBOSA.

basis; 7) monitoring the "Niebieska Karta" procedure; 8) providing information referred to in Article 9e(3) of the UPPD Act, and the documentation referred to in Article 9c(5a) of the UPPD Act; 9) referring a perpetrator of domestic violence to a corrective and educational programme or a psychological and therapeutic programme; 10) submitting, at the request of the diagnostic and support group, a notification on committing by a perpetrator of domestic violence an offence consisting in persistent failure to comply with the obligations specified in Article 4(6) of the UPPD Act[46] (Article 9b(2) of the UPPD Act).

Another institutional form for the implementation of the tasks set out in the UPPD Act (and, at the same time, a forum for the cooperation of entities) is the diagnostic and support group. As indicated above, it is obligatorily established by the interdisciplinary team, no later than within 3 days from the day of receipt of a report on a suspicion of domestic violence, in order to diagnose and assess the situation in relation to this report, as well as to perform other tasks listed in Article 9b(8) of the UPPD Act (Article 9a(10–10a) of the UPPD Act). The tasks of the group include: 1) assessing, on the basis of the "Niebieska Karta" procedure, the domestic situation of victims of domestic violence and perpetrators of domestic violence; 2) implementing the "Niebieska Karta" procedure in the event of confirmation of a suspicion of domestic violence, especially in situations where there is a risk to life or health; 3) notifying the person suspected of domestic violence of the initiation of the "Niebieska Karta" procedure in his/her absence; 4) carrying out actions in relation to victims of domestic violence and perpetrators of domestic violence; 5) submitting to the interdisciplinary team a binding application for referring a perpetrator of domestic violence to corrective and educational programmes for perpetrators of domestic violence or to psychological and therapeutic programmes for perpetrators of domestic violence; 6) submitting to the interdisciplinary team a binding application to submit a notification on committing by a perpetrator of domestic violence a petty offence referred to in Article 66c of KW; 7) monitoring the situation of victims of domestic violence and also persons at risk of domestic violence, including also after the completion of the "Niebieska Karta" procedure; 8) completing the "Niebieska Karta" procedure; 9) documenting actions taken which constitute

[46] See Article 66c of the Act of 20 May 1971 – the Code of Petty Offences, Journal of Laws of 2022 item 2151, as amended; hereinafter: KW.

the basis for recognising the lack of legitimacy of initiating the "Niebieska Karta" procedure or the basis for its initiation; 10) informing the chairperson of the interdisciplinary team of the results of actions taken under the "Niebieska Karta" procedure.

The above exemplification of tasks is not exhaustive, for the simple reason that he realisation of the values underlying the counteraction of domestic violence takes place, in particular, through the performance of social assistance tasks (see Article 3(2) in conjunction with Article 2(1) and in conjunction with Article 7(7) of the UPS Act) or tasks related to counteracting alcoholism (see Article 2(1)(7) and Article 1(1)(2) of the UWWT Act).

Against the background of the above-mentioned "tasks" related to counteracting domestic violence, the literature formulates the view that – as a rule – they do not assume a repressive impact, so that in this respect the police function of the public administration is not dominant, and the rendering function is predominant.[47] The public administration focuses on providing support, undertaking – in addition to individual interventions in specific cases of violence – programming, analytical, preventive, educational and inspirational activities focused on domestic violence in general. The implementation of this rendering function does not always take the form of providing services. Social and organisational activities are an important area of activity of the rendering administration. They include information campaigns, social advertising or the creation of inter-organisational networks of local support, which sensitise society to violence and enable victims to seek effective assistance.[48]

To sum up the presented extensive catalogue of tasks, it may be noted that their assignment to the relevant public authorities generally corresponds to the constitutional assumption that the framework of administrative policy concerning individual departments of government administration is determined by the Council of Ministers (see Article 146(1) and (2) of the RP Constitution). In particular, this refers to the social security department,[49] which includes issues

[47] I. Sierpowska, *Administracja świadcząca wobec zjawiska przemocy w rodzinie*, "Wrocławskie Studia Erazmiańskie" 2017, No. 11, p. 282.

[48] *Ibidem*, pp. 289–290.

[49] Article 31(1) of the Act of 4 September 1997 on Governmental Administration Departments, Journal of Laws of 2022 item 2512, as amended;, hereinafter: the UDAR Act.

of counteracting domestic violence. The so-called government programmes,[50] such as the Government Programme for Counteracting Domestic Violence just adopted by the Council of Ministers (Article 10 of the UPPD Act), are deemed as basic acts of the administrative policy. Subsequently, according to the systemic model of the legal position of the minister in charge of a specific department, he/she implements the policy of the Council of Ministers and coordinates its implementation by the bodies, offices and organisational units subordinate to him/her.[51] On the basis of the provisions of the UPPD Act, this task of the minister competent for social security is carried out through the National Coordinator for the Implementation of the Government Programme for Counteracting Domestic Violence, whose activities are monitored by this minister. In the remaining subjective scope, the minister is obliged to cooperate in particular with the bodies of local self-government and with the bodies of economic and professional self-government, trade unions and employers' organisations, as well as other social organisations and representatives of professional and artistic circles[52] (*cf.* Article 8(7) of the UPPD Act).

Another constitutional requirement is that local self-government should participate in the exercise of public authority by performing a significant part of public tasks assigned thereto on the basis of the principle of subsidiarity (Article 16(2) in conjunction with the preamble to the RP Constitution). In particular, this principle entails entrusting the power to perform public administration to as low a level as possible, namely, that nearest to the citizen (in order: municipality, poviat, voivodeship), and at the same time be capable of performing the tasks.[53] This is reflected in the assignment to local self-government of activities which specify the directions of the governmental administrative policy of counteracting domestic violence and implement this policy (e.g., development and implementation of municipal, poviat and voivodeship programmes of counteracting domestic violence, providing victims of domestic violence with places

[50] See, e.g., S. Gajewski, *Programy rządowe. Studium administracyjnoprawne*, Warszawa 2017, p. 47.
[51] Article 34(1) of the UDAR Act.
[52] Article 38(1) of the UDAR Act.
[53] T. Bąkowski, *Administracyjnoprawna sytuacja jednostki w świetle zasady pomocniczości*, Warszawa 2007, p. 79.

in support centres, implementation of the "Niebieska Karta" procedure by an organisational unit established on the initiative of a municipal body).

The constitutionally defined system of public administration bodies is complemented by the voivod, who, firstly, is the representative of the Council of Ministers in a voivodeship (Article 152(1) of the RP Constitution) and, secondly, is the body supervising the activities of local self-government units (Article 171(1) of the RP Constitution). The implementation of these assumptions of the legislator may be seen in particular in the voivod's tasks related to the implementation of the Government Programme for Counteracting Domestic Violence in the voivodeship by the Voivodship Coordinator (Article 7(1)(3) and (4) of the UPPD Act) and the supervision over the implementation of tasks for counteracting domestic violence implemented by the municipal, poviat and voivodeship self-governments (Article 7(1)(5) of the UPPD Act).

When formulating the conclusions, it should also be noted that up to this point in this study the term "task" has been used in the meaning applied by the legislator in the UPPD provisions. Nevertheless, it can be seen that the quoted catalogues of powers of administrative bodies do not in fact uniformly refer to the category of public tasks in the doctrinal sense presented in the initial part of this subsection. This is because they refer to different theoretical constructs of administrative law – beside indicating the tasks (e.g., "counselling and intervention for counteracting domestic violence" – Article 6(2)(2) of the UPPD Act), they identify the competences (forms of action) of the authorities (e.g., "development and implementation of voivodship programme for counteracting domestic violence" – Article 6(6)(1) of the UPPD Act), or their jurisdiction (e.g., "appointing and recalling the Voivodship Coordinator for the Implementation of the Government Programme for Counteracting Domestic Violence" – Article 7(3) of the UPPD Act[54]). Only in this perspective can it be assessed that the mentioned catalogues of "tasks" of public administration bodies were statutorily defined as exemplary by the use of the words "in particular" in the introduction to the enumerations. This raises the question of the meaning of such a verbal formula. It would be inappropriate to assume that it constitutes a general authorisation for a given administering entity to independently expand the catalogue by including activities similar to those expressly listed. This is

[54] On the substance of these doctrinal constructions see Z. Cieślak, *Istota i zakres…*, pp. 61–64.

because the principle of legalism (Article 7 of the RP Constitution) assumes only the explicit establishment of public tasks,[55] jurisdiction or authoritative competencies of public administration bodies, excluding their presumption. Therefore, the legislator probably meant that the public tasks serving to realise the axiology of counteracting domestic violence also derive from other Acts of Parliament (especially the UPS Act and the UWWT Act), and that the performance of some of the tasks listed in the UPPD Act may take the form of other, non-authoritative ("soft") forms of action, not explicitly defined in the Act, or authoritative forms resulting explicitly from other normative acts.

5. Legal forms of action to implement tasks related to counteracting domestic violence

5.1. Introduction

The statutorily distinguished tasks of public administrative bodies correspond to the legal forms of action for their implementation. The latter term means "a distinct or distinguishable, legally determined, with well-established features, type of conventional or factual action or a set of such actions of a specific entity appointed to perform public administration tasks (or a set of entities) in order to fulfil public administration tasks".[56] For the purposes of the present analysis, the catalogue of such forms has been reduced to generally uncontroversial list, including: normative acts, administrative acts, consensual legal actions (civil contracts and public law contracts), material and technical (factual) actions and acts of internal management.[57] Taking into account the provisions of the UPPD Act, this set should be supplemented with the so-called planning acts,

[55] See, e.g., M. Stahl, *Zagadnienia ogólne*, [in:] *System prawa administracyjnego. Podmioty administrujące*, (eds.) R. Hauser, Z. Niewiadomski, A. Wróbel, Vol. 6, Warszawa 2011, p. 38.

[56] K.M. Ziemski, *Indywidualny akt administracyjny jako forma prawna działania administracji*, Poznań 2005, p. 138.

[57] As to the essential features of the mentioned legal forms of administrative action see: B. Majchrzak, *Formy działania zakładu administracyjnego w indywidualnych sprawach studenckich*, Warszawa 2020, pp. 11–12, https://iws.gov.pl/wp-content/uploads/2021/01/

recognised in the literature as special forms,[58] but appearing as other, typical forms of action, i.e., a normative act, an act of internal management, a general administrative act or a material and technical action.[59] They may be of informative nature (contain data or forecasts), imperative nature (bind the addressees as regards a certain behaviour) or influential nature (in between the above, being an incentive or encouragement to a certain behaviour).[60]

5.2. Forms of action of a general nature

As previously noted, the provisions of the UPPD Act provide for ten authorisations to issue implementing regulations. In this view, the first form used to implement the tasks set out in the Act is a normative act by means of which, for example, the minister competent for social security determines the standard of basic services provided by specialised support centres for victims of domestic violence, qualification requirements for persons employed in such centres (Article 5 of the UPPD Act), the standard of corrective and educational programmes and psychological and therapeutic programmes for perpetrators of domestic violence (Article 5a and 5b of the UPPD Act), and the organisation and procedure of the voivod's supervision and control of the implementation of tasks related to counteracting domestic violence and the qualifications of inspectors authorised to perform these activities (Article 7(3) of the UPPD Act), while the Council of Ministers specifies the "Niebieska Karta" procedure and the templates of forms to be filled in by representatives of entities implementing this procedure (Article 9d(5) of the UPPD Act).

Another authorisation to adopt a normative act is contained in Article 9a(15) of the UPPD Act, in accordance with which the municipal council regulates, by means of a resolution, the procedure and manner of appointing and recalling

IWS_Majchrzak-B._Formy-dzia%C5%82ania-zak%C5%82adu-administracyjnego-w-indywidualnych-sprawach-studenckich.pdf (accessed on: 6 July 2023).

[58] See, e.g., M. Stahl, *Szczególne prawne formy działania administracji*, [in:] *System prawa administracyjnego. Prawne formy działania*, (eds.) R. Hauser, Z. Niewiadomski, A. Wróbel, Vol. 5, Warszawa 2013, pp. 364–373.

[59] *Cf. ibidem*, p. 370.

[60] E. Ochendowski, *Swoiste źródła prawa*, [in:] *idem*, *Prawo administracyjne*, Toruń 1999, p. 126.

members of the interdisciplinary team. Although the aforementioned provision does not expressly prejudge the legal nature of the resolution, in current case law of the administrative courts related to Article 9a(15) of the UPPD Act in its previous wording,[61] it was in principle unquestionably accepted that it is an act of local law and thus requires publication in the voivodeship official gazette.[62] "The resolution is not an act of internal management. Acts of internal management (internal law) are addressed only to the organisational units subordinated to the body that issues them", and "the Team is composed of persons both remaining in employment in the organisational units of the municipal self-government (...) (e.g., in the municipal social assistance centre or educational institution) and remaining outside the structure of the municipal self-government – e.g., in the Police".[63] "The Act on Counteracting Family Violence undoubtedly has a normative character and the provisions contained therein shape the legal situation of citizens. Thus, in a situation where the Act grants to individual entities listed therein, *inter alia*, the right to take action in an environment at risk of violence, and the resolution in question should be an exercise of this right, because, after all, only a properly appointed entity has the right to take such action, it is not possible to conclude that the resolution does not shape the legal situation of addressees of the Act."[64] "In addition, it should be noted that the Act on Counteracting Family Violence stipulates in Article 10a the obligation to establish at the national level a Monitoring Team for Counteracting Family Violence as a consultative and advisory body of the minister competent for social security. The tasks of this team coincide in many points with the tasks of teams established at the municipal level. It is important that the legislator empowered in Article 10f the minister competent for social security to determine, by means of a regulation, the procedure for appointing members of the Team, its organisation, the mode of the Team's activity, as well as the rules for participation in its work, taking into account the need to

[61] According to this wording: "The municipal council shall determine, by means of a resolution, the procedure and manner of appointing and recalling members of the interdisciplinary team and the detailed conditions of its operation."

[62] See the Supreme Administrative Court judgment of 1 December 2021, file III OSK 728/21 and the rulings quoted therein; in the same way also, NSA Court judgment of 7 October 2020, file I OSK 841/20; all published in CBOSA.

[63] The Supreme Administrative Court judgment, file No. III OSK 728/21.

[64] The Supreme Administrative Court judgment, file No. I OSK 841/20.

ensure the appropriate level of performance of the Team's tasks. In the light of the provision of Article 87(1) of the [RP] Constitution, there is no doubt that the regulation constitutes a source of universally binding law in the Republic of Poland. Therefore, if the legislator decides at the national level on the form of a regulation which determines the procedure for appointing members of the Team, its organisation, mode of activity, as well as the rules for participation, although the Team has only a consultative and advisory character, then when applying the systemic interpretation within the same legal act it would be hard to deny the features of local law to the executive resolution of the municipal council on the procedure, manner of appointing and recalling members of the interdisciplinary team and the conditions of its operation, especially since the team also undertakes actions of operative nature."[65]

A frequent practice related to the application of Article 9a(1)5 of the UPPD Act was that municipal councils duplicated in their resolutions the rules resulting from the UPPD Act, e.g., by indicating the catalogue of entities whose representatives compose the disciplinary team.[66] The administrative courts were critical of this practice in a number of judgments, arguing that: "[w]hen a local law act is issued on the basis of a statutory delegation, only compliance with both the subjective and material scope of this delegation provides grounds for considering that act as lawful. A provision of a local legal act may not regulate again something that has been already regulated by a law. The admissibility of repetition of the same regulation in a hierarchically lower act would lead to contradictions in the legal system, including a situation in which the same legal rule would be contained in two hierarchically separate legal acts, and the repeal of one of these acts would not automatically result in the rule contained in the other act being deprived of validity."[67]

The regulations developed and adopted by the interdisciplinary team, which are to specify detailed conditions for the functioning of the team and the

[65] The Supreme Administrative Court judgment, file No. II OSK 1922/11.

[66] See, e.g., the Supreme Administrative Court judgment of 24 November 2021, file No. III OSK 4122/21, CBOSA.

[67] The Supreme Administrative Court judgment of 1 February 2023, file No. III OSK 6688/21; in the same way also, e.g., the Supreme Administrative Court judgments of: 24 November 2021, file No. III OSK 4122/21; 24 November 2021, file No. III OSK 4190/21; 17 November 2021, file No. III OSK 4197/21; 13 October 2021, file No. III OSK 4091/21; all published in CBOSA.

procedure and manner of appointing diagnostic and support groups are also normative acts (Article 9a(6b) of the UPPD Act). It is worth noting that prior to the entry into force of the Amending Act, the above operating conditions were the subject of a resolution of the municipal council adopted on the basis of Article 9a(15) of the UPPD Act in its previous wording, assessed by administrative courts as an act of local law. Again, it is worth referring to the previously quoted judgment of the Supreme Administrative Court (hereinafter: NSA) file No. III OSK 728/21, which concluded: "An act of local law is such an act which contains rules of conduct of a general and abstract nature (...). Acts of local law are addressed to entities (addressees) remaining outside the administrative structure (...). The resolution appealed to the Court of First Instance on establishing the procedure and manner of appointing and recalling members of the Interdisciplinary Team and the detailed conditions of its functioning contains abstract rules, as the works and meetings of the Interdisciplinary Team and of the working groups created by the Team are of a repetitive, cyclical nature, and not of a one-off nature. The activities of the Team itself are aimed at assisting persons outside the structure of the local self-government administration (...). There is also no doubt that the resolution contains normative provisions on the basis of which its addressees have been entitled to assistance provided by the Interdisciplinary Team."[68] In such a perspective, granting the interdisciplinary team the power to adopt regulations may probably be assessed negatively. This is because Article 9a(6b) of the UPPD Act implies the authority to issue a normative act of only internal application (an act of internal management), which in no way may affect the rights or obligations of an individual (especially of victims and perpetrators of domestic violence). Meanwhile, it seems that it would be reasonable to make the regulations universally binding, due to the need to possibly include "procedural" rules directly affecting the individual within the scope of the "detailed conditions for the operation of the interdisciplinary team".[69]

In addition, the provisions of the UPPD Act are the basis for the creation of so-called (policy) planning acts, i.e., acts of public authorities in which the objectives, tasks and directions of activity of the addressees are established, together

[68] The Supreme Administrative Court judgment, file No. III OSK 728/21.

[69] *Cf.* also the Supreme Administrative Court judgment, file No. II OSK 1922/11.

with indication of the means for their implementation.[70] Such documents include: municipal and poviat programmes for counteracting domestic violence and protecting its victims (Article 6(2)(1) and Article 6(3)(1) of the UPPD Act), voivodeship programmes for counteracting domestic violence (Article 6(6)(1) of the UPPD Act), programmes oriented at preventive measures, which are aimed at specialised support, in particular regarding promotion and implementation of correct upbringing methods for children at risk of domestic violence (Article 6(3)(2) of the UPPD Act), corrective and educational programmes and psychological and therapeutic programmes for perpetrators of domestic violence (Article 6(4)(2) and (3) of the UPPD Act), framework protection programmes for victims of domestic violence and framework corrective and educational programmes and psychological and therapeutic programmes for perpetrators of domestic violence (Article 6(6)(3) of the UPPD Act), and the Government Programme for Counteracting Domestic Violence (Article 10 of the UPPD Act).

With regard to the programmes of local self-government units, K. Wlaźlak noted that the UPPD Act "lacks provisions on the legal nature of these programmes, their form, adoption procedure, content, implementation manner, duration, and there is no indication of specific bodies responsible for the preparation and implementation of the programmes".[71] In the current legal state, this view, which is in principle correct, should be supplemented with the statement that the draft municipal programme for counteracting domestic violence and protecting its victims is prepared by an interdisciplinary team (Article 9b(2)(4) of the UPPD Act), which then "performs activities set out in [the] municipal programme" (Article 9b(1) of the UPPD Act). In fact, the form of adoption of the above planning documents or the subjective scope of powers does not follow clearly from the provisions of the UPPD Act, of course with the exception of the Government Programme for Counteracting Domestic Violence, which was adopted by the Council of Ministers (see Article 10(1) of the UPPD Act)

[70] See S. Gajewski, *Programy rządowe...*, p. 66; M. Górski, J. Kierzkowska, *Strategie, plany i programy*, [in:] *System prawa administracyjnego. Prawo administracyjne materialne*, (eds.) R. Hauser, Z. Niewiadomski, A. Wróbel, Vol. 7, Warszawa 2012, p. 186; K. Kokocińska, *Prawny mechanizm prowadzenia polityki rozwoju w zdecentralizowanych strukturach władzy publicznej*, Poznań 2014, pp. 150–151; A. Wróbel, *Centralne planowanie państwowe. Studium administracyjnoprawne*, Lublin 1990, p. 193.

[71] K. Wlaźlak, *Programy jednostek samorządu terytorialnego w zakresie przeciwdziałania przemocy w rodzinie*, "Samorząd Terytorialny" 2011, No. 9, p. 45.

as a government document within the meaning of Section 19(2) of Resolution No. 190 of the Council of Ministers of 29 October 2013 – Rules of Procedure of the Council of Ministers.[72] This insufficient regulation resulted, in the legal state prior to the entry into force of the Amending Act, in different practices of local self-government units, consisting, for example, in the adoption of a voivodeship programme of counteracting family violence by the voivodeship assembly or the voivodeship board. Current regulations also give rise to interpretation problems with regard to determining the competent body for adopting the programmes listed in Article 6(2) to (4) and (6) of the UPPD Act. While at the municipality level there is a presumption that matters are dealt with by way of resolutions of the municipal council (Article 18(1) of the Act of 8 March 1990 on Municipal Self-Government[73]), the Act of 5 June 1998 on Poviat Self-Government[74] does not contain any similar regulation (and at the same time it does not indicate that the development of the discussed programmes belongs to the competence of the poviat council or poviat board – *cf.* Article 12 and Article 32(2)), and the Act of 5 June 1998 on Voivodeship Self-Government[75] provides for a presumption of competence in favour of the voivodeship board (without referring the discussed issue of planning acts explicitly to the competence of the voivodeship assembly – see Article 41(1) and Article 18. Articles 110(10) and 112(13) of the UPS Act, in conjunction with Article 6(1) of the UPPD Act, may provide some interpretative guidance. Indeed, if we consider that the programmes set out in Article 6(2) to (4) of the UPPD Act are "social assistance programmes" within the meaning of the UPS Act (which, however, raises doubts), the power to enact them must consequently be assigned to the municipal council and the poviat council, respectively, in accordance with the above-mentioned provisions of the UPS Act. In summary, municipal and poviat programmes for counteracting domestic violence should take the form of resolutions of the municipal or poviat governing bodies, while voivodeship self-government programmes should take the form of resolutions of the voivodeship board.

As far as the content of the analysed programmes is concerned, the legislator has permitted far-reaching freedom of its shaping by the empowered bodies,

[72] Monitor Polski of 2022 item 348.
[73] Journal of Laws of 2023 item 40, as amended; hereinafter: USG Act.
[74] Journal of Laws of 2022 item 1526, as amended; hereinafter: USP Act.
[75] Journal of Laws of 2022 item 2094, as amended: hereinafter: USW Act.

in principle limited only by the very nature of planning in legal terms as well as the axiology of the UPPD Act provisions and the public tasks imposed on the administering entity. In other words, the mentioned documents should set out the general and specific objectives, tasks and courses of action of the addressees, together with an indication of the means of their achieving, present them against the background of a diagnosis of the current situation and take into account the assumptions of the financial framework and potential sources of funding for programme implementation. More specific directives have been established only in the context of the Government Programme for Counteracting Domestic Violence, which is to set out detailed activities concerning: 1) providing protection and assistance to victims of domestic violence; 2) corrective and educational programmes addressed to the perpetrators of domestic violence, 3) raising social awareness of origins and consequences of domestic violence and promoting violence-free approaches to upbringing; 4) disseminating information about opportunities for and forms of assistance for both victims and perpetrators of domestic violence (Article 10(1) of the UPPD Act).

As regards the legal nature of the above-mentioned planning acts (including the Government Programme for Counteracting Domestic Violence), it must be acknowledged that they are the internal management acts. In the absence of an express statutory reservation to the contrary, they may not contain indications addressed "outside" the administrative apparatus, but only to the units subordinate to the body adopting the given programme.[76] Moreover, it should be noted that the following *expressis verbis* indication by the legislator would be a condition for acknowledging their different nature, in particular that of a universally binding legal act (implementing regulation or local law act) or an administrative act: 1) the planning act is this type of authoritative act (the so-called formal criterion); 2) obligations (restrictions) arising therefrom may be legally binding on entities that are not subordinate in terms of system or organisation to the issuing authority. Meanwhile, the provisions of the UPPD Act do not contain such reservations. The only exception is the municipal programme for counteracting domestic violence and protecting its victims. The "activities"

[76] See K. Wlaźlak, *Programy jednostek…*, p. 46; *cf.* also S. Spurek, *Przeciwdziałanie przemocy w rodzinie. Komentarz*, Warszawa 2021, LEX/el., notice 4 to Article 10; the Supreme Administrative Court judgment of 23 February 2016, file No. I OSK 2742/15, CBOSA.

resulting therefrom are to be carried out by an interdisciplinary team, consisting of representatives of the organisational units of social assistance, the municipal commission for solving alcohol problems, the Police, education, healthcare, non-governmental organisations, the Military Police, court guardians, prosecutors and others, i.e., in particular entities situated outside the organisational structure of the municipality and its bodies. Thus, if a given municipal programme contains a binding order addressed to such a team, it should be considered as a local law act with all the consequences thereof.

Another form of action of a general nature are the guidelines of the minister competent for social security on the training on counteracting domestic violence, including mandatory training for members of the interdisciplinary team and diagnostic and support groups (Article 8(5) of the UPPD Act). The term "guidelines" may be misleading, as it is traditionally used in administrative law theory to denote an act of internal management,[77] which does not contain "normative novelty", but only an interpretation of existing rules.[78] Meanwhile, the minister's guidelines mentioned in Article 8(5) of the UPPD Act, having an imperative value in terms of content, are addressed to voivodeship self-governments (see Article 6(6)(4) of the UPPD Act), i.e., to entities with constitutionally guaranteed self-governing nature (Article 165(2) of the RP Constitution). It should also be emphasised that the legislator has not authorised the minister to issue a regulation in this regard. For this reason, the guidelines may not be attributed a binding force with respect to the voivodeship self-government. As a result, it is not legally permissible to draw negative consequences directly resulting from non-compliance with these guidelines (e.g., by means of supervision activities of the voivod over the implementation of tasks related to counteracting domestic violence – Article 7(1)(5) of the UPPD Act). This seems to be contrary to the intention of the legislator, who, in order to strengthen the guarantee effect, should empower the minister to use the form of an act of generally applicable law.

---

[77] See, e.g., J. Mielczarek-Mikołajów, *Akty prawa wewnętrznego organów administracji publicznej*, Wrocław 2021, pp. 94–95, https://www.bibliotekacyfrowa.pl/Content/132270/PDF/Akty_prawa_wewnetrznego_organow_administracji_publicznej.pdf (accessed on: 6 July 2023).

[78] See M. Brzeski, *Akt kierownictwa wewnętrznego*, [in:] *Leksykon prawa administracyjnego*, (eds.) E. Bojanowski, K. Żukowski, Warszawa 2009, pp. 20–28.

5.3. Forms of action of an individual nature

In spite of approval, within the framework of this study, of the opinion that the provisions of the UPPD Act to a large extent adopt an administrative-legal method of regulating social relations, they do not establish any legal basis for the application of a typical form of administrative action, namely a decision within the meaning of the KPA. Such decisions in relation to the phenomenon of domestic violence are issued on the basis of other Acts of Parliament, but rather on an exceptional basis, because factual (material-technical) actions with limited formalisation prevail in this sphere.[79] An example of an administrative decision is, however, the starost's decision on referral to a home for mothers with minor children and pregnant women, whose addressees – beside the above-mentioned persons – may also be fathers with minor children or other persons with legal custody of children (Article 47(4) UPS in conjunction with Section 5(1) and (6) of the Regulation of the Minister of Family, Labour and Social Policy of 7 February 2024 on homes for mothers with minor children and pregnant women[80]), as well as the withdrawal by a voivod of a permit to run an institution[81] in the event of failure to undertake or implement actions resulting from post-inspection recommendations aimed at reducing or eliminating the identified significant deficiencies or irregularities in the activities and services covered by the standards, performed/provided by organisational units of social assistance or units subject to inspection (Article 129(1) of the UPS Act in conjunction with Article 7(2) of the UPPD Act).

One of the most important instruments for the realisation of the value of counteracting domestic violence on the basis of the UPPD is the "Niebieska Karta" procedure, which consists of a sequence of actions undertaken by the diagnostic and support group, in connection with a justified suspicion of said violence (Article 9d(2) of the UPPD Act). The procedure is initiated by means of a material and technical action of the authority filling in the "Niebieska Karta" form, which takes place as a result of a relevant suspicion arising in the course of

[79] *Cf.* I. Sierpowska, *Administracja świadcząca*..., p. 298.
[80] Journal of Laws item 169.
[81] See I. Sierpowska, *Pomoc społeczna. Komentarz*, Warszawa 2021, LEX/el., comments to the Article 129; judgement of the Voivodeship Administrative Court in Warsaw of 8 July 2011, file No. I SA/Wa 2371/10, CBOSA.

the performance of official or professional tasks, or as a result of a notification by a witness (Article 9d(4) of the UPPD Act). Prior to the entry into force of the Amending Act, and in particular of Article 9b(11)(3) in conjunction with Article 4(6) of the UPPD Act, the prevailing view in the case law of the administrative courts was that the discussed procedure did not cover conduct that could be challenged before a court on the basis of Article 3(2)(4) of the Act of 30 August 2002 – Law on proceedings before administrative courts (PPSA Act).[82] As pointed out by the NSA in its decision, file No. I OSK 2896/15, it aims "in fact to reduce the unknown number of cases in which domestic violence may occur, so it has been shaped by the legislator in such a way as not to require the use of measures referred to in Article 3(2) of the PPSA Act.[83] This does not deprive the complainant of his/her right to a court hearing. The rights and obligations of the complainant shall be shaped within the framework of proceedings governed by separate laws – before highly specialised national authorities – the Family Court (...) or the Public Prosecutor and then – possibly – the common court (...). In each of these proceedings, the complainant shall enjoy the right of defence." Therefore, in particular, "the initiation of the "Niebieska Karta" procedure and its issuing do not create any administrative relationship and therefore do not give rise to any direct rights or obligations of persons subject to the procedure". Thus, these behaviours do not fall within the scope of acts or actions listed in Article 3(2)(4) of the PPSA Act.[84]

Against this background, it is, however, worth noting a different – not devoid of rational arguments – interpretation of the legal nature of actions taken under the discussed procedure. Such interpretation was presented in the decision of the Voivodeship Administrative Court in Poznań, according to which "a person suffering from family violence (a victim of family violence) (...) has – depending on the state of the case – within the framework of the Niebieska Karta procedure,

[82] Journal of Laws of 2023 item 259, as amended; hereinafter: PPSA.

[83] See also K. Wlaźlak, *Przeciwdziałanie przemocy...*, p. 107.

[84] The Supreme Administrative Court decision, file No. I OSK 1714/20. A similar assessment of the legal nature of the actions undertaken in the "Niebieska Karta" procedure was expressed, *inter alia*, in the decision of the The Supreme Administrative Court, file No. I OSK 137/20 and the decisions of the Voivodeship Administrative Court: in Bydgoszcz of 8 May 2015, file No. II SA/Bd 376/15; in Warszawa of 13 February 2020, file No. VII SA/Wa 2265/19; in Warszawa of 28 June 2022, file No. VII SAB/Wa 59/22; in Wrocław of 18 November 2022, file No. IV SA/Wr 573/22; all published in CBOSA.

a number of rights resulting from the law", pursuant to Article 3(1) of the UPPD Act. "In turn, in connection with the initiation of the procedure (...), the person using domestic violence (perpetrator of domestic violence) has certain obligations", specified in Article 4 of the UPPD Act and in other statutory provisions and the implementing regulation. "In the light of the foregoing, it should be assumed that actions taken by the interdisciplinary team (or their lack), as concerning the rights or obligations of the participants in these proceedings arising from the law, may be subject to judicial-administrative control, because they constitute actions referred to in Article 3(2)(4) of the PPSA Act."[85] This position has subsequently found approval in the doctrine of law. Namely, P. Daniel has recognised that both the initiation of the above procedure and its termination indirectly create the legal situation of the persons participating therein, and thus affect the legal situation of these individuals. Therefore, a restrictive interpretation resulting in the inability to challenge the procedure itself before an administrative court, would limit the protection of the said persons.[86]

The thesis that actions taken as a result of the initiation of the "Niebieska Karta" procedure include acts meeting the conditions set out in Article 3(2)(4) of the PPSA Act, is strengthened by the Amending Act and Article 9b(2)(9) and (10), Article 9b(8)(5) and (6), Article 9b (11)(3) and Article 9b(13) in conjunction with Article 4(6) of the UPPD Act, introduced as a result of its entry into force. These provisions empower the disciplinary team, acting in this regard upon a binding application of the diagnostic and support group, to impose on the perpetrator of domestic violence an obligation to report for participation in a corrective and educational programme or a psychological and therapeutic programme within 30 days of the service of such a referral. This "obligation" has the features of an administrative act (*sui generis*) directly producing a legal effect in the form of an obligation on the part of the perpetrator of domestic violence to participate in and complete the indicated programme. The fulfilment of this obligation is additionally guaranteed by the threat of a notification by the interdisciplinary team on committing by a perpetrator of domestic violence a petty offence referred to in Article 66c of the KW (i.e., persistent failure to comply

[85] Decision of the Voivodeship Administrative Court in Poznań of 14 June 2017, file No. II SAB/Po 87/17, CBOSA.

[86] P. Daniel, *Glosa do postanowienia Wojewódzkiego Sądu Administracyjnego w Poznaniu z 14 lipca 2017 r. (II SAB/Po 87/17)*, "Samorząd Terytorialny" 2018, No. 4, p. 87.

with the disposition of Article 4(6) of the UPPD Act), in the event of failure to provide a certificate of completion of the relevant programme on time. The above referral for participation in a corrective and educational or psychological and therapeutic programme fulfils the conditions for its recognition as behaviour mentioned in Article 3(2)(4) of the PPSA Act. And namely, it is characterised by: 1) authoritativeness (i.e., the content of the obligation is determined unilaterally by the authority performing the public administration, the addressee is bound by this unilateral action, and the unilateral action is guaranteed by the possibility to apply state coercive measures); 2) the fact that it is taken in an individual case; 3) its public-law character; 4) the close and direct connection between the action of the administrative body and the fulfilment of an obligation imposed by law by an entity that is not organisationally related to the body issuing the given act or undertaking the given action (in particular, the wording of the act indicates that the addressee has been made subject to certain obligations).[87]

Irrespective of the possible admission of the possibility to file a complaint to the administrative court with regard to individual acts or actions undertaken under the "Niebieska Karta" procedure, the legislator provides for a complaint against the activity of the interdisciplinary team or its member and against the activity of the diagnostic and support group or its member (Article 9a(7h) and Article 9b(16) of the UPPD Act). Such complaints are considered – respectively – by the mayor or the president of a city and the interdisciplinary team, acting "in accordance with the provisions of the Act (...) – Code of Administrative Procedure" (see Part VIII of the KPA). Such regulation does not allow to treat the analysed measure as different from the one under Articles 221–240 of the KPA, the regulation of which in the UPPD Act only supplements the provisions on the "code-based" complaint, which is available, in principle, in any situation of dissatisfaction with the activity of public authority[88] and which

[87] See the Supreme Administrative Court judgment of 23 June 2022, file No. II GSK 812/22; the Supreme Administrative Court decision of: 31 January 2023, file No. III OSK 2848/22; both published in CBOSA.

[88] According to the Constitutional Court, "The concept of 'public authority' includes all constitutional authorities of a state or self-government, as well as other institutions, insofar as they perform the functions of 'public authority' as a result of entrusting or delegating these functions to them. The exercise of public authority refers to all forms of activity of the state, local self-government and other public institutions, which involve very diverse forms of activity. The exercise of such functions is linked as a rule, although not always,

details the right resulting from Article 63 of the RP Constitution. Therefore, the complaint referred to in Articles 9a(7h) and 9b(16) of the UPPD Act, as de-formalised means of protection regulated, moreover, in Part VIII of the KPA, triggers a separate type of verification procedure, different from general administrative proceedings or any other formalised special procedure. It initiates a one-instance administrative procedure of a simplified nature, ending with a factual (material-technical) action, i.e., a notification of the manner in which the complaint has been handled or of its refusal. This notification does not give rise to administrative or administrative court proceedings.[89] In particular, "There is no reason to assume that a notification to the complainant of the manner in which the complaint has been handled is an act of public administration concerning the rights or obligations under the law, as referred to in Article 3(2)(4) of the PPSA Act."[90]

In connection with the adopted interpretation of the legal nature of a complaint against the activities of an interdisciplinary team or a diagnostic and support group (their members), fundamental doubts are raised as to the legitimacy to lodge the above measure being narrowed to "a person covered by the "Niebieska Karta" procedure", a notion which means both a victim of domestic violence and a perpetrator of such violence. Indeed, the constitutional right of complaint serves "everyone", which "suggests that the right of petition is based on the principle of universality (*actio popularis*) in the broadest sense. Thus, the indicated subjective right is enjoyed by everyone, regardless of their citizenship or place of residence (registered office), whether a natural person or any collective entity (with or without legal personality)."[91] While the intention of the legislator was clear, i.e., to explicitly ensure the protection of the interest of persons covered by the discussed procedure, he does not seem to have taken

to the possibility of authoritative shaping of the situation of an individual. This concerns the area in which the rights and freedoms of the individual may be infringed by the public authority." – judgment of the Constitutional Court of 18 October 2005, file No. SK 48/03, OTK ZU 2005, No 9/A, item 101.

89 The Supreme Administrative Court decision of 09 June 2010, file No. I FSK 497/10, CBOSA.

90 The Supreme Administrative Court decision of 18 February 2011, file No. II GSK 162/11, CBOSA.

91 The Constitutional Court judgment of 12 July 2016, file No. K 28/15, OTK ZU 2016, No. A, item 56.

into account the circumstances of the derivation of such guarantees directly from the RP Constitution, the wide subjective scope of which could not be narrowed without exceptionally important reasons. Such motives, in particular referring to the need to protect other constitutional values, are hard to identify in relation to Article 9a(7h) and Article 9b(16) of the UPPD Act.

An important element of the system of measures counteracting domestic violence is the provision of protection to the child by placing him/her with another next of kin within the meaning of Article 115(11) of the Act of 6 June 1997 – Penal Code[92] not residing at the same address, who guarantees the safety and proper care of the child, in a foster family, family foster home or institutional foster care (Article 12a(1) of the UPPD Act). Within the framework of this study, it is necessary to focus on the administrative-legal aspects of this legal construction, leaving aside the essentially judicial mode of placing children in family or institutional foster care (see Article 35(1) of the Act of 9 June 2011 on family support and the system of foster care[93] in conjunction with Article 12a(2) of the UPPD Act), which also applies *mutatis mutandis* to the placement of a child with another next of kin not residing at the same address (Article 12a(6) of the UPPD Act). The mentioned administrative-legal context of powers refers to the "co-decision" of the social worker and the police officer, doctor, paramedic, nurse and – "where possible" – psychologist. The indicated "decision" to provide protection to the child was made conditional on the cumulative occurrence of two premises: 1) risk to the life or health of the child, 2) being in connection with domestic violence. One should approve J. Słyk's view that taking a child away should only relate to serious cases of health risks and not, for example, situations where the parents on one occasion, during a verbal domestic dispute, failed to ensure that the child was appropriately dressed, exposing him/her to the cold.[94] There is also some doubt about the relevance of the requirement of "connection with domestic violence", as it also allows to apply the discussed provision when not the parents, but other persons residing at the same address (e.g., a brother

[92] Journal of Laws of 2022 item 1138, as amended.

[93] Journal of Laws of 2022 item 447, as amended; hereinafter: UWR Act.

[94] J. Słyk, *Odbieranie dzieci rodzicom na podstawie art. 12a ustawy z 29 lipca 2005 o przeciwdziałaniu przemocy w rodzinie*, "Prawo w Działaniu" 2015, No. 24, p. 273.

or sister, or even a tenant) are the perpetrators of the violence. This may lead to aggravating the child's trauma rather than protecting the child's well-being.[95]

According to Article 12a(1) of the UPPD Act, the provision of protection to a child is primarily the responsibility of the "social worker". A systemic interpretation suggests that it refers to a worker of a social assistance organisational unit within the meaning of Article 6(5) of the UPS Act, although such workers may also be employed by other institutions, in particular organisational units competent for employment and unemployment, hospitals or prisons (see Article 120(1) of the UPS Act).[96] By virtue of the Amendment Act, the proviso concerning a social worker "performing official duties" has been removed from Article 12a(1) of the UPPD Act, which was interpreted as making the possibility of taking a child away dependent on the working hours and the scope of official duties assigned to the employee concerned.[97] In the current state of the law, the action of social workers is therefore not subject to the mentioned restrictions.

According to Article 12a(3) and (4) of the UPPD Act, the "decision" under consideration is taken by the social worker together with a police officer, doctor, paramedic or nurse and, if possible, in the presence and with the support of a psychologist. The disadvantage of this provision consists in particular in the fact that the provisions of the Act do not explicitly require the participation of the aforementioned persons in child removal.[98] The question therefore arises as to whether "the burden of the decision lies [solely] with the social worker"[99] who in this respect may act alone (as a consequence of highlighting the powers in the separate provision of Article 12a(1) of the UPPD Act) or by co-deciding with only some of those present, or whether, in any case, the social worker is obliged to request the participation of all the persons indicated in Article 12a(3) and (4) of the UPPD Act and only then take a joint decision on taking the child away. In this context, it would be advisable to assume that it is the social worker who assesses the need to summon some or all of the persons mentioned in the above-mentioned provisions (which, with regard to a doctor, paramedic

[95] *Ibidem*, pp. 274 and 324.
[96] *Cf. ibidem*, pp. 274–275.
[97] See A. Kiełtyka, [in:] *Przeciwdziałanie przemocy...*, A. Kiełtyka, A. Ważny, p. 228.
[98] J. Słyk, *Odbieranie dzieci...*, p. 275.
[99] See P. Piskozub, *Procedura odebrania dziecka na podstawie przepisów ustawy o przeciwdziałaniu przemocy w rodzinie. Problemy praktyczne i postulaty de lege ferenda*, "Teka Komisji Prawniczej PAN Oddział w Lublinie" 2019, Vol. 12, No. 1, p. 193.

or nurse, will be a rather typical situation, due to the premise of "risk to the life or health of the child") and, depending on the circumstances of the specific case, co-decides with those persons who have been summoned and are present. This co-decision, however, requires the consensual positions of all these persons, and the absence of the consent of even one of them excludes the lawful application of the measure of "provision of protection to a child". At the same time, in the analysed case, the social worker and the other mentioned entities do not act on behalf of a designated public administration body (social assistance body), which would grant them the relevant authorisations (e.g., pursuant to Article 268a of the KPA), but within the framework of the independent tasks and powers assigned thereto by law.[100] Therefore, the indicated legal situation of the social worker and co-deciding persons present at the moment of taking the child away brings these entities closer to the position of public administration bodies, performing a "specific scope of action", which has been assigned to a given "official position".[101]

In addition, it is necessary to assess the legal nature of the action designated in Article 12a(1) of the UPPD Act as "providing protection by placing" a child with another next of kin or in foster care. An interpretation of the provisions justifies the conclusion that we are dealing with certain actions in the sphere of facts, and not with the issuing of a "decision" (which, however, is a term used in Article 12a(3) and (4) of the UPPD Act) in the sense of an administrative act aimed directly at producing legal effects, i.e., changes in the legal situation of the addressee of this act (e.g., with regard to the rights and obligations of the parent as a perpetrator of domestic violence). This finding suggests a reflection on the concept of the so-called material-technical action as one of the legal forms of administrative action. In the view of the doctrine of law, such actions are characterised as follows: a) they are actions taken on the basis of and for the purpose of implementing the applicable legal rules; b) they serve the direct and practical implementation of specific tasks of the state; c) they are subject to control, the essential criterion of which is their compliance with the law; d) they are not directly aimed at creating, changing or abolishing legal relations;

[100] *Cf.* W. Maciejko, [in:] *Ustawa o pomocy społecznej. Komentarz*, W. Maciejko, P. Zaborniak, Warszawa 2013.

[101] See B. Adamiak, *Uwagi o współczesnej koncepcji organu administracji publicznej*, [in:] *Jednostka, państwo, administracja – nowy wymiar*, (ed.) E. Ura, Rzeszów 2004, p. 17.

e) nevertheless, they may, by way of facts, produce certain legal effects; f) they resemble actions taken by citizens when dealing with various matters of everyday life.[102] In the context of the analysed behaviour of the social worker (and other interacting entities) specified in Article 12a(1) of the UPPD Act, it seems most important to distinguish a material and technical action from a legal action (administrative act). In this respect, the observations of K.M. Ziemski should be considered correct. According to him, "A legal action is not so much an action producing legal effects as an action taken directly in order to produce such effects and, moreover, in order to produce direct legal effects and producing such effects."[103] In contrast, determining, establishing, changing or dissolving a legal relationship is not the direct objective of a material and technical action. This is because it is only aimed to cause specific factual effects (changes in the factual situation), which may subsequently be associated with a legal effect.[104] Against this background, it seems reasonable to assume that the provision of protection to the child is aimed directly at producing only factual consequences, i.e., the condition of the child's isolation from the situation of domestic violence, and that only the decision of the common (guardianship) court, which relates to the said factual change, is aimed at producing direct legal consequences (see Article 35(1) of the UWR Act in conjunction with Article 12a(2) and (6) of the UPPD Act). Of course, this change may also be revoked if the court considers it to be unjustified, illegal or incorrect (see Article 12b(3) of the UPPD Act).

In view of the foregoing, it must be assumed that the action of child removal does not follow the administrative procedure regulated by the KPA. "[I]t is not (...) an action performed by a social worker as an administrative body deciding on the rights and obligations of an individual under administrative law."[105] It would also be pointless to consider treating it as a public administration action concerning rights or obligations arising from the provisions of the law (Article 3 § 2(4) of the PPSA Act). Indeed, by virtue of Articles 12a(5) and 12b(1) of the

[102] Z. Kmieciak, *Czynności faktyczne administracji państwowej*, "Studia Prawno-Ekonomiczne" 1987, No. 39, p. 77–78.
[103] K.M. Ziemski, *op. cit.*, p. 466.
[104] *Ibidem*, p. 104–105.
[105] See decision of the Voivodeship Administrative Court in Gdańsk of 20 December 2018, file No. III SAB/Gd 63/18, CBOSA.

PPSA Act, control of the actions of the social worker and other co-deciding entities has been transferred to the jurisdiction of the guardianship court.

Another legal form for the implementation of tasks relating to domestic violence is an "agreement" concluded between the mayor or the president of the city and the entities whose representatives compose the interdisciplinary team (see Article 9a(3), (3a) and (5) of the UPPD Act). It should determine – beside the parties to the agreement – in particular: the manner and form of exchanging information as part of work in the team, as well as matters relating to the participation of members of diagnostic and support groups in the meetings and activities of these groups. Despite the use of the name "agreement" in Article 9a(8) of the UPPD Act, we are not dealing with a typical administrative ("municipal") agreement[106] as provided for in Article 8(2) and (2a) and Article 74 of the USG Act. Therefore it must be considered that a prior resolution of the municipal council to approve the conclusion of an agreement with a specific content[107] (*cf.* Article 18(2)(11) and (12) of the USG Act) will not be necessary in the analysed situation. However, these circumstances do not fundamentally affect the possibility of considering the mentioned consensual act as an administrative agreement in theoretical terms. Indeed, according to the definition of Z. Cieślak, it constitutes "a factually and legally conditioned cooperation of entities independent in the subject-matter of the agreement, whose content involves the creation in the legal act of the agreement of formal grounds for joint implementation of specific administrative tasks and taking the necessary and synchronised factual and legal actions to implement the concluded act".[108] "Agreement" under Article 9a(8) of the UPPD Act meets the above conditions of a material nature. As far as the subjective elements of the discussed act are concerned, some of the parties thereto do not have the attribute of independence in relation to the municipality and its executive body (e.g., social assistance centres or social service centres as organisational units of social assistance – see Article 110(3) of the UPPD Act. In these cases, there

[106] See L. Wengler, *Porozumienie komunalne zawierane między województwami – podstawowe zagadnienia*, "Gdańskie Studia Prawnicze" 2000, No. 7, pp. 615–616.

[107] See D. Kiwior, M. Kotulski, *Porozumienie administracyjne*, "Przegląd Prawa Publicznego" 2008, No. 6, p. 78.

[108] Z. Cieślak, *Porozumienie administracyjne*, Warszawa 1985, pp. 113–114.

is a significant modification of the nature of the act, as the essential element – the equality of its parties – disappears.[109] Taking into account the purposive interpretation, it should be acknowledged that only the concluded agreements will be the basis for appointing an interdisciplinary team by the mayor or the president of a city (although the literal interpretation could suggest a different order of actions – since the team "acts on the basis of agreements", it must be previously constituted). Efficiency considerations make it necessary to first agree on the cooperation within the team itself, and then its composition should be constituted as a result of mutual agreement of the parties.

The presented overview of the types of actions of bodies carrying out tasks related to counteracting domestic violence justifies the conclusion that the assessment of the legal character of these activities from the perspective of the theory of legal forms of administrative action is in many cases difficult. Indeed, apart from a few unambiguous authorisations to issue implementing regulations and the legal bases for administrative decisions provided for exceptionally, and only in the UPS Act, all other regulations defining powers require more advanced interpretative efforts to establish the legal nature of the administrative action in question. Moreover, the interpretative results thus obtained may be questioned as non-exclusive. This, in turn, is in conflict with one of the basic praxeological guidelines that should be followed by the legislator, namely the principle of clear definition of the forms of influence of authorities.[110]

6. Legal ties (relationships) between actors performing tasks related to counteracting domestic violence

One of the basic "institutions" of systemic administrative law are the so-called legal ties (relationships) in administration, i.e., the various relations between separate organisational units of public administration and within these units (in the administrative apparatus).[111] These ties guarantee internal harmony,

[109] *Ibidem*, p. 114.
[110] Z. Cieślak, *Istota i zakres...*, pp. 67 and 70.
[111] Z. Cieślak, *Podstawowe instytucje prawa administracyjnego*, [in:] *Prawo administracyjne. Część ogólna*, (ed.) Z. Niewiadomski, Warszawa 2002, pp. 98–99.

convergence and uniformity of action of individual links for the achievement of the set objectives.[112] Among the aforementioned ties, the one that is particularly highlighted under the provisions of the UPPD Act is cooperation, whose essence is to allow the joint achievement of objectives[113] (here comprising the primary objective of counteracting domestic violence). This seems to be due to the fact that domestic violence is a multifaceted phenomenon, the combating of which requires many actors to "join forces", not only public authorities, but also other specialised institutions and organisations, up to and including individual citizens.[114] Moreover, the UPPD Act lays down *expressis verbis* the "principle of cooperation", thus referring to a relevant efficiency value (Article 9d(3) of the UPPD Act). In addition, it contains a number of specific constructs of an institutional and functional nature indicating collaborative relationships within administrative authorities and with non-state actors.[115] Among their manifestations the following should be mentioned: 1) general rules defining powers in cooperation of governmental and self-governmental administration bodies with non-governmental organisations and churches and religious associations (Article 9(1) of the UPPD Act); 2) cooperation – within the interdisciplinary team – of organisational units of social assistance, municipal commission for solving alcohol problems, the Police, representatives of education and healthcare, non-governmental organisations, Military Police, court guardians, public prosecutors and other entities (Article 9a (3)–(5) of the UPPD Act); 3) cooperation – within the framework of diagnostic and support groups – of social workers of units of social assistance organisations, Police officers, soldiers of the Military Police, social workers of specialised support centres for victims of domestic violence, family assistants, teachers who are class teachers or teachers familiar with the home situation of minors, medical professionals, including doctors, nurses, midwives or paramedics, representatives of the municipal commission for solving alcohol problems, educators, psychologists or therapists, court guardians (Article 9a (11–12) of the UPPD Act); 4) cooperation – within the Monitoring

[112] *Cf.* M. Jełowicki, *Podstawy organizacji administracji publicznej. Zagadnienia teoretyczne*, Warszawa 1998, pp. 77–78.

[113] Z. Cieślak, *Podstawowe instytucje...*, p. 101.

[114] *Cf. Uzasadnienie projektu...*, p. 1.

[115] This issue is exhaustively analysed by dr Michał Poniatowski in the next chapter of this monograph.

Team for Counteracting Domestic Violence – of the National Coordinator for the Implementation of the Government Programme for Counteracting Domestic Violence, representatives of governmental administration bodies and their subordinate or supervised units, including Voivodeship Coordinators for the Implementation of the Governmental Programme for Counteracting Domestic Violence, representatives of local self-government units, including chairpersons of interdisciplinary teams, representatives of non-governmental organisations, unions of non-governmental organisations, churches and religious associations (Article 10b(1) of the UPPD Act); 5) cooperation of the Monitoring Team for Counteracting Domestic Violence with governmental and self-governmental administration bodies, non-governmental organisations, churches and religious associations (Article 10a(3)(8) of the UPPD Act); 6) cooperation of persons who, due to the performance of their official or professional duties, suspect that a crime of domestic violence prosecuted *ex officio* has been committed, with the Police or the public prosecutor (Article 12(1) of the UPPD Act); 7) the "co-decision" of a social worker, a police officer, a doctor or paramedic or a nurse and a psychologist on the provision of protection to the child (Article 12a(1), (3) and (4) of the UPPD Act).

Further types of legal ties explicitly provided for in the UPPD Act include: supervision and control, defined as the relationship of the voivod with "municipal, poviat and voivodeship self-governments" and "non-public entities" performing tasks on the basis of agreements with governmental and self-governmental administration bodies (Article 7(1)(5) and (6) of the UPPD Act). Both of the above-mentioned ties should be fully legally delimited as to their subjective and material scope, verification criteria, procedure, measures of influence and effects.[116] At the same time, the rules concerning these elements are subject to a strict interpretation as limitations with respect to the autonomy of the subjects of control or supervision. At the same time, it should be borne in mind that Article 7(1)(5) and (2) of the UPPD Act do not exclude the application of general regulations concerning the voivod's supervision over the activity of local self-government contained in the provisions of the USG, USP and USW Acts.

The material scope of the control and supervision by the voivod resulting from Article 7(1) of the UPPD Act is specified primarily by Article 6(2)–(4)

[116] See Z. Cieślak, *Podstawowe instytucje...*, pp. 87–88.

and (6) of the UPPD Act establishing the tasks of the municipality, poviat and voivodeship self-government for counteracting domestic violence. It is supplemented in particular with social assistance tasks (see Article 3(2) in conjunction with Article 2(1) and in conjunction with Article 7(7) of the UPS Act) or alcohol prevention tasks (see Article 2(1)(7) and Article 4^1 (1)(2) of the UWWT Act) also related to such violence. The subjective scope of the voivod's interference is further specified by the Regulation of the Minister of Family and Social Policy of 20 June 2023 on the supervision and control over the implementation of tasks related to counteracting domestic violence.[117] It defines the concepts of a "unit subject to control (inspection)" and a "unit subject to supervision". Both include common elements, i.e.: a social assistance organisational unit (see Article 6(5) of the UPS Act) implementing tasks related to counteracting domestic violence, a specialised support centre for victims of domestic violence, as well as a municipal office, a poviat office and a marshal's office. In addition, the unit subject to control (inspection) is, according to the regulation, a non-public entity performing tasks related to counteracting domestic violence on the basis of an agreement with the governmental and self-governmental administration bodies. Measures of influence are identified by – appropriately applied – Articles 126–133 of the UPS Act in conjunction with Article 7(2) of the UPPD Act, as well as by the above-mentioned Regulation.

One of the most significant measures within the powers of the voivod are the so-called post-inspection recommendations issued to the unit subject to control (inspection) on the basis of Article 128(1) of the UPS Act in conjunction with Article 7(2) of the UPPD Act. In addition to the legal obligation to notify the voivod of following-up the recommendations, observations and conclusions contained therein (Article 128(4) and (5) of the UPS Act), the implementation of the post-inspection recommendations was secured to a certain extent by the application of measures of authoritative influence. Firstly, in accordance with Article 129(1) of the UPS Act, in the event of failure to undertake or carry out actions resulting from post-inspection recommendations aimed at reducing or eliminating the identified significant shortcomings or irregularities in the activities and services covered by the standards, performed/provided by organisational units of social assistance or other units subject to control (inspection), the voivod

[117] Journal of Laws item 1165.

may issue an administrative decision[118] on temporary or permanent withdrawal of the permit to run an institution. Secondly, Articles 130(1) and 131(1) of the UPS Act provide that anyone who fails to implement post-inspection recommendations is liable to a fine of between PLN 500 and PLN 12,000, imposed by an administrative decision of the voivod.

Taking into account Article 7(1)(6) of the UPPD Act, which provides only that the voivod "controls" the performance of tasks related to counteracting domestic violence by non-public entities – on the basis of agreements concluded by them with governmental and self-governmental administration bodies, the question arises as to the admissibility of applying to these non-public entities the consequences set out in Articles 129(1) and 130(1) of the UPS Act in conjunction with Article 7(2) of the UPPD Act. Some arguments can be made in favour of the exclusion of these measures within the aforementioned subjective scope. Indeed, the provisions on control (and supervision) are subject to a strict interpretation (as restrictions on the autonomy of "subordinate" entities), and, as a result, a clear distinction must be made between the legal concept of control (inspection) (i.e., the power to make a binding assessment of an action and its effects,[119] without the permanent possibility of influencing the activity of the entity subject to control (inspection) by issuing orders or instructions thereto[120]) from the supervisory powers, amounting, in particular, to the application of measures of authoritative interference and remedying the irregularities found.[121] Articles 129(1) and 130(1) of the UPS Act can be regarded as such a manifestation of authoritative influence, considering them as an element of a supervisory relationship, which – in the light of Article 7(1)(6) of the UPPD Act – has not been established in the relationship between the voivod and non-public entities performing tasks for counteracting domestic violence. This relationship includes only the "control" by the voivod, and thus in particular only the power to issue post-inspection recommendations linked with the obligation to

[118] See I. Sierpowska, *Pomoc społeczna*..., comments to the Article 129; judgment of Voivodeship Administrative Court in Warsaw, file No. I SA/Wa 2371/10.

[119] B. Majchrzak, *Istota administracji publicznej*, [in:] *Nauka administracji*, (eds.) Z. Cieślak, Warszawa 2017, p. 26;

[120] M. Wierzbowski, A. Wiktorowska, *Podstawowe pojęcia teoretyczne w nauce prawa administracyjnego*, [in:] *Prawo administracyjne*, (ed.) M. Wierzbowski, Warszawa 2011, p. 101.

[121] W. Federczyk, *Kontrola administracji publicznej*, [in:] *Nauka administracji*, (ed.) Z. Cieślak, Warszawa 2017, p. 139.

inform of following-up the recommendations, observations and conclusions contained therein.

The next problem that emerges on the grounds of regulation of the above mentioned post-inspection recommendations is their legal character assessed in the context of the subjective scope of the court-administrative complaint and Article 3(2)(4) of the PPSA Act. P. Zaborniak expressed the view that such recommendations may be considered as acts concerning powers or obligations under the provisions of administrative law. Although they do not directly create an obligation to follow-up the observations, conclusions and recommendations contained therein, but linking them to the irregularities found, setting specific guidelines of conduct with respect to the entity subject to control (inspection) in a unilateral manner and the consequences of non-implementation clearly formulated in the Act may convince us that they are acts indicated in Article 3(2)(4) of the PPSA Act. The distinguished features of the recommendations allow to treat the relations between them and the provisions establishing the obligations of entities subject to control (inspection) as relations of a strict nature.[122] A similar position was taken by I. Sierpowska, according to whom the analysed recommendations are a type of material and technical action in the field of public administration of an authoritative character, concerning the rights or obligations under law. They affect the rights and obligations of the entity subject to control (inspection), because failure to inform about the scope of implementation of the order or inaccurate information are subject to a sanction – the imposition of a fine. In conclusion, the post-inspection recommendations stating the existence of a specific obligation on the part of the entity subject to control (inspection), i.e., being an authoritative action, could be subject to appeal to court pursuant to Article 3(2)(4) of the PPSA.[123]

However, a different interpretation of the nature of the voivod's post-inspection recommendations under Article 128(1) of the UPS Act is presented by the administrative courts. It deserves approval, as it is an expression of pragmatism and an appropriate balance between judicial protection of individual interest in a specific case and a guarantee of effective right to a court in general, depending on a moderate burden of administrative courts with

[122] P. Zaborniak, *Uwaga 3. do art. 128,* [in:] *Ustawa...*, W. Maciejko, P. Zaborniak.
[123] I. Sierpowska, *Pomoc społeczna...*, notice to Article 128.

cases pending before them. The NSA points out that although post-inspection recommendations of a voivod create obligations on the part of the addressee, the non-fulfilment of which is liable to an administrative fine, and thus their legality should be subject to judicial control, they are not subject to appeal to the administrative court on the basis of Article 3(2)(4) of the PPSA Act. In fact, the post-inspection recommendations may be subject to review by this court as part of the review of the administrative decision imposing the administrative penalty. In other words, the case must "mature" to the cognisance of the court and only when the decision on the administrative fine is challenged may the legality of the post-inspection recommendations be verified. Such protection is realised indirectly, on the occasion of handling a complaint against other acts or actions of public administration bodies, i.e., when the effects and significance of the challenged behaviour can be fully assessed. To sum up, in the opinion of the NSA Court, "The post-inspection recommendations of the voivod are not other acts or actions of public administration concerning the rights or obligations under law, within the meaning of Article 3(2)(4) of the PPSA Act." At the same time, they also do not constitute acts of supervision over the activities of local self-government units within the meaning of Article 3(2)(7) of the PPSA Act, because they may also be issued in relation to a private entity, e.g., a natural person running a residential care home.[124]

In another ruling, the NSA emphasised, however, that the discussed recommendations do not concern the granting, stating or recognising an entitlement or obligation under law. They also do not create a new legal situation for the entity subject to control (inspection), they are not acts of authoritative interference of the public administration body in the sphere of activity of the entity subject to control (inspection). They only summarise inspection and indicate deficiencies that the entity subject to control (inspection) should remedy voluntarily, without the use of administrative coercive measures.[125] Moreover, the NSA presents arguments based on the fact that the irregularity found in the course of inspection is not subject to any sanctions, as no obligation to remove it is contained in the post-inspection recommendation. Thus, it may not

[124] Decision of 22 February 2022, file No. I OSK 158/22, CBOSA.

[125] The Supreme Administrative Court decisions of: 30 September 2022, file No. I OSK 923/20; 08 November 2022, file I OSK 325/22; both published in CBOSA.

be deemed a statement concerning the entitlement or obligation, within the meaning of Article 3(2)(4) of the PPSA Act, taking into account the subject of the obligation, which does not exist, and the obliged entity – the administrative apparatus performing its tasks and responsibilities. In addition, the statement of the inspection body is not of an external nature, as it is addressed to another entity performing public administration, and both administrative entities are linked by a control relationship.[126]

On the basis of the foregoing, it can be concluded that, in the framework of counteracting domestic violence, the legislator makes extensive use of the legal construction of ties in administration. This deserves full approval in view of the need for an interdisciplinary approach to the analysed social phenomenon, requiring the cooperation of many specialised entities, while at the same time guaranteeing the state, acting through the government administration bodies that directly represent it, adequate opportunities to influence the correct performance of tasks for counteracting domestic violence by local self-government and non-public entities.

7. Evaluation of current solutions and proposals for changes

The analysis of the provisions of the UPPD Act allows to state that the administrative-legal rules contained therein are in fact very extensive and provide adequately diverse instruments of administrative-legal influence. They empower actions of general prevention, planning of certain behaviours or non-authoritative stimulation, as well as direct interference in specific events requiring immediate response due to current threats to fundamental human rights. Despite the generally positive assessment of the analysed instrumentarium, mainly due to its comprehensiveness and multifaceted nature, it is possible to point out to the need of meeting several *de lege ferenda* postulates.

One of the basic principles of administrative law relating to the determination of powers of administrative bodies is the principle of determining the forms

[126] The Supreme Administrative Court decision of 11 March 2021, file No. I OSK 3967/18, CBOSA.

of influence. It is an elementary condition for the functioning of the broader structure of bodies, as it indicates the body legally empowered to influence other entities and the manner of this influence.[127] A problem arises as to whether the legislator has adequately implemented the aforementioned guideline against the background of the rules defining powers relating to planning acts in counteracting domestic violence listed in Articles 6(2)–(4) and 6 of the UPPD Act. This is because the provisions of this Act do not unambiguously identify the bodies empowered to issue the above-mentioned acts, and the systemic rules contained in the so-called self-government acts only to a limited extent allow to interpret the competent entity (this applies in principle only to the provisions of the USG Act). Hence, it would be reasonable to adopt a law that would unambiguously indicate the body of the local self-government unit responsible for the development of plans specified in Article 6(3), (4) and (6) of the UPPD Act.

The demand for a more thought-out approach to realising the principle of determining the forms of influence also applies to Article 9a(6b) of the UPPD Act. It provides for the adoption by the interdisciplinary team of regulations specifying the conditions of its functioning and the procedure and manner of appointment of diagnostic and support groups. Taking into account the case law relating to the previous legal status,[128] it may be argued that the indicated regulations should take the form of a local law act, which in fact prevents the interdisciplinary team, as a body incapable of such actions, to adopt them on its own (see Article 94 of the RP Constitution). Therefore, it seems necessary rather to empower the municipal council to adopt the regulations, previously "developed" by the interdisciplinary team and having the attribute of a provision of local law. Thus, Article 9a(6b) of the UPPD Act should read as follows: "The interdisciplinary team shall draw up regulations specifying detailed conditions for the functioning of the interdisciplinary team and the procedure and manner of appointment of diagnostic and support groups. The regulations shall be adopted by the municipal council, by means of an act of local law." A similar proposal can be made in the context of Article 8(5) of the UPPD Act, namely that in order to strengthen the influence on the voivodship self-government, it should authorise the minister competent for social security to use the form of

[127] *Cf.* Z. Cieślak, *Istota i zakres…*, pp. 64 and 66.
[128] See, e.g., The Supreme Administrative Court judgment, file No. III OSK 728/21.

a regulation, as an act of universally binding law, to lay down the guidelines for conducting training on counteracting domestic violence.

Application of the principle of determining the forms of influence is also difficult in the case of Article 7(1)(6) in conjunction with Article 7(2) of the UPPD Act. This is because the scope of application of the reference to Articles 126–133 of the UPS Act with regard to the control of the implementation of tasks related to counteracting domestic violence performed by non-public entities on the basis of agreements with the bodies of governmental and local administration is not clear. This applies in particular to the issue whether the powers of the voivod include influencing these entities by imposing an administrative fine thereon for the failure to implement post-inspection recommendations (Article 130(1) of the UPS Act). In the current state of the law, the answer to this question requires more advanced interpretations, which, however, may lead to divergent conclusions. There are compelling arguments in favour of excluding the application of an administrative sanction within the indicated scope, but given the importance of the legal consequences associated therewith, it would be desirable for the legislator to unequivocally resolve the discussed issue.

Furthermore, a comparison of Article 9b(4) and Article 9b(11) of the UPPD Act *in principio* raises interpretation doubts. The first provision stipulates that the interdisciplinary team is bound by an application of the diagnostic and support group to refer a perpetrator of domestic violence to a corrective and educational or psychological and therapeutic programme. In turn, according to Article 9b(11) of the UPPD Act *in principio*, this application is subject to "consideration" by the interdisciplinary team and therefore, according to the linguistic meaning of the term, to its thorough examination and analysis for its assessment or taking a decision.[129] It seems to overlook the regulation of paragraph 4 of this Article, which excludes the assessment of the application of the diagnostic and support group and the possibility of taking a decision in this regard, because the sole and direct consequence of such application should be the referral of the person concerned to the relevant programme. Therefore, instead of the phrase "after considering the application referred to in paragraph 8(5)"

[129] See *Wielki słownik języka polskiego PAN*, https://wsjp.pl/haslo/podglad/34836/rozpatrzec (accessed on: 6 July 2023).

(Article 9b(11) of the UPPD Act *in principio*), it would be appropriate to use, for example, the phrase "on the basis of" this application.

One of the fundamental directives of the linguistic interpretation of legal provisions is the prohibition of synonymous interpretation, according to which "different phrases should not be given the same meaning".[130] It is possible to indicate provisions of the UPPD Act that do not take this directive into account. And namely, Articles 9a(7h) and 9b(16), as well as Articles 9e(3) and 9h(2) of the UPPD Act use the following terms: "a person covered by the 'Niebieska Karta' procedure", "a person in relation to whom actions under the 'Niebieska Karta' procedure are carried out" and "persons referred to in Article 2(1)(2) and (3), who participate in the 'Niebieska Karta' procedure". At the same time, there is no argument in favour of the claim that the above-mentioned terms refer to a different range of actors. Since they identify essentially the same persons, the same term should be used in each of these cases.

Articles 9a(7h) and 9b(16) of the UPPD Act raise also other doubts. It is because they narrow the constitutional subjective right of petition, based on the principle of universality in the broadest sense, exclusively to the person covered by the "Niebieska Karta" procedure. In view of the fact that the measure mentioned in the indicated provisions of the UPPD Act has not been formulated as specialised in terms of its effects *vis-à-vis* Article 63 of the RP Constitution in conjunction with Part VIII of the KPA, its subjective scope should not be limited.

One of the problems revealed in the practice of UPPD Act application is that the actual burden (and even the "exclusive power") of deciding whether to provide protection to a child in accordance with Article 12a of the UPPD Act lies with the social worker.[131] Given the significant effects of this "decision", it would be advisable to strengthen the current operationalisation of its making by the social worker "together" with a police officer, doctor, paramedic or nurse and, if possible, in the presence and with the support of a psychologist. It would be advisable to regulate explicitly in the law the obligatory participation in the action of a police officer and at least one of the representatives of the listed medical professions. As a consequence – also at the statutory level – it would be advisable to regulate the requirement for these entities to prepare and sign

[130] L. Morewski, *Zasady wykładni*..., pp. 117–119.
[131] See P. Piskozub, *Procedura odebrania*..., pp. 193–194; J. Słyk, *Odbieranie dzieci*..., p. 275.

a formalised document (e.g., a report being at the disposal of a social worker), which would reflect the consensual declarations of will concerning the removal of the child. Therefore, the following modification of Article 12a of the UPPD Act could be proposed: "1. In the event of a risk to the life or health of a child in connection with domestic violence, the social worker, in consultation with a police officer, as well as a doctor, paramedic or nurse, and, where possible, a psychologist, shall provide protection to the child by placing him/her with another next of kin not residing at the same address, within the meaning of Article 115(11) of the Act of 6 June 1997 – Penal Code, who guarantees the safety and proper care of the child, in a foster family, family foster home or institutional foster care (...). 3. The social worker shall summon the entities referred to in paragraph 1 to participate in the action. The provisions of Article 598,[10] Article 598[11](3) and Article 598[12](1) the first sentence of the Act of 17 November 1964 – Code of Civil Procedure shall apply accordingly. 4. The social worker shall draw up a report of the action referred to in paragraph 1. The report shall be signed by all actors mentioned in paragraph 1."

8. Conclusion

Due to the limited framework of the present study, it has focused primarily on an attempt to analyse the provisions of the UPPD Act, which – due to the adopted method of regulating social relations – may be regarded as an Act of Parliament within the scope of substantive and systemic administrative law, with very exceptional references to the rules of another area of law. Therefore, it should be noted that the study only hinted at administrative-legal issues against the background of other laws complementing the system of counteracting domestic violence, in particular the Act on social assistance. This means, inter alia, that the issues presented here do not exhaust the topic, and its detailed and comprehensive presentation would require a separate monograph. At the same time, it can be noted against this background that, unfortunately, the administrative-legal bases for counteracting domestic violence are very scattered (*cf.* the remarks in the 2nd subsection), which impedes the reconstruction of their system and thus their application in combination with each other. Moreover, they give the

impression that the Act on counteracting domestic violence is only one element of this elaborate structure of normative acts, and not the most important one, because the tasks arising from this Act are – in principle – implemented on the basis of the provisions of the UPS Act and UWWT Act (see Article 6(1) of the UPPD Act). At the same time, it seems that the authors of the draft Act on counteracting domestic violence made a different assumption, while at the same time most deserving of approval. As they have declared, guided by the social importance of the problem, the need to cover the victims of violence by protection and the interdisciplinary nature of the solutions, they aimed to regulate these issues with an independent legal act. "This should result in a better understanding of the phenomenon of violence in the family and in other close relationships and constitute evidence of the special importance that the Government of the Republic of Poland attaches to combating it."[132]

In conclusion, it should be reminded once again that the presented issues refer to the legal situation in the field of counteracting domestic violence in force since 22 June 2023. On that day, the amendment to the UPPD Act entered into force – a very significant change in terms of substance and number of modified provisions. Certainly, this circumstance made it difficult to assess the new regulations, especially due to the lack of administrative practice of their application and, above all, the interpretation of these provisions in the case law of administrative courts. Only their formation will allow a fully reliable verification of the quality of the administrative-legal regulation on combating this extremely important social problem.

References

Legal acts

Regulation of the Minister of Family and Social Policy of 20 June 2023 on the supervision and control over the implementation of tasks related to counteracting domestic violence (Journal of Laws item 1165).

[132] Uzasadnienie projektu ustawy o przeciwdziałaniu przemocy w rodzinie, Druk sejmowy No. 3639 of 28 December 2004, 4th term of office of the Sejm, p. 5.

Regulation of the Minister of Family, Labour and Social Policy of 7 February 2024 on homes for mothers with minor children and pregnant women (Journal of Laws item 169).
Regulation of the Prime Minister of 18 December 2023 on the detailed scope of activities of the Minister of Family, Labour and Social Policy (Journal of Laws item 2715).
Resolution No. 190 of the Council of Ministers of 29 October 2013 – Rules of Procedure of the Council of Ministers (Official Gazette of the Republic of Poland "Monitor Polski" 2022, item 348.
The Act of 12 March 2004 on Social Assistance (Journal of Laws of 2023 item 901).
The Act of 14 June 1960 – the Code of Administrative Procedure (Journal of Laws of 2023 item 775).
The Act of 19 July 2019 on the Implementation of Social Services by a Social Service Centre (Journal of Laws item 1818).
The Act of 20 May 1971 – the Code of Petty Offences (Journal of Laws of 2022 item 2151, as amended).
The Act of 21 May 1999 on Arms and Ammunition (Journal of Laws of 2022 item 2516, as amended).
The Act of 24 April 2003 on Public Benefit Aactivity and Voluntary Work (Journal of Laws) of 2023 item 571).
The Act of 24 August 2001 on Military Police and Military Law Enforcement Units (Journal of Laws of 2021 item 1214, as amended).
The Act of 26 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism (Journal of Laws of 2023 item 165, as amended).
The Act of 29 July 2005 on Counteracting Domestic Violence (Journal of Laws of 2021 item 1249, as amended).
The Act of 30 August 2002 – the Law on Administrative Courts Procedure (Journal of Laws of 2023 item 259, as amended).
The Act of 4 September 1997 on Governmental Administration Departments (Journal of Laws of 2022 item 2512, as amended).
The Act of 5 June 1998 on Poviat Self-Government (Journal of Laws of 2022 item 1526, as amended).
The Act of 5 June 1998 on Voivodship Self-Government (Journal of Laws of 2022 item 2094, as amended).
The Act of 6 April 1990 on the Police (Journal of Laws of 2023 item 171, as amended).
The Act of 6 June 1997 – the Penal Code (Journal of Laws of 2022 item 1138, as amended).
The Act of 8 March 1990 on Municipal Self-Government (Journal of Laws of 2023 item 40, as amended).
The Act of 9 June 2011 on Family Support and the Foster Care System (Journal of Laws of 2022 item 447, as amended).

The Act of 9 March 2023 amending the Act on Counteracting Domestic Violence and some other acts (Journal of Laws item 535).
The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483, as amended).
The Council of Europe Convention on preventing and combating violence against women and domestic violence drawn up in Istanbul on 11 May 2011 (Journal of Laws of 2015 item 961).

Case law

Decision of the Voivodeship Administrative Court in Wrocław of 18 November 2022, file No. IV SA/Wr 573/22, CBOSA.
The decision of the Supreme Court of 08 November 2022, file No. I OSK 325/22, CBOSA.
The decision of the Supreme Court of 11 March 2021, file No. I OSK 3967/18, CBOSA.
The decision of the Supreme Court of 12 February 2020, file No. I OSK 137/20, CBOSA.
The decision of the Supreme Court of 18 February 2011, file No. II GSK 162/11, CBOSA.
The decision of the Supreme Court of 20 October 2020, file No. I OSK 1714/20, CBOSA.
The decision of the Supreme Court of 22 February 2022, file No. I OSK 158/22, CBOSA.
The decision of the Supreme Court of 25 November 2015, file No. I OSK 2896/15, CBOSA.
The decision of the Supreme Court of 30 September 2022, file No. I OSK 923/20, CBOSA.
The decision of the Supreme Court of 31 January 2023, file No. III OSK 2848/22, CBOSA.
The decision of the Supreme Court of 9 June 2010, file No. I FSK 497/10, CBOSA.
The decision of the Voivodeship Administrative Court in Bydgoszcz of 8 May 2015, file No. II SA/Bd 376/15, CBOSA.
The decision of the Voivodeship Administrative Court in Gdańsk of 20 December 2018, file No. III SAB/Gd 63/18, CBOSA.
The decision of the Voivodeship Administrative Court in Poznań of 14 June 2017, file No. II SAB/Po 87/17, CBOSA.
The decision of the Voivodeship Administrative Court in Warsaw of 28 June 2022, file No. VII SAB/Wa 59/22, CBOSA.
The decision of the Voivodeship Administrative Court in Warszawa of 13 February 2020, file No. VII SA/Wa 2265/19, CBOSA.
The Judgement of the Constitutional Tribunal of 12 July 2016, file No. K 28/15, OTK ZU 2016, No. A, item 56.

The Judgement of the Constitutional Tribunal of 18 October 2005, file No. SK 48/03, OTK ZU 2005, No. 9/A, item 101.
The Judgement of the Supreme Court of 01 December 2021, file No. III OSK 728/21, CBOSA.
The Judgement of the Supreme Court of 01 February 2023, file No. III OSK 6688/21, CBOSA.
The Judgement of the Supreme Court of 07 October 2020, file No. I OSK 841/20, CBOSA.
The Judgement of the Supreme Court of 11 January 2012, file No. II OSK 1922/11, CBOSA.
The Judgement of the Supreme Court of 13 June 2018, file No. II GSK 573/18, CBOSA.
The Judgement of the Supreme Court of 13 October 2021, file No. III OSK 4091/21, CBOSA.
The Judgement of the Supreme Court of 17 November 2021, file No. III OSK 4197/21, CBOSA.
The Judgement of the Supreme Court of 23 February 2016, file No. I OSK 2742/15, CBOSA.
The Judgement of the Supreme Court of 23 June 2022, file No. II GSK 812/22, CBOSA.
The Judgement of the Supreme Court of 24 November 2021, file No. III OSK 4122/21, CBOSA.
The Judgement of the Supreme Court of 24 November 2021, file No. III OSK 4190/21, CBOSA.

Literature

Adamiak B., *Uwagi o współczesnej koncepcji organu administracji publicznej*, [in:] *Jednostka, państwo, administracja – nowy wymiar*, (ed.) E. Ura, Rzeszów 2004.
Bandarzewski K., *Prywatyzacja zadań publicznych*, [in:] *Koncepcja systemu prawa administracyjnego. Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego Zakopane 24–27 Września 2006,* (ed.) J. Zimmermann, Warszawa 2007.
Bąkowski T., *Administracyjnoprawna sytuacja jednostki w świetle zasady pomocniczości*, Warszawa 2007.
Bosek L., *Opinia na temat legislacyjnej spójności oraz zgodności z Konstytucją RP projektu ustawy o zmianie ustawy o przeciwdziałaniu przemocy w rodzinie oraz niektórych innych ustaw*, "Zeszyty Prawnicze BAS" 2010, No. 2.
Brzeski M., *Akt kierownictwa wewnętrznego*, [in:] *Leksykon prawa administracyjnego*, (eds.) E. Bojanowski, K. Żukowski, Warszawa 2009.
Budyn-Kulik M., *Zamiar – pojęcie i rodzaje. Uwagi wprowadzające*, [in:] *Umyślność w prawie karnym i psychologii. Teoria i praktyka sądowa*, Warszawa 2015, LEX/el.

Cieślak Z., *Istota i zakres prawa administracyjnego*, [in:] *Prawo administracyjne. Część ogólna*, (ed.) Z. Niewiadomski, Warszawa 2002.
Cieślak Z., *Modele układów administracyjnych i ich usprawnianie*, [in:] *Nauka administracji*, (ed.) Z. Cieślak, Warszawa 2017.
Cieślak Z., *Podstawowe instytucje prawa administracyjnego*, [in:] *Prawo administracyjne. Część ogólna*, (ed.) Z. Niewiadomski, Warszawa 2002.
Cieślak Z., *Podstawy aksjologiczne administracji publicznej w Polsce – próba oceny*, "Studia Iuridica" 2000, No. 38.
Cieślak Z., *Porozumienie administracyjne*, Warszawa 1985.
Daniel P., *Glosa do postanowienia Wojewódzkiego Sądu Administracyjnego w Poznaniu z 14 lipca 2017 r. (II SAB/Po 87/17)*, "Samorząd Terytorialny" 2018, No. 4.
Federczyk W., *Kontrola administracji publicznej*, [in:] *Nauka administracji*, (ed.) Z. Cieślak, Warszawa 2017.
Gajewski S., *Programy rządowe. Studium administracyjnoprawne*, Warszawa 2017.
Górski M., Kierzkowska J., *Strategie, plany i programy*, [in:] *System prawa administracyjnego. Prawo administracyjne materialne*, (eds.) R. Hauser, Z. Niewiadomski, A. Wróbel, Vol. 7, Warszawa 2012.
https://www.bibliotekacyfrowa.pl/Content/132270/PDF/Akty_prawa_wewnetrznego_organow_administracji_publicznej.pdf (accessed on: 6 July 2023).
Jełowicki M., *Podstawy organizacji administracji publicznej. Zagadnienia teoretyczne*, Warszawa 1998.
Kiełtyka A., *Uwagi do art. 12a,* [in:] *Przeciwdziałanie przemocy w rodzinie. Komentarz*, A. Kiełtyka, A. Ważny, Warszawa 2015, pp. 222–240.
Kiełtyka A., *Wstęp*, [in:] *Przeciwdziałanie przemocy w rodzinie. Komentarz*, A. Kiełtyka, A. Ważny, Warszawa 2015, pp. 13–28.
Kiwior D., Kotulski M., *Porozumienie administracyjne*, "Przegląd Prawa Publicznego" 2008, No. 6.
Kmieciak Z., *Czynności faktyczne administracji państwowej*, "Studia Prawno-Ekonomiczne" 1987, No. 39.
Kokocińska K., *Prawny mechanizm prowadzenia polityki rozwoju w zdecentralizowanych strukturach władzy publicznej*, Poznań 2014.
Lipowicz I., *Istota administracji*, [in:] *Prawo administracyjne. Część ogólna*, (ed.) Z. Niewiadomski, Warszawa 2002.
Lisowski P., *Między niepomijalnością administracji publicznej a deadministrowaniem*, "Acta Universitatis Wratislaviensis. Prawo" 2020, No. 331.
Łętowski J., *Administracja. Prawo. Orzecznictwo sądowe*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1985.
Maciejko W., *Uwaga 1. do art. 119* [in:] *Ustawa o pomocy społecznej. Komentarz*, W. Maciejko, P. Zaborniak, Warszawa 2013.
Majchrzak B., *Formy działania zakładu administracyjnego w indywidualnych sprawach studenckich*, Warszawa 2020.

Majchrzak B., *Istota administracji publicznej*, [in:] *Nauka administracji*, (ed.) Z. Cieślak, Warszawa 2017.

Majchrzak B., *Podstawy aksjologiczne regulacji prawnych dotyczących przeciwdziałania przemocy w rodzinie*, [in:] *Podstawy przeciwdziałania przestępczości oraz pomocy osobom pokrzywdzonym. Konkretyzacja i realizacja*, (ed.) P. Sobczyk, Warszawa 2020.

Majchrzak B., *Problem nieprecyzyjności przesłanek wszczęcia procedury "Niebieskie Karty"*, [in:] *Prawa i obowiązki członków rodziny*, (eds.) M. Gołowikin-Hudała, P. Sobczyk, A. Wilk, Vol. 2, Lublin 2018.

Mielczarek-Mikołajów J., *Akty prawa wewnętrznego organów administracji publicznej*, Wrocław 2021.

Morawski L., *Zasady wykładni prawa*, Toruń 2006.

Ochendowski E., *Swoiste źródła prawa*, [in:] *Prawo administracyjne*, E. Ochendowski, Toruń 1999.

Ostaszewski P., *Przemoc domowa w świetle danych statystycznych procedury "Niebieskiej Karty"*, Warszawa 2022.

Piskozub P., *Procedura odebrania dziecka na podstawie przepisów ustawy o przeciwdziałaniu przemocy w rodzinie. Problemy praktyczne i postulaty de lege ferenda*, "Teka Komisji Prawniczej PAN Oddział w Lublinie" 2019, Vol. 12, No. 1.

Sierpowska I., *Administracja świadcząca wobec zjawiska przemocy w rodzinie*, "Wrocławskie Studia Erazmiańskie" 2017, No. 11.

Sierpowska I., *Pomoc społeczna. Komentarz*, Warszawa 2021, LEX/el., notice to Article 128 and Article 129.

Słyk J., *Odbieranie dzieci rodzicom na podstawie art. 12a ustawy z 29 July 2005 o przeciwdziałaniu przemocy w rodzinie*, "Prawo w Działaniu" 2015, No. 24.

Spurek S., *Przeciwdziałanie przemocy w rodzinie. Komentarz*, Warszawa 2021, LEX/el., notice 4. to Article 10.

Stahl M., *Szczególne prawne formy działania administracji*, [in:] *System prawa administracyjnego. Prawne formy działania*, (eds.) R. Hauser, Z. Niewiadomski, A. Wróbel, Vol. 5, Warszawa 2013.

Stahl M., *Zagadnienia ogólne*, [in:] *System prawa administracyjnego. Podmioty administrujące*, (eds.) R. Hauser, Z. Niewiadomski, A. Wróbel, Vol. 6, Warszawa 2011.

Stasikowski R., *Funkcja regulacyjna administracji publicznej. Studium z zakresu nauki prawa administracyjnego oraz nauki administracji*, Bydgoszcz–Katowice 2009.

Stasikowski R., *O pojęciu zadań publicznych (studium z zakresu nauki administracji i nauki prawa administracyjnego)*, "Samorząd Terytorialny" 2009, No. 7–8.

Ważny A., *Uwagi do art. 9a,* [in:] *Przeciwdziałanie przemocy w rodzinie. Komentarz*, A. Kiełtyka, A. Ważny, Warszawa 2015, pp. 104–108.

Wengler L., *Porozumienie komunalne zawierane między województwami – podstawowe zagadnienia*, "Gdańskie Studia Prawnicze" 2000, No. 7.

Wielki słownik języka polskiego PAN.

Wierzbowski M., Wiktorowska A., *Podstawowe pojęcia teoretyczne w nauce prawa administracyjnego*, [in:] *Prawo administracyjne*, (ed.) M. Wierzbowski, Warszawa 2011.

Wlaźlak K., *Problemy funkcjonowania zespołów interdyscyplinarnych ds. przeciwdziałania przemocy w rodzinie*, "Samorząd Terytorialny" 2012, No. 4.
Wlaźlak K., *Programy jednostek samorządu terytorialnego w zakresie przeciwdziałania przemocy w rodzinie*, "Samorząd Terytorialny" 2011, No. 9.
Wlaźlak K., *Przeciwdziałanie przemocy w rodzinie w orzecznictwie sądów administracyjnych*, "Prokuratura i Prawo" 2017, No. 10.
Wróbel A., *Centralne planowanie państwowe. Studium administracyjno-prawne*, Lublin 1990.
Zaborniak P., Uwaga 3. do art. 128 [in:] *Ustawa o pomocy społecznej. Komentarz*, W. Maciejko, P. Zaborniak, Warszawa 2013.
Ziemski K.M., *Indywidualny akt administracyjny jako forma prawna działania administracji*, Poznań 2005.

ABOUT AUTHOR

Bartosz Majchrzak – habilitated in Legal Sciences, Professor at Cardinal Stefan Wyszyński University (CSWU) in Warsaw and at the Institute of Justice; the Head of Department of Administrative Science and Environmental Protection of the Faculty of Law and Administration, CSWU; attorney at law; member of the Central European Professors' Network (in 2022–2023) coordinated by the Central European Academy in Miskolc, Hungary. Research interests: law on administrative procedures, administrative law theory, construction law, environmental law and axiology of public law. Author of ca. 100 scientific publications and co-author of academic textbooks on administrative procedure and administrative science.
ORCID: 0000-0001-5336-6717

mgr Nina Maciejczyk-Krysiak, MA
CARDINAL STEFAN WYSZYŃSKI UNIVERSITY IN WARSAW

Prevention of domestic violence in family law

1. Introduction

The measures for the prevention of domestic violence among relatives and household members have been regulated in Polish family law,[1] in particular in the Family and Guardianship Code of 25 February 1964 (hereinafter: KRO),[2] which will constitute the main subject of the considerations to follow. At the same time, the paper will discuss the procedure referred to in Article 12a of the Domestic Violence Prevention Act, concerning the removal of the child from the family, which – although it is not explicitly stipulated in the Family and Guardianship Code – nevertheless requires the guardianship court to issue an *ex post* decision. The regulation contained in the Family Support and Foster Care System Act of 9 June 2011[3] will remain outside the scope of the analysis, considering that, in the author's opinion, that Act only serves to define the rules by which certain institutions dealing with family support operate and does not itself create new

[1] As has been argued in the literature, the family law regulates marriage, affinity and guardianship over a minor (see J. Winiarz, [in:] *System prawa rodzinnego i opiekuńczego*, (ed.) J.S. Piątkowski, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1985, p. 58).
[2] Journal of Laws of 2020, item 1359.
[3] Journal of Laws of 2011, No. 149, item 887.

legal measures that could be indicated as instruments for the prevention of domestic violence among relatives and household members.

2. Terminological remarks

2.1. Defining the terms "domestic violence" and "family violence"

The notion of violence is distinctly heterogeneous. As a phenomenon, it has been tackled by representatives of sociology, psychology and law. However, the individual definitions differ from one another. Four terms can be most often found in the literature in order to refer to acts of violence: aggression, violence, coercion and criminal violence. According to the dictionary definition, "violence" is "a force which overcomes someone else's strength, physical advantage used for unlawful acts committed against someone; unlawfully imposed power, dominion; unlawful acts committed by physical coercion; rape."[4] The normative definition of domestic violence in Polish law is formulated in Article 2(1)(1)(2) of the Act on Counteracting Domestic Violence (hereinafter: UPPD),[5] whereby it constitutes a one-time or repeated intentional activity or omission, taking advantage of physical, psychological or economic superiority, violating the rights or personal interests of a person suffering domestic violence, in particular: exposing that person to the risk of loss of life, damage to health or property; violating their dignity, bodily integrity or freedom, including sexual freedom; causing harm to their physical or mental health, causing suffering and moral harm to that person; limiting or depriving that person of access to financial resources or the opportunity to work or become financially independent; substantially invading

[4] M. Szymczak, *Słownik Języka Polskiego*, Warszawa 1993, p. 651.

[5] In the wording of the Family Violence Prevention Act (Journal of Laws of 2020, item 218), the term "family violence" was deemed to mean a one-time or repeated intentional activity or omission, violating the rights or personal interests of the members of the family, in particular exposing these persons to the risk of loss of life, damage to health, violating their dignity, bodily integrity, freedom, including sexual freedom, causing harm to their physical or mental health, as well as causing suffering and moral harm to the persons subjected to violence.

that person's privacy or causing that person to feel threatened, humiliated or tormented, including by means of electronic communication.[6]

Family violence is a specific type of domestic violence. According to the definition presented by D. Lawson, which most closely approximates the approach functioning in the Polish legal system, "Family violence is a sub-type of interpersonal violence, which includes violence among intimate partners, members of the family and persons known to the family, who are often perceived as friends or persons very closely related to the family (regardless of whether they can be considered actual members of the family, belonging to it by virtue of birth, marriage or adoption)."[7]

Taking into account the definitions outlined above, it is possible to identify certain criteria that distinguish domestic violence from other behaviours. These include: asymmetry of power (the victim is weaker and the perpetrator takes advantage of his/her superiority), intentionality (family violence is an intentional act) and violation of the rights and personal interests of another person.[8] According to this definition, domestic violence may take the form of physical, psychological, sexual or economic violence. In this paper, the author will use the term "family violence" to describe the phenomenon of violence, where the persons being the victims of violence are family members (in the legal sense), and the term "domestic violence" to describe the phenomenon that may occur between persons who do not form a family in the legal sense, but who remain in a common household.

Family violence, including against a child, can take the form of psychological violence, physical violence and/or sexual abuse. Psychological violence is the most difficult to see from the outside and also to prove. Amnesty International defines it in operational terms by referring to such forms of behaviour as

---

[6] The Council of Europe Convention on preventing and combating violence against women and domestic violence of 11 May 2011 defines domestic violence as all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.

[7] D.M. Lawson, *Family Violence: Explanations and Evidence-Based Clinical Practice*, "American Counseling Association", https://onlinelibrary.wiley.com/doi/book/10.1002/9781119222750, 2013, p. 3.

[8] A. Dudziak, *Zespoły interdyscyplinarne. Budowanie koalicji na rzecz przeciwdziałania przemocy domowej,* [in:] *Zagrożenia bezpieczeństwa społecznego. Wybrane problemy*, (eds.) B. Boniek, A. Dudziak, Bydgoszcz 2015, p. 18.

isolation, sleep and food restriction, imposition of judgements, verbal degradation (name-calling, debasement, humiliation), hypnosis, drugging, threats to kill or otherwise harm.[9] Physical violence can be either active or passive. Active forms include, for the most part, hitting, kicking, coercing into performing derogatory services and particularly brutal forms such as burns, cuts, lacerations, strangulation, throwing a child, attempts to kill or committing murder. Passive violence includes various types of prohibitions, such as not speaking for a given period of time, preventing someone from satisfying their physiological needs or house arrest.[10] Each form of violence against a child is a traumatic event that has both immediate and long-term consequences.

As explicitly listed by the legislator in Article 12a(1)(2) of the UPPD, victims of domestic violence include the following categories of subjects against whom violence is used: a spouse, also in case where the marriage has ceased or has been annulled, and the spouse's ascendants and descendants; siblings and their spouses, ascendants and descendants and the spouses thereof; siblings and their ascendants, descendants and the spouses thereof; an adoptee and their spouse as well as the ascendants, descendants, siblings and the spouses thereof; a person currently or previously cohabiting as well as their ascendants, descendants, siblings and the spouses thereof; a person cohabiting and managing the common household and their ascendants, descendants, siblings and the spouses thereof; a person who is or was in a lasting emotional or physical relationship with the given person, whether or not cohabiting or managing the common household; a minor.[11]

There can be no doubt that the phenomenon of violence among relatives and household members who form a community by law or fact (irrespective of whether it is referred to as domestic violence or family violence) often leads to the biological, legal or social disintegration of the family (in the legal or factual

[9] I. Pospiszyl, *Przemoc w rodzinie*, Warszawa 1994, p. 106.

[10] *Ibidem,* p. 94.

[11] There can be no doubt that the subjective and objective scope of the Act on Counteracting Family Violence is broader than in the case of the Act on Counteracting Domestic Violence, which should be most definitely be welcomed. Nevertheless, some terminological discrepancies should also be pointed out. The catalogue of actors which can be deemed victims of domestic violence includes a minor, without specifying the meaning of this term; at the same time, the legislator failed to explain whether, against the background of this Act, the concepts of a child and a minor should be treated as synonymous.

sense). For this very reason, preventing this type of violence is extremely important from the point of view of individuals and the society as a whole. As is oftentimes argued in the social sciences (sociology and psychology), the experiences of violence in the family have immediate and long-lasting consequences. The effects of problems and disorders affecting people experiencing family violence during childhood also affect their families, friends and acquaintances. These have a detrimental impact on their performance of certain social roles, resulting in negative socio-economic implications for the State.[12] One could note that the legislation itself was not consistent as it tends to use these terms interchangeably, even though the 2023 amendment seems to point to there being differences between family violence and domestic violence.

2.2. Definition of the term "family"

The Constitution of the Republic of Poland (hereinafter: the Polish Constitution) in Article 18 expresses the principle of protection of marriage, motherhood and family. The status of the family within the meaning of the Polish Constitution is also determined by its other provisions concerning: the principle of equal rights of a woman and a man in family life, the legal protection of the privacy of family life and parental rights, the right of parents to raise their children in accordance with their own convictions, the protection of the welfare of the family and the right of the family and the mother to receive assistance from public authorities, the protection of children's rights and the constitutional guarantee of the right of inheritance. However, the provisions of the Polish Constitution fail to offer even a piecemeal definition of "family". This makes it necessary to refer to the sociological concept of the family as a social group based on kinship and social ties.[13] This leads to the conclusion that "family" as per the Polish Constitution means any permanent relationship between two or more persons,

[12] E. Jarosz, A. Nowak, *Dzieci ofiary przemocy w rodzinie: raport Rzecznika Praw Dziecka: funkcjonowanie znowelizowanej ustawy o przeciwdziałaniu przemocy w rodzinie*, Warszawa 2012, pp. 25–28.

[13] A. Zielonacki, *Prawo do zawarcia małżeństwa i założenia rodziny*, [in:] *Prawa człowieka. Model prawny*, Wrocław 1991, p. 297.

usually based on marriage and on ties of consanguinity or affinity.[14] It should be emphasised that, in the light of the provisions of the Polish Constitution, legal institutionalisation or sanctioning by law are not necessary for the existence of the family. The constitutional protection is afforded to families as legal or factual relationships.[15] For this reason, the notion of family encompasses also partners living in cohabitation and having children. The constitutional concept of family includes childless marriages, foster families and families based on adoption, as well as a *de facto* union of persons of the same sex, if it satisfies the requirement of being long-lasting.[16] It bears noting, however, in the latter case the position of the doctrine and court decisions is not unanimous.

The Family and Guardianship Code does not contain an *expressis verbis* definition of the "family," nor does it define such terms as "ascendants," "descendants" or "marriage." As a matter of fact, the legislator rarely makes use of this term addresses the relevant norms to specific family members (e.g., spouses, parents, children, ascendants, descendants). Moreover, the Polish legislator, when using the term "family" in the Family and Guardianship Code, refers to a small, two-generation family. Meanwhile, in family law, there can be no dispute that the family is formed upon marriage. Confirmation of this can be found both in Article 23 of the KRO, whereby: "Spouses have equal rights and obligations in marriage. They are obliged to cohabit, help each other, remain faithful and collaborate for the benefit of the family they created by entering into marriage," as well as in Article 27 of the KRO, which provides that "Both spouses shall, each according to his or her powers and earning capacity and financial status, support the needs of the family they created by entering into marriage." The composition of the family, in accordance with the KRO, is determined by marriage or the birth of a child. Thus, the family is formed by the spouses and their joint minor children, including, of course, adopted children and adult children if they live together with their parents.[17] There are no clear provisions

[14] L. Garlicki, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Vol. 1, Ed. 2, M. Zubik (ed.), Warszawa 2016, art. 18.

[15] See the judgment of the Constitutional Court of 12 April 2011, SK 62/08, Journal of Laws of 2011, No. 87, item 492.

[16] P. Tuleja, *Artykuł 18*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, P. Czarny, M. Florczak-Wątor, B. Naleziński, P. Radziewicz, P. Tuleja, Warszawa 2021.

[17] K. Sterna-Zielińska, *Zakres semantyczny pojęcia rodzina w prawie polskim*, "Krytyka Prawa" 2016, Vol. 8, No. 1, p. 105.

that would indicate whether the children of one of the spouses are part of the newly formed family. There is no consensus among the representatives of the doctrine in this regard. One view is that "The criterion of commonality should constitute the factor determining whether a particular person belongs to a newly created family."[18] As noted by T. Smyczyński: "Entering into marriage with a person having a dependent child of their own and accepting the child into a common household as well as concordant inclusion of a child of other people into a family household (foster family) implies acceptance of certain duties to provide for the family thus established."[19] This view seems to be guided by the fundamental principle of protection of the child and the stepchild's inclusion in the family grounds upon consanguinity with one of the spouses and affinity with the other. Cohabitation as a *de facto* relationship under the KRO does not constitute a family, since, as noted earlier, a marriage is necessary prerequisite for the establishment of a family. However, it is a contentious issue in the doctrine whether partners living in cohabitation with their common child are comprised within the definition of "family". According to J. Winarz, the birth of a child in a cohabitation will result in the creation of a family, to be formed based on the motherhood of the cohabiting female partner and the establishment or acknowledgement of paternity of the male partner.[20]

The family is undoubtedly a long-lasting phenomenon, although it does undergo changes. Alternative forms of family life and ways of establishing a family are emerging, e.g., a man and a woman living together on a permanent or short-term basis, the former being called cohabitation in common and legal language, functionally similar to marriage. Another form is partnership between persons of different sexes and persons of the same sex. As sociologists point out, this direction in which the forms of family life evolve, including the marriage itself, is the result of the changing value system, as it affects individuals' preferences as regards their life goals, the order in which they are to be achieved, and so on.

[18] S. Grobel, R. Łukasiewicz, J. Wiktor, *Instytucje prawa rodzinnego*, Warszawa 2014.
[19] T. Smyczyński, *Komentarz do art. 27 k.r.o.*, [in:] *Prawo rodzinne i opiekuńcze*, T. Smyczyński (ed.), Warszawa 2014, p. 22.
[20] J. Winiarz, *Prawo rodzinne*, Warszawa 1996, p. 19.

2.3. Definition of the term "child"

The phenomenon of family violence is in itself destructive and extremely undesirable from a social and legal point of view. However, this is particularly true in case where the victim of this violence is a child, who by definition is unable to defend themselves, and thus requires the most far-reaching intervention by the legislator and state authorities at large.[21] The term "child" is heterogeneous and has not yet been clearly defined. It can mainly be found in acts of international law, while the national legal order tends to use a bit more formalised legal terms such as "minor" (*małoletni*), "juvenile" (*nieletni*), "adolescent" (*młodociany*).

The Convention on the Rights of the Child defines "child" in Article 1 as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier". Within the meaning of Article 2(1) of the Children Ombudsman Act of 6 January 2000, "A child is any human being from conception until the age of majority." It should be assumed that the aforementioned definition is also applicable in the field of family law.[22] The term "child" is used multiples times in the KRO. A special regulation is Article 75 § 1 of the Family and Guardianship Code, according to which a child conceived may be acknowledged by the father. Also of great importance is Article 92 of the KRO, which presupposes that the child remains under parental authority until the age of majority. In the KRO, this term is often associated with the term "minor" (*małoletni*). A child so defined is entitled to the rights set out in the Polish Constitution, the Convention on the Rights of the Child and other legal provisions, in particular: the right to the protection of life and health and the right to full and harmonious development.[23]

---

[21] P. Piskozub, *Procedura odebrania dziecka na podstawie przepisów ustawy o przeciwdziałaniu przemocy w rodzinie. Problemy praktyczne i postulaty de lege ferenda*, "Teka Komisji Prawniczej PAN Oddział w Lublinie" 2019, Vol. 12, No. 1, pp. 191–199; doi.org/10.32084/tekapr.2019.12.1-14.

[22] J. Gajda, *Kodeks rodzinny i opiekuńczy. Akty stanu cywilnego. Komentarz*, Warszawa 2002, p. 377.

[23] M. Żelichowski, *Prawnokarna ocena pobierania embrionalnych komórek macierzystych*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2000, No. 2, p. 69.

2.4. The best interests of the child clause in the context of preventing family violence

The term "the best interests of the child" (*dobro dziecka*) was first used in international law in the Declaration of the Rights of the Child of 20 November 1959 (principle 2) and in the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 in Articles 5 and 1.[24] The Convention on the Rights of the Child,[25] being a universally recognised document defining the rights of the child, also refers to "the best interests of the child" on several occasions. The English version of the Convention uses only one phrase, i.e., "the best interest of the child"; similarly, *Kindeswohl* in the German-language version. On the other hand, the Polish version interchangeably uses the terms "*interes dziecka*" ("the interest of the child") (Article 3), "*najlepiej pojęty interes dziecka*" ("the best interest of the child") (Articles 9 and 18), "*dobro*" ("welfare") (Article 20), "*dobro dziecka*" ("the welfare of the child") (Article 21), "*najwyższe dobro dziecka*" ("the well-being of the child") (Article 37), "najwyższy interes dziecka" ("the utmost welfare of the child") (Article 40). This inconsistency does not seem justified, as it leads to terminological chaos.[26]

At the same time, the Convention on the Rights of the Child does not specify what the best interests of the child consist of, and there is no general section to contain interpretative standards, such as the requirement to hold the best interests of the child as the paramount consideration. In contrast, Article 3 of the Convention indicates that the best interests of the child should always be a primary consideration for both public or private social welfare institutions, courts of law, administrative authorities and legislative bodies. Some interpretative guidance in this context is provided by the preamble of the Convention itself, referring to values such as upbringing in a family environment (intended to ensure harmonious and full development) and in the traditions and cultural values of each people (in which the child is born) which provide a reference on how to interpret "the best interests of the child". Subsequent articles of the Convention further clarify the notion of "the best interests of the child," and

[24] Journal of Laws of 1982, No. 10, item 71.
[25] Journal of Laws of 1991, No. 120, item 526.
[26] Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 2009, pp. 50–65.

thus: Article 9 states that the best interests of the child shall take priority over the rights of parents and other persons. The best interests of the child comprise, for instance, the capability to express oneself in legal proceedings affecting the child (Article 12), the possibility to benefit from child-care facilities (Article 18), to live in a family environment (Article 20) and, of course, the prohibition of torture and degrading treatment (Article 37).

General Comment No. 14 of the Committee on the Rights of the Child of 2013[27] accepts that "the best interests of the child" clause is complex and that it is necessary for entities dealing with cases concerning children to determine its meaning on a case-by-case basis. The Committee recommends that the clause be redefined each time in the light of the specific circumstances and provisions of the Convention. In doing so, the Committee noted that, despite its flexibility, the child "the best interests of the child" clause is often abused by States parties to the Convention.

As in the Convention on the Rights of the Child, there is no statutory definition of "the best interests of the child" in the Polish legal system, although courts and the doctrine have made certain attempts to clarify this notion. This concept thus belongs to the category of legal terms constituting, as with "social interest," "gross harm" or "principles of life in a community", a general clause addressed to all entities applying the law. In the provisions of law, the term "the best interests of the child" can be found in the context of the vulnerable position of a child: adoption, child abduction, divorce, exercise of parental authority over the child and child-rearing duties. The fact that it has been singled out implies that "the best interests of the child" have a different value and content than the best interests of other persons. As T. Smyczyński notes, "The principle of the best interests of the child, with the child being weaker than others and in need of protection, permeates the entirety of family law regardless of which legal act regulates a particular aspect of family relations."[28]

The best interests of the child have also been addressed by the Constitutional Court. In its judgment of 28 April 2003,[29] the Court stated that "The mandate to protect the best interests of the child constitutes the basic, overriding

[27] CRC/C/GC/14.

[28] T. Smyczyński, *Prawo rodzinne i opiekuńcze*, Warszawa 2012, p. 19.

[29] See the judgment of the Constitutional Court of 28 April 2003, K 18/02, Journal of Laws of 2003 No. 83, item 772.

principle of the Polish family law system, to which all regulations in the sphere of relations between parents and children are subordinated [...]." The Court also accepted that "The notion of the rights of the child in the provisions of the Constitution should be deemed to mean the mandate to ensure the protection of the interests of the minor who, in practice, has only very limited capabilities of pursuing them on his or her own. The best interests of the child is also the value which determines the shape of other institutional arrangements, including, in particular, within the confines of the Family and Guardianship Code."

The doctrine defines the best interests of the child as "a set of tangible and intangible values which are necessary to ensure the proper physical and spiritual development of the child and to prepare the child adequately for work in accordance with the child's talents, these values being determined by a wide variety of factors and their structure being dependent on the content of the applicable legal norm and the specific situation of the child at the moment, assuming that the best interests of the child so understood are consistent with the social interest".[30] Nevertheless, some representatives of the doctrine argue that it is dangerous to equate the best interests of the child with the social interest or that it is dangerous to construe the best interests of the child through the prism of the social interest. This view was shared by the Supreme Court, which acknowledged as follows: "It has, however, been aptly pointed out recently that approaches intending to blur the distinction between the best interests of the child and the social interest come at a risk that the best interests of the child would be interpreted in such a way that corresponds to the requirements imposed by the social interest. Guided by the provisions of the Convention, in particular Article 3, one must nevertheless start from the assumption that the best interests of the child are the primary and overriding value [...]. In a democratic State governed by the rule of law, one must not assume the priority of society, but regard a human individual as the supreme value, and provide the child with special care on these grounds." Again, it should be borne in mind that the Convention on the Rights of the Child requires that, in cases of conflict between the best interests of the child

[30] W. Stojanowska, *Rozwód a dobro dziecka*, Warszawa 1979, p. 27.

and the interests of society, the best interests of the child must take priority as they constitute "a primary consideration".[31]

3. Prevention of family violence under the Family and Guardianship Code

It should be noted that the concepts of family violence or domestic violence or the prevention of violence do not appear *expressis verbis* even once in the KRO. A final and binding conviction for an offence against sexual freedom or morality or for an intentional offence with the use of violence against a person or an offence committed to the detriment of a minor or in cooperation with a minor, pursuant to Article 148 § 1 a of the KRO, constitutes a negative prerequisite for appointing a given person as a guardian of a child.

Even though the KRO does not contain a direct regulation providing for a guardianship court's reaction to acts of violence, it is important to note that it permits the court to employ a variety of measures that can serve to counteract domestic or family violence. These take the form of an obligation to apply general principles, e.g., the best interests of the child (e.g., Article 109 of the KRO),[32] general prohibitions, among them for instance the prohibition of corporal punishment (e.g., Article 96^1 of the KRO), but also specific solutions constituting the basis for the court's interference with parental authority (e.g., 112^3 of the KRO, 113^3 of the KRO, 113^4 of the KRO) or restrictions on maintaining contact with the child (Article 1132 of the KRO).

The Family and Guardianship Code also includes provisions that may indirectly constitute measures against violence between spouses, for instance the possibility to grant a divorce on the grounds of the spouse's fault, where the

[31] See the resolution of the Supreme Court of 12 June 1992, III CZP 48/92, OSNC 1992/10/179.

[32] Under the International Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989, the well-being of the child should be a primary consideration, requiring preferential treatment as compared to other interests of natural and legal persons. It forms the basis of all the provisions of the Convention.

reason for the breakdown of marriage is the use of violence, and ruling on spousal maintenance in the divorce decree.

3.1. Violence as a reason for the guardianship court to interfere with parental rights

3.1.1. Prohibition of corporal punishment

The prohibition of corporal punishment, which follows from international documents, appears in Article 96^1 of the KRO,[33] according to which: "Persons exercising parental authority and guardianship or custody over a minor are not allowed to use corporal punishment." The provision of Article 96^1 of the KRO protects the right to bodily integrity and freedom from degrading treatment or punishment, which is among the fundamental human rights.[34] The cited provision of the KRO is not complemented by a definition of corporal punishment. One must therefore refer to how corporal punishment has been defined by the Committee on the Rights of the Child, which oversees compliance with the provisions of the Convention on the Rights of the Child. As clarified by the Committee in General Comment No. 8: "The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment", which was issued in 2006, corporal or physical punishment is the use of physical force, intended to cause some degree of pain or discomfort, however light.[35] The guardianship court may sanction violations of this rule by implementing measures pursuant to Article 109 of the KRO (restriction of parental authority), Article 111 of the KRO (termination of parental authority), Articles 113^2 and 113^3

[33] At this point, reference should be made to the provision of Article 96(1) of the Family and Guardianship Code introduced pursuant to the Act of 10 June 2010 amending the Act on Counteracting Domestic Violence and Other Acts (Journal of Laws of 2010, No. 125, item 842).

[34] In 2006, the Committee on the Rights of the Child, which oversees the implementation of the Convention, issued General Comment No. 8 titled "The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment". The Committee urged States to introduce and implement the prohibition of corporal punishment.

[35] E. Trybulska-Skoczelas, *Artykuł 96(1)*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, (ed.) J. Wierciński, Warszawa 2014.

of the KRO (restriction or prohibition of contact with the child) or Article 168 § 2 of the KRO (dismissal of the guardian).[36] This list is by no means exhaustive. The introduction of the prohibition of corporal punishment, considering the absence of a normative definition of this term, is assessed negatively in the literature. Some scholars point out that this provision is controversial and unnecessary and, moreover, it can be a tool of manipulation, both within the family environment or by third parties who may groundlessly interfere in the affairs of the family, acting to its detriment.[37] To a certain extent, the use of corporal punishment may be interpreted as exhausting the substantive scope of violence referred to in the UPPD.

3.1.2. Prohibition of contact with the child

The Family and Guardianship Code, in Article 113 § 1, provides for the right and obligation of parents and child to maintain contact. The right to maintain regular personal relationships and direct contact with both parents, insofar as (in exceptional circumstances) this is not contrary to the best interests of the child, is guaranteed by Articles 9 and 10 of the United Nations Convention on the Rights of the Child. The right to contact between relatives and household members is regarded as an element of the right to family life as referred to in Article 8 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms.[38]

In accordance with Article 113^3 of the KRO: "If maintaining contact between parents and a child seriously threatens or infringes the child's interest, the court prohibits further contact." The prohibition of contact (in all its forms) is the strictest form of interference by the guardianship court in the area of contact.[39] The prohibition of contact with the child, according to this typology, constitutes a direct measure serving to prevent violence. It may be imposed in exceptional circumstances, e.g., when maintaining contact is a danger to the child's life,

[36] S. Spurek, *Przeciwdziałanie przemocy w rodzinie. Komentarz*, Warszawa 2021, pp. 271–272.
[37] See M. Kosek, *Art. 96(1)*, [in:] *Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 r. i 10 czerwca 2010 r. Analiza. Wykładnia. Komentarz*, (eds.) W. Stojanowska, M. Kosek, Warszawa 2011.
[38] Journal of Laws of 1993, No. 61, item 284, as amended.
[39] E. Trybulska-Skoczelas, *op. cit.,* Article 113(3).

health or safety, but only if the danger is serious.[40] The court may rule on the prohibition of contact between the parent and the child without depriving the parent of parental authority, the former constituting a higher degree of separation of the child from the parent(s) than deprivation of parental authority. It may be presumed that the court, when ruling on a prohibition of contact between the parent and the child, should consider whether it is justified to initiate *ex officio* proceedings for the deprivation of parental authority. Since there were grounds for prohibiting contact between the parent and the child, these grounds, all the more or equally, may justify the deprivation of parental authority.[41]

The literature has not paid particular attention to the prohibition of "personal contact" with the child, as referred to in Article 113^3 of the KRO. It is the prevailing view in the doctrine that contact with the parent may endanger the child's best interests if "the contact could reveal the demoralising influence of the mother or father deprived of parental authority [...], not only by directly instilling immoral principles in the child or encouraging aversion towards the other parent, but also through reprehensible behaviour that could be a bad example for the minor."[42] It was indicated, in general terms, that such a prohibition should be a reaction of the court to a state of danger to the spiritual or physical sphere of the child, for example through excessive discipline, instilling antisocial patterns of behaviour, demoralisation, inducing hate towards the other parent, as in such situations any form of contact may be undesirable.

The prohibition of contact that may be ruled pursuant to Article 113^3 of the KRO means that, based on the decision of the guardianship court, any form of contact is prevented, even including providing the parent remotely, at specified times, with information on the child's current state of health, development, education. The prohibition of contact is therefore an extremely onerous measure for the person concerned. The court may amend its decision, but only if the child's best interests so require (Article 113^3 of the KRO), which necessitates a meticulous, multi-faceted analysis of these best interests, also in terms of the

[40] See the decision of the Supreme Court of 7 November 2000, I CKN 1115/2000, LexisNexis No. 348662, OSNC 2001, No. 3, item 50.

[41] W. Stojanowska, *Art. 113(3)*, [in:] *Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 r. i 10 czerwca 2010 r. Analiza. Wykładnia. Komentarz*, (eds.) W. Stojanowska, M. Kosek, Warszawa 2011.

[42] M. Goettel, *Ingerencja sądu opiekuńczego w sprawowanie władzy rodzicielskiej a prawo rodziców do osobistej styczności z dzieckiem*, "Nowe Prawo" 1983, No. 9–10.

child's functioning in the future, after becoming an adult, as a mature person who should function properly in social and family life. At the same time, this implies a *post hoc* verification (review of the evaluation) of the child's best interests from the date when the prohibition was imposed.[43]

In one of the few judgments where a position on the prohibition of contact has been expressed, the Supreme Court stated: "The best interests of the child may be a reason for prohibiting the parents from personal contact with the child. These best interests should be understood broadly. The best interests of the child are not served by the cessation of the parents' personal contact with the child, even when they do not exercise parental authority or there are grounds for depriving them of the exercise of that authority (Article 111 § 1 of the KRO). Due to the nature of the right to personal contact with the child, the deprivation of the parents' right to personal contact with the child may occur in exceptional circumstances only [...]."[44] It should be indicated that the mere fact of the child's best interests being profoundly endangered becomes a prerequisite for the imposition of a prohibition of contact, but the danger must be serious, *i.e.*, real, but not necessarily direct and unavoidable.[45]

The prohibition of contact with the child may be ordered with a view to protecting the child against "maltreatment",[46] i.e., any form of physical or psychological violence, harm, neglect, exploitation, including sexual abuse, and any other form of exploitation, to protect the child's sense of security and to

[43] See E. Holewińska-Łapińska, *Orzeczenie zakazu kontaktów z dzieckiem*, Warszawa 2018, https://iws.gov.pl/wp-content/uploads/2018/10/IWS-Holewi%C5%84ska-%C5%81api%C5%84ska-E.Orzeczenie-zakazu-kontakt%C3%B3w-z-dzieckiem.pdf, p. 9 (accessed on: 15.06.2023).

[44] See the decision of the Supreme Court of 7 November 2000, I CKN 1115/00, OSNC 2001/3/50 LEX.

[45] J. Ignaczewski (ed.), *Sądowe Komentarze Tematyczne. Władza rodzicielska i kontakty z dzieckiem*, Warszawa 2015, p. 236.

[46] See L. Kociucki, *Ochrona dziecka przed złym traktowaniem,* [in:] *Konwencja o prawach dziecka. Analiza i wykładnia*, (ed.) T. Smyczyński, Poznań 1999; B. Banaszak, Ł. Żukowski, *Prawo dziecka do ochrony przed przemocą, okrucieństwem, wyzyskiem i demoralizacją – rozwiązania polskie na tle standardów Konwencji o Prawach Dziecka,* [in:] *Konwencja o prawach dziecka. Wybór zagadnień (artykuły i komentarze)*, (ed.) S.L. Stadniczeńko, Warszawa 2015.

eliminate any impact of parents' violence on the child's psyche,[47] even if the child himself is not a victim of physical aggression[48] but is only a witness to it.

A prohibition of contact with the child may be imposed in proceedings before the family court (district court) upon a request or *ex officio*, or, alternatively, a regional court in the course of divorce proceedings, when ruling on contact between the parents and the child, may impose a prohibition thereof if, in the course of the divorce proceedings, it comes to the conclusion that the prerequisites provided for in the provision of Article 113^3 of the KRO have been satisfied, i.e., the child's best interests are seriously endangered or violated (in which case, the prohibition will be based on the provisions of Article 58 § 1 in conjunction with Article 113^3 of the KRO).[49]

Article 113^3 of the KRO has been interpreted in two distinct ways. On the one hand, a view has been expressed that a prohibition of contact may be ordered for a definite or indefinite period of time. Others argue that the duration thereof is not specified. According to the first stance, one may distinguish between a prohibition where there is only a temporary obstacle, and a definitive prohibition with indefinite duration.[50] A contrary view, however, has been met with broader acceptance, casting doubt on whether it is actually possible for the court to predict that the serious risk to the best interests of the child will cease at all or after a precisely specified period of time. Indeed, the court does not have, when ruling on the prohibition of contact, the data justifying such a prediction.[51]

3.1.3. Restriction of contact with the child

According to Article 113^2 § 1 of the KRO: "If it is in the child's best interests, the guardianship court limits the parents' contact with the child." Further, Article 113^2 § 2 of the KRO states that a restriction in this scope may take the

[47] T. Szlendak, *Socjologia rodziny. Ewolucja, historia, zróżnicowanie*, Warszawa 2012, pp. 274–283.
[48] See S. Wójcik, *Przemoc fizyczna wobec dzieci*, "Dziecko Krzywdzone" 2012, No. 2(39).
[49] T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, (eds.) H. Dolecki, T. Sokołowski, Warszawa 2013, p. 815.
[50] J. Zajączkowska-Burtowy, *Art. 113(3)*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, (eds.) M. Fras, M. Habdas, Warszawa 2021.
[51] J. Strzebińczyk, [in:] *System Prawa Prywatnego*, Vol. 12, (ed.) T. Smyczyński, Warszawa 2011, p. 382.

form of: prohibition of contact with the child (clause 1); prohibition of outings with the child (clause 2); allowing meetings with the child only in the presence of the other parent or guardian, court custodian or other person identified by the court (clause 3); limitation of contact to certain means of remote communication (clause 4); prohibition of remote communication (clause 5). The list referred to in this provision is precise, but is illustrative only. Thus, the court is not bound by this catalogue, since the legislator has only indicated one condition for restricting contact, i.e., the best interests of the child. Therefore, it cannot be excluded that the best interests of the child will necessitate finding another way of restricting contact than the examples listed in Article 113^2 § 2 of the KRO. This also implies the possibility to configure the aforementioned restrictions, not fully contained in each other, in a variety of ways.[52]

The phrases used in Article 113^2 of the KRO are vague and, even though they have been a subject of numerous commentaries and monographs, in specific factual circumstances it is difficult to propose a judgment that would be based on considerations going beyond mere intuition. The facts in cases where contact is restricted are similar to those that have been ascertained in cases where contact is prohibited, except that the circumstances potentially harmful to the child's best interests are less severe.[53] As follows from the wording of Article 113^2 of the KRO, the parents are restricted in their contact with the child: "if the child's best interests so require", and prohibited (Article 113^3 § 1 of the KRO), if maintaining them – at the minimum – "seriously endangers the best interests of the child" (which have not yet been violated) or if the previous contacts between the parent and the child have already violated the child's best interests.[54] A state where the child's best interests have been endangered is not necessary to restrict contact. It is sufficient to ascertain that the best interests of the child will be served if the court "corrects" the previous pattern of contact between the parent and the child in a manner that is restrictive from the perspective of the parent with rights of contact, while at the same time enabling the child to function

[52] J. Zajączkowska-Burtowy, *Art. 113(2)*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, (eds.) M. Fras, M. Habdas, Warszawa 2021.

[53] E. Holewińska-Łapińska, *Ustalanie dobra dziecka jako przesłanki ograniczenia kontaktów z dzieckiem w praktyce sądów rodzinnych*, Warszawa 2022, p. 6.

[54] *Ibidem*, p. 18.

better in a given (precisely determined in the case) area – relevant to the best interests of the child, taking into account all the factual circumstances.

The grounds to restrict contact with the child extend to objective circumstances, such as the culpable behaviour of the parent who fails to properly care for the child or the quality of the time spent with the child, and to the harmful nature of the parent's behaviour affecting the minor, and circumstances not rooted in a detrimental influence of the parent's conduct on the child, such as the parent's illness or prolonged travel abroad. In such situations, restricting contact to certain forms is intended to protect the best interests of the child, which is ensured, for instance, by regular telephone or video call from abroad or the presence of a person appointed by the court to normalise the proper course of contacts. The ways in which contact is limited may, as a rule, be used jointly or incrementally.[55] The sequence in which the restrictions have been enumerated suggests that the legislator lists them in order of severity. The guardianship court is not bound by this sequencing, however. It should be emphasised that some restrictions should be coupled with others.[56]

Proceedings on the restriction of contact with a child under Article 113^2 of the KRO may be initiated upon request or *ex officio*, and the court having jurisdiction over the minor's place of residence is competent to conduct the proceedings. It should also be pointed out that a ruling on this subject may only be issued after a hearing.

3.1.4. Deprivation of parental authority

The provision of Article 111 of the KRO regulates the deprivation of parental authority by the court. It lists mandatory (§ 1) and facultative (§ 2) grounds for making such a decision. It also provides for the possibility of restoring parental authority (§ 3). According to the legislator, the first category includes: the occurrence of a permanent obstacle to the exercise of parental authority, the abuse of parental authority and gross neglect of parental authority by the parents. There

[55] W. Stojanowska, [in:] W. Stojanowska, M. Kosek, *Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 r. i 10 czerwca 2010 r. Analiza – Wykładnia – Komentarz*, Warszawa 2011, p. 281.

[56] G. Jędrejek, *Art. 113(2)*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz aktualizowany*, G. Jędrejek, LEX/el. 2019.

can be no doubt that the deprivation of parental authority is one of the most severe interferences in family life under the Family and Guardianship Code; it is the most stringent measure that the guardianship court may apply to a parent who cannot, will not, or is unable to exercise his or her parental authority in a proper manner.[57] It is not, however, an institution of a penal nature. It is imposed for the reason of protecting the child's best interests and safety.

A permanent obstacle preventing the exercise of parental authority should be deemed to mean such an arrangement of relations which makes the exercise of parental authority by the parents permanently impossible in the sense that either the duration of that obstacle, according to reasonable estimate, cannot be determined or this obstacle will persist for a long time.[58] Examples of a permanent obstacle include a parent's stay in prison to serve a long-term sentence, going permanently abroad while having completely no interest in the child left behind in the country, or an illness with no prospect of cure or remission that precludes the exercise of parental authority.[59]

Abuse of parental authority consists of highly reprehensible behaviour by the parent towards the child, e.g., using corporal punishment, excessive discipline, forcing the child to work in unsuitable conditions (whether for money or in the household), incitement to commit a crime,[60] incitement to beg, acts of indecency, sexual harassment, the drinking of alcohol, raising the child with antisocial values and/or in contempt and hostility towards the other parent.[61] These behaviours can be seen in the light of the definition in UPPD as violence. Deliberate isolation of the child from the other parent and psychological subjugation of the child may be regarded as abuse of parental authority and gross neglect of duties arising from it. According to the doctrine and court decisions, abuse of parental authority does not have to result from conduct which has only the child as its direct addressee. It also includes behaviour that is expressed in the

[57] U. Nowicka, *Pozbawienie władzy rodzicielskiej w polskim porządku prawnym*, "Ius Matrimoniale" 2017, Vol. 28, No. 4, p. 15, DOI:10.21697/im.2017.28.4.02.

[58] See the decision of the Supreme Court of 2 June 2000, II CKN 960/2000, Lexis.pl no. 379813.

[59] E. Trybulska-Skoczelas, *Art. 111,* [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, (ed.) J. Wierciński, Warszawa 2014.

[60] *Ibidem*.

[61] See H. Haak, *Władza rodzicielska. Komentarz*, Toruń 1995, p. 169.

presence of the child and directed towards the other parent or another person, ultimately posing a risk to the child's proper development.[62]

Gross neglect of duties means severe negligence or such negligence which is less severe but shows intense malicious will, persistence, and/or helplessness.[63] Following I. Ignaczewski, one may distinguish two groups of factual states used to verify gross neglect of the parents' duties towards the child. The former includes situations in the nature of social pathologies, alcohol abuse, drug abuse and other addictions, leading to shortcomings and irregularities in the care of the child, in meeting its basic hygienic, nutritional, or educational needs.[64] On the other hand, the latter group comprises evading child support,[65] but also the complete severance of ties with the child, lack of interest in the child's fate, or long-term lack of contact with the child for reasons attributable to the parent.[66]

In addition to the mandatory grounds for deprivation of parental authority, the legislator also provides for the possibility of such interference with parental authority in a situation where, despite the assistance provided, the grounds for applying Article 109 § 2(5) of the KRO have not ceased (a previous order has been issued as a result of which the child was placed in a foster family or in any other institutional form of foster care), and in particular where the parents are permanently disinterested in the child.

A parent who was deprived of parental authority has no right to make any decisions in any area of the child's functioning, i.e., the parent does not participate in the child's upbringing, in making decisions about the child, does not act on the child's behalf and does not manage the child's property. In such a case, he or she has no influence on where the child resides, the child's leaving

---

[62] See the decision of the Supreme Court of 7 September 2000, I CKN 931/2000, Lexis.pl no. 7297899, which stated that "The abuse of parental authority also occurs when the conduct of a parent has an objectively destructive effect on the upbringing and psychological development of the child, even if this is not related to a subjective, negative attitude of the parent towards the child."

[63] See the decision of the Supreme Court of 19 June 1997, III CKN 122/97, unpublished, LEX no. 1402785.

[64] H. Ciepła, J. Ignaczewski, J. Skibińska-Adamowicz, *Komentarz do spraw rodzinnych*, Warszawa 2012, pp. 321–324.

[65] See the decision of the Supreme Court of 12 January 2000, III CKN 834/99, Lexis.pl no. 1517567.

[66] H. Ciepła, J. Ignaczewski, J. Skibińska-Adamowicz, *op. cit.*, pp. 321–324, see also E. Trybulska-Skoczelas, *op. cit.,* Article 111.

the country, choice of school, medical treatment, etc. However, this does not mean – as a general rule – that he or she cannot contact the child.[67] Only in exceptional cases may the court also prohibit or restrict all contact between the parent and the child when ruling on the deprivation of parental authority. A view has been expressed in judicial decisions that the court may only prohibit contact with the child if the prospective contact endangers the life, health, or safety of the child, or has a demoralising effect.[68] It must be thus deemed that family violence can constitute both grounds for the deprivation of parental authority and the prohibition of personal contact with the child.

Proceedings for the deprivation of parental authority may be initiated at the request of one of the parents, the public prosecutor, other persons, including, in particular, the paternal or maternal grandparents, or *ex officio*, which is by far the most common occurrence and usually takes place after the court has received information from the municipal (or communal) social assistance centre.[69] The court may issue a decision in cases for the deprivation of parental authority (as in other cases involving relations between parents and children) only after conducting a hearing, in non-contentious proceedings, with such decisions to be enforced only after becoming final and unappealable (Article 579 of the Code of Civil Procedure). The participants in proceedings for the deprivation of parental authority are the parents of the child as well as the applicant (unless it is one of the parents). The family court with territorial jurisdiction in proceedings for the deprivation of parental authority is the district court of the place of residence of the person concerned by the proceedings (i.e., the child), and if the child has no place of residence – then the court of the child's place of stay, and if the place of stay is also impossible to ascertain – the district court for the capital city of Warsaw (Article 569 of the Code of Civil Procedure).

3.1.5. Suspension of the exercise of parental authority

The provision of Article 110 of the KRO permits the guardianship court to suspend the exercise of parental authority. Pursuant to § 1 of this provision, "In the

[67] U. Nowicka, *op. cit*., p. 22.
[68] E. Kawala, *Kodeks rodzinny i opiekuńczy. Tekst, orzecznictwo*, Toruń 2003, p. 191.
[69] E. Holewińska-Łapińska, *Orzecznictwo w sprawach o pozbawienie władzy rodzicielskiej*, "Prawo w Działaniu. Sprawy Cywilne" 2013, No. 14, pp. 40–41.

case of a temporary obstacle in exercising parental authority, the guardianship court may suspend the authority." There are some doubts in the literature about how to interpret the term "temporary obstacle". According to A.K. Bieliński and M. Pannert, a temporary obstacle occurs when "for a certain period of time the rights and obligations of the parents arising from parental authority cannot be exercised, although they do not cease to exist".[70] The view has been expressed that the obstacle must pass until such time as the child reaches the age of majority.[71] It is also accepted that in the majority of circumstances such an obstacle is not due to the fault of the parents.[72] Suspension of parental authority is the only optional measure.[73] This means that should there be a temporary obstacle, the court is not obliged to order the suspension of parental authority.[74] The court has therefore the duty to evaluate the nature of the obstacle and assess whether ruling on the suspension is reasonable. This means that the decision on the suspension of parental authority on these grounds cannot be issued if it will be detrimental to the best interests of the child.[75] The guardianship court rules on the suspension of parental authority in non-contentious proceedings, after conducting a hearing.

3.1.6. Restriction of parental authority

Pursuant to Article 109 of the KRO, in a situation where the child's best interests are at risk, the court may issue, *inter alia*, the following orders: "1) commit the parents and the minor to a certain conduct and in particular to work with a family assistant or to engage in other form of work with a family, refer a minor to a day centre as defined in the provisions on family assistance and the foster care system or refer parents to a centre or specialist providing family therapy, consulting or other family services, specifying the method for controlling compliance with court orders; 2) define the acts that parents may not perform without court approval or subject the parents to other limitations

[70] A.K. Bieliński, M. Pannert, *Prawo rodzinne*, Warszawa 2011, p. 207.
[71] J. Strzebińczyk, *Prawo rodzinne*, Warszawa 2013, p. 282.
[72] R. Krajewski, *Podstawy prawa rodzinnego*, Warszawa 2003, p. 93.
[73] K. Gromek, *Władza rodzicielska. Komentarz*, Warszawa 2008, p. 346.
[74] M. Goettel, *Prawo rodzinne w pytaniach i odpowiedziach*, Warszawa 2012, p. 168.
[75] J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, p. 360.

applicable to a guardian; 3) subject the exercise of parental authority to permanent supervision by a court custodian; 4) refer a minor to an organisation or institution established to provide vocational training or another centre that ensures partial custody over children; 5) order that a minor be placed in a foster family, a family-run children's home, in a residential institution, or temporarily appoint a married couple as foster family, or a person who does not meet the conditions of a foster family, in the area of essential training as defined in the provisions on family assistance and the foster care system." This catalogue is open[76] and lists the orders from the most lenient to the most severe.[77] Orders to restrict parental authority are "the most comprehensive and flexible means of controlling the exercise of parental authority".[78] In fact, the guardianship court has the power to make any order that the best interests of the child require.[79] The court's decision must be viable and enforceable.[80] It is also the duty of the court to indicate the method of services, specifying the method for controlling compliance with the issued custody order.[81]

The institution of the restriction of parental authority is intended to prevent a situation where the best interests of the child are at risk. This means that the guardianship courts are obliged to react when it is likely that the child is exposed to harm. The legislator has also permitted to restrict parental authority when the child's best interests are not at stake.[82] Measures aimed at limiting parental authority are intended to "prevent the negative consequences of the improper exercise of parental authority".[83] This implies that actual harm is not a necessary prerequisite for a decision to be taken in this respect by the guardianship court. The restriction of parental authority provides an opportunity to protect the child

[76] M. Andrzejewski, H. Dolecki, A. Lutkiewicz-Rucińska, A. Olejniczak, T. Sokołowski (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2010, p. 641.

[77] H. Ciepła, B. Czech, T. Domińczyk, S. Kalus, K. Piasecki (ed.), M. Sychowicz, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2011, p. 795.

[78] A. Łapiński, *Ogólna problematyka ograniczenia władzy rodzicielskiej według art. 109 k.r.o.*, "Palestra" 1974, No. 3, p. 22.

[79] J. Gajda, J. Ignatowicz, J. Pietrzykowski, K. Pietrzykowski, J. Winiarz, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2012, p. 930; see also the decision of the Supreme Court of 4 March 1999, II CKN 1106/98, SIP no. 1125073.

[80] J. Strzebińczyk, *Prawo rodzinne*, Warszawa 2013, p. 280.

[81] R. Krajewski, *Podstawy prawa rodzinnego*, Warszawa 2003, p. 93.

[82] J. Gajda, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2000, p. 410.

[83] J. Ruszewski, *Prawo rodzinne*, Suwałki 2011, p. 77.

from factors adversely affecting the child's mental and physical development from the immediate environment.[84] Thus, in the context of the family violence prevention, decisions made by the guardianship court to restrict parental authority can serve a preventive function if issued at an appropriate time.

The mildest instrument of limitation of parental authority of those referred to in Article 109 of the Family and Guardianship Code is to oblige the parents and the minor to engage in a certain conduct, in particular to work with a family assistant, to engage in other forms of work with a family, to refer a minor to a day centre as defined in the provisions on family assistance and the foster care system, or refer parents to a centre or specialist providing family therapy, consulting or other family services, specifying the method for controlling compliance with court orders. The duties and method of operation of a family assistant are regulated by the Family Assistance and Foster Care System Act of 9 June 2011.[85] The Act introduces the function of a family assistant, who is tasked with supporting families in upbringing-related problems and everyday matters. The assistance works to help the family achieve a basic level of life stability and to prevent the child from being separated from the family or to enable the child placed in foster care to return to its parents as soon as possible. The cooperation of the assistant with the family, as a rule, always occurs with the consent of the family members, which in the case of families faced with the problem of violence may be an obstacle to realising the preventive nature of this form of assistance. Furthermore, in order for this form of family support in the violence prevention area to be effective, the assistant's insight and professional commitment are necessary. As a rule, family violence takes place behind closed doors; outside, the persons being victims and perpetrators are able to give the appearance of normality without arousing suspicion in the immediate surroundings.

Committing the parents and the minor to behave in a certain way, as referred to in Article 109 § 2(1) of the KRO, is the most lenient measure among the orders that may be issued by the guardianship court. This order may consist in obliging the parents to improve the child's upbringing conditions, systematically send the child to school and establish contact with the school, take care of the child's

[84] A. Kilińska-Pękacz, *Ograniczenie, zawieszenie i pozbawienie władzy rodzicielskiej jako instytucje prawa rodzinnego służące ochronie dzieci*, "Studia z Zakresu Prawa, Administracji i Zarządzania Uniwersytetu Kazimierza Wielkiego w Bydgoszczy" 2013, Vol. 4, p. 260.

[85] Journal of Laws of 2013, item 135, as amended.

medical treatment, enhance supervision over the child's leisure time, increase control over the child's use of media. This provision also provides the court with the basis to refer the parents to facilities or professionals for counselling, family therapy or providing other appropriate assistance to the family.[86]

The second instrument by which the guardianship court may interfere with the exercise of parental authority, as listed in Article 109 § 2 of the Family and Guardianship Code, may consist in defining what acts cannot be performed by the parents without the approval of the guardianship court or in subjecting the parents to other limitations applicable to a guardian. In the former case, the scope of the restrictions may be narrower. These may extend to acts concerning both the person of the child, e.g., the need to obtain approval from the guardianship court to change schools, and concerning the child's assets. Acts which cannot be performed without the approval of the guardianship court should be expressly indicated.[87]

A more intrusive measure that can be taken by the guardianship court to interfere with parental authority is to subject the exercise of that authority to the permanent supervision by a court custodian, as referred to in Article 109 § 2(3) of the KRO. Pursuant to Article 1 of the Act of 27 July 2001 on Court Probation Officers,[88] custodians perform tasks related to upbringing and rehabilitation, diagnostics, prevention and supervision in the area of enforcement of court decisions. The court-appointed custodian is an ancillary body of the court. The institution of the court-appointed custodian is socially significant, which should be relevant in light of concern for the quality of how the tasks entrusted thereto are implemented.[89] The court-appointed custodian performs the duties entrusted thereto in an open environment. These tasks pertain to the most sensitive areas of personal relations between spouses and between parents and children, i.e., those relations which in practice have a substantial impact on the functioning of the family and on the degree to which its social functions are fulfilled, including, in particular, the care and socialisation (in

[86] E. Trybulska-Skoczelas, *Art. 109*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, (ed.) J. Wierciński, Warszawa 2014.
[87] *Ibidem*.
[88] Journal of Laws of 2014, item 795, as amended.
[89] W. Stojanowska, M. Kosek, *Rola i zadania organów pomocniczych sądu rodzinnego*, "Prawo w Działaniu. Sprawy Cywilne" 2022, No. 50, p. 77.

many cases also the re-socialisation) function.[90] The court-appointed custodian also has an important role in the system of family violence prevention[91] and in the system of supporting families experiencing difficulties in fulfilling their parental functions. The status of the court-appointed custodian and the extent to which they may positively influence those under his care should be furthered in the broad preventive, conciliatory and re-socialisation activities. As noted by W. Stojanowska, "A certain problem may be the fact that custodians are overloaded with cases assigned to them (which has been mentioned by custodians themselves) and that their work is organised by implementing tasks ordered to the court."[92] Irrespective of or even in spite of the legislative solutions introduced in the past, the role of custodian still remains unclear. Priority is given to its enforcement and supervisory functions, which boil down to the implementation of court decisions, rather than to its preventive powers, which are of the highest importance from the perspective of preventing family violence.[93] In the current socio-professional model of custody organised within the structures of the court, and especially considering the excessive workload, the family custodian resembles a "juvenile control technician" (a "supervisor" of the wards that were entrusted to him or her) rather than a humanistically-oriented educator. In this context, the proposals expressed in the doctrine almost three decades ago, calling for the professionalisation of the custodian function and for changing the profile of this vocation in the educational-therapeutic direction, remain valid.[94]

---

[90] M. Kosek, *Prewencyjna i resocjalizacyjna funkcja rodziny a przestępczość nieletnich,* [in:] *Przestępczość. Dowody. Prawo. Księga jubileuszowa Prof. Bronisława Młodziejowskiego*, (eds.) J. Moszczyński, D. Solodov, I. Sołtyszewski, Olsztyn 2016, p. 393 *et seq*.

[91] Court-appointed custodians are actively involved in the work of interdisciplinary teams and working groups, on the basis of the Family Violence Prevention Act.

[92] W. Stojanowska, M. Kosek, *op. cit*., p. 82.

[93] A. Węgliński, referencing the multi-year research on this environment, claims that "Nowadays, family custodians in Poland are a professional group with varied levels of awareness and identification with the values, principles and goals of social service. It is still not entirely clear with which functions they identify as a professional group organised within the structures in the Ministry of Justice. [...] The currently applicable legal regulations on the statutory tasks of professional family custodians fail to very precisely and clearly define who a family custodian is and who he/she becomes in the course of performing polyvalent activities." (see A. Węgliński, *Skuteczność i jakość oddziaływań wychowawczych w warunkach nadzorów kuratorskich,* [in:] *Sukcesy i porażki poprawiania niepoprawnych*, (ed.) I. Pospiszyl, Kielce 2009, p. 96).

[94] K. Sawicka, *Model kurateli sądowej*, "Biuletyn Polskiego Towarzystwa Kryminologicznego im. Profesora Stanisława Batawii" 1996, No. 5.

The custodian's activity in the scope of supporting the parenting skills of those under supervision is only one area of involvement in the process of improving interpersonal relationships and rebuilding strained bonds within a family. In their everyday practice, the custodian handles various problems faced by their wards, and the nature of the diagnosed needs determines a specific profile of their work. Different strategies would be used when dealing with families affected by unemployment and material poverty, with environments with alcohol problems or in cases with family violence or in situations on the verge of divorce. In each of these, however, the custodian – in addition to their own knowledge and skills – should, or at least have the opportunity to, take advantage of the competences of the various individuals and institutions that form the interdepartmental network of family assistance in the local environment.

The possibility of separating the child from the parents, which is the most severe of the non-exhaustive list of measures, is regulated in clauses 4 and 5 of Article 109 § 2 of the KRO. This provision should be read in conjunction with Article 112^3 of the KRO, according to which "A child shall be placed in foster care after exhausting all the measures for providing assistance to the child's family referred to in the provisions on family assistance and the foster care system, unless it is in the child's best interests to be immediately placed in foster care." The interference by the guardianship court in the exercise of parental authority, whereby the child is separated from their parents, should be used with particular caution and only in cases where the child needs to be removed from its current environment. The Supreme Court presented arguments in favour of such an interpretation of Article 109 § 2(5) of the KRO, stating as follows: "One of the most far-reaching measures interfering with parental authority is the restriction of their authority by placing the child in a foster family or in a foster care institution. For this very reason, the aforementioned measure should be imposed only when other orders have failed to achieve the desired result or when, in view of the particular circumstances of the case, it may be assumed that such a result will be impossible to attain. Issuance of such a decision is therefore necessary when the family environment adversely affects the upbringing of the child or when the parents are incapable of handling the daily upbringing problems. When making a ruling to this effect, the guardianship court should bear in mind that as a rule it is preferable to place the child in a foster family rather than in an institution, because, as has been noted by experts, a stay in such an institution sometimes

has a negative impact on the child's psyche; on the other hand, a foster family, if properly chosen, creates natural conditions for the child's development."[95]

Proceedings on the restriction of parental authority are conducted in the non-contentious procedure. Article 579 of the KPC, according to which orders in cases of restriction or deprivation of parental authority may be issued only after a hearing has been conducted, also applies to orders issued pursuant to Article 109 of the KRO and to amending final and unappealable orders on this subject pursuant to Article 577 of the KPC.[96] In emergency situations, an *ad hoc* order may even be issued by a guardianship court which has no jurisdiction (Article 569 § 2 of the KPC). It is worth pointing out at this point, with regard to the subject of this paper and referring to the judicial practice of the Supreme Court, that a court order issued in the course of proceedings on the restriction of parental authority may also entail commanding the parents or the guardian to file a motion for prosecution or, should they fail to satisfy the obligation imposed on them, appointing a custodian to do so in their stead where the victim is a minor who is not authorised to file a motion for prosecuting the perpetrator of an offence prosecuted upon a motion, and the legal representative or the person in whose custody the victim remains does not file such a motion, thus violating the best interests of the minor.[97] The orders of the guardianship court may be in the nature of an *ad hoc* or lasting interference.[98]

Bearing in mind the deliberations above, it can be concluded that the measures provided for in the KRO can also be applied as a means of family violence prevention. However, they are only of an indirect nature. To a large extent, they will constitute interference by the guardianship court with parental authority (by depriving, suspending or restricting it) or with the right to have contact with the child (by prohibiting such contact or specifying the manner in which the right may be exercised). The measure to be applied should be always determined

[95] See the Thesis XIII point 3 of the resolution of the Civil Chamber of the Supreme Court of 9 June 1976, III CZP 46/75, OSNC 1976, No. 9, item 184; the judgment of the Appellate Court in Białystok of 28 October 2010, I ACa 458/10, OSAB 2010, No. 3, pp. 35–42.

[96] See the decision of the Supreme Court of 15 October 1970, III CRN 275/70, LexPolonica No. 325840, OSNCP 1971, No. 6, item 108.

[97] See the resolution of the panel of seven judges of the Supreme Court of 17 December 1970, VI KZP 43/68, OSNKW 1971, No. 7–8, p. 101.

[98] See the resolution of the Supreme Court of 2 October 1991, III CZP 92/91, OSNC 1992, No. 4, item 58.

having due regard to the specific circumstances of the case and the protection of the child's best interests. In the context of family violence prevention, the instruments provided for in the KRO are ancillary and secondary as compared to the measures referred to in the UPPD. To a large extent, these will be measures of an indirect nature. It should be pointed out that the application of any of them requires a prior decision of the guardianship court. Even assuming that custody orders are immediately enforceable, prior information from the person or an authorised body is needed for proceedings to be initiated, which requires time, which is precisely what persons experiencing violence often do not have.

3.2. Violence as a prerequisite of at-fault divorce

It is a rule in divorce cases to establish whether any of the spouses – and if so which one – is at fault for the breakdown of the marriage (Article 57 § 1 of the KRO). "Fault" under the Family and Guardianship Code is defined in the same manner as in the case of torts regulated by the Civil Code.[99] And thus, it covers such acts or omissions which are the expression of the spouse's will and which – by violating the duties set forth by the law – lead to the breakdown of marriage (intentional or unintentional breach of marital obligations which are the cause or co-cause of the breakup of the family). In order to attribute fault to a spouse, the spouse does not have to intend for a specific act or omission to lead to the breakdown of marriage; it is enough for the spouse to foresee the significance of the consequences of the given act or omission violating the law. When ruling on fault, the court should determine whether there is inconsistency between the spouse's conduct or behaviour and the legal norms or principles of coexistence informing the spouses' obligations, and whether such inconsistency is accompanied by the spouse's wilfulness or negligence. Moreover, there must be a causal link between such conduct of the spouse and the resulting breakdown of the marital relationship. Not every breach of duty will constitute fault on the part of the given spouse, but only those which have had the effect

[99] *Cf.* the judgment of the Supreme Court of 13 November 1997, I CKN 306/97, LexisNexis No. 8453626, SIP No. 484738, and the judgment of the Appellate Court in Białystok of 8 December 1994, I ACr 346/94, LexisNexis No. 304274, OSA 1995, No. 6, item 42, p. 43.

of causing (or contributing to) the breakdown of marriage.[100] There can be no doubt that the use of violence can be a cause or a co-cause of the breakup of the family. Violence can take psychological (emotional), physical and/or economic form. It is also important in this regard that violence, being a prerequisite of a divorce decree where one of the spouses has been declared at fault, does not have to be directed only against the spouse, but can also affect other persons who have a close relationship with the spouse, e.g., parents, siblings, or children from a previous relationship.[101]

The guilty spouse, as a result of being declared solely at fault for the breakdown of marriage, may be ordered to pay maintenance to the innocent spouse. Furthermore, according to Article 60 § 2 of the KRO: "If one spouse was considered solely at fault for breakdown of marriage and the divorce causes major deterioration of the financial situation of the other spouse, the court, at the request of that other spouse, may order the spouse at fault to support the reasonable needs of the other spouse, even if that other spouse does not suffer insufficiency of means." The obligation provided for in the provision referred to above is in principle not limited in time (it expires by operation of law only in the event of remarriage of the spouse entitled to received maintenance) and is irrelevant of whether or not the entitled spouse suffer insufficiency of means.

4. Violence as ground for removal of a child from his or her family pursuant to Article 12a of the Act on Counteracting Domestic Violence

The analysis of the legal aspects of family violence prevention in family law, also the available instruments, will not be complete without discussing the most severe and direct measure of violence prevention, one which is not directly regulated in the Family and Guardianship Code, i.e., removing a child from the family. The legal basis for taking steps aimed at removing a child from his

[100] M. Manowska, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, (ed.) J. Wierciński, Warszawa 2014, art. 57.

[101] See the judgment of the Supreme Court of 28 March 2003, IV CKN 1957/2000, Lexis.pl, No. 1632049.

or her family for the reason of violence the child is experiencing is provided in Article 12a(1) of the Act on Counteracting Domestic Violence of 29 July 2005. It states as follows: "In the event of a threat to the life or health of a child due to domestic violence, a social worker shall protect the child by placing him or her with another person who does not cohabit with the child and who is a relative or a household member within the meaning of Article 115 § 11 of the Criminal Code of 6 June 1997 (Journal of Laws of 2022, items 1138, 1726, 1855, 2339 and 2600, and of 2023, item 289) and who provides a guarantee for the child's safety and proper care, in a foster family, a family-run children's home, in a residential institution." Meanwhile, according to Article 12a(3) of the UPPD: "The decision referred to in clause 1 shall be made by a social worker in cooperation with a police officer as well as with a doctor, paramedic or nurse. The provisions of Article 598,[10] Article 598[11] § 3 and Article 598[12] § 1 first sentence of the Code of Civil Procedure of 17 November 1964 – shall apply accordingly."

First of all, the amendments to this provision introduced by the Act of 9 March 2023 on amendment of the Act on Counteracting Domestic Violence and certain other acts and certain other acts[102] should be welcomed. These changes managed to do eliminate, to some extent, the previous interpretative doubts on how the procedure of removing a child from the family should occur. This is done by, among others, replacing the requirement of an imminent threat to the life or health of the child with the requirement of a state of threat to the life or health of the child, which makes it possible for the procedure to take on a preventative role in a situation where the danger has already passed, but it is highly probable that it may occur in the future; abandoning the requirement whereby a social worker may take the decision to remove a child only in the performance of official duties; and, in this procedure, removing the option to place a child in a foster care institution. Moreover, it has been clarified that a child may be removed in situations where the threat to the life or health of the child results from domestic violence, not family violence as previously.

One may distinguish two main prerequisites for this procedure to be applied under Article 12a of the UPPD: the existence of a threat to the life or health of the child due to domestic violence, and a joint decision by a social worker, a police

[102] Journal of Laws of 2023, item 535.

officer, and a representative of the medical establishment (doctor or nurse).[103] In addition, on an optional basis, the legislator indicates that the decision to remove a child may be taken with the involvement and in the presence of a psychologist. After the prerequisites referred to above have been fulfilled, the social worker has the right to remove the child from the family and place it with another person who does not cohabit with the child and who is a relative or household member, in a foster family or in institutional foster care, where a threat to the life or health of the child due to domestic violence.[104] The aforementioned provisions require the social worker to notify the guardianship court without undue delay (but no later than within 24 hours) of the removal of the child.[105]

There is no doubt that the provision of Article 12a of the UPPD sets forth a very specific legal tool that is difficult to apply and is used inconsistently in view of the numerous interpretative problems that this regulation causes. Indeed, the legislator has empowered a social worker to remove a child from the child's family in the event of a threat to the life or health of the child due to domestic violence even before a ruling of the guardianship court has been made on this matter. The legislator has specified that the decision to remove the child shall be made by the social worker jointly with a police officer as well as with a medical representative (doctor, nurse or paramedic). According to Article 12b of the UPPD, parents, legal or actual guardians are entitled to lodge a complaint with the guardianship court against the removal of the child, in which they may request the court to carry out the review of the legitimacy and legality of the child's removal and of whether the removal was conducted properly.

---

[103] P. Piskozub, *op. cit*., p. 192.

[104] Domestic violence is defined in Article 2(1) of the Act on Counteracting Domestic Violence as a one-time or repeated intentional activity or omission, taking advantage of physical, psychological or economic superiority, violating the rights or personal interests of a person suffering domestic violence, in particular: in particular exposing that person to the risk of loss of life, damage to health or property; violating their dignity, bodily integrity or freedom, including sexual freedom; causing harm to their physical or mental health, causing suffering and moral harm to that person; limiting or depriving that person of access to financial resources or the opportunity to work or become financially independent; substantially invading that person's privacy or causing that person to feel threatened, humiliated or tormented, including by means of electronic communication.

[105] S. Spurek, *Artykuł 12(a), Artykuł 12(b), Artykuł 12(c),* [in:] *Przeciwdziałanie przemocy w rodzinie. Komentarz,* Warszawa 2021.

It should be noted at this point that the aforementioned regulation should trigger sectoral cooperation [collaboration] between institutions safeguarding the best interests of the child. However, a closer examination of this matter makes it apparent that this much-needed provision, seemingly phrased in a correct manner, is very difficult to apply in practice. And it is not simply a manner of emotional difficulty. Even the first prerequisite thereof raises doubts considering the extremely broad definition of domestic violence. One solution intended to narrow the definition of family violence that was in force before the amendment was, most likely, the change in terminology to domestic violence, but also adding an open catalogue of behaviours regarded as domestic violence to Article 2(1) of the Domestic Violence Prevention Act. It should be emphasised that such a broad definition of domestic violence goes far beyond physical violence, covering not only psychological violence, but also omissions resulting or likely to result in the violation of the rights or interests of a family member. However, it is worth considering whether this concept is still too broad.

The regulation of Article 12 of the UPPD still does not set out in detail uniform and exhaustive rules of conduct for representative of each service, i.e., social worker, police officer, doctor (or other medical professional). Currently, there are no implementing laws that would regulate the role, function, and scope of conduct of the categories of persons mentioned in the provision during the procedure for the removal of a child.[106] In the absence of implementing legislation, it is unknown what the procedure for documenting the decision-making process of the participants in the intervention should consist of.

Thirdly, the legislator specified, which did not change in the 2023 amendment, that a social worker makes the decision on the removal of a child from

[106] The Regulation of 31 March 2011, issued still on the basis of the provision of Article 12a of the Act on Counteracting Family Violence (i.e., prior to the latest amendment), unequivocally indicates that the actions which may be taken by an officer are limited to activities of a technical and formal nature. These include, in particular, identification of the participants in the procedure; establishing the identity of the child that is being taken away and of the parents, legal or actual guardians; reading the information in the social worker's possession concerning the child; providing first aid if necessary and calling an ambulance (although, at the same time, the legislation requires that a medical staff member participate in the intervention) and generally ensuring the safety of the participants in the intervention. As regards the medical staff member, the situation is even worse, as neither the provisions of the Act nor the implementing regulation contain any norms regarding the rights and obligations of the medical staff member participating in the procedure.

the family jointly with a police officer or a doctor, paramedic or nurse, which may also lead to doubts on how to proceed where even one of these persons has a dissenting opinion. The legislator authorises a social worker to remove a child, but makes this decision contingent upon the consent of the other persons. In the literature on the subject written before the amendment to Article 12a of the Act on Counteracting Domestic Violence, it was generally noted that clause 1 of this provision specifies, in a way, that the exclusive authority to remove a child vests in a social worker.[107] However, this opinion should be deemed unjustified, since it transfers – contrary to the legislator's intention – the burden of the decision on the removal of the child onto the social worker, whereas the decision is taken by all participants in the procedure and all of them may be held liable (*de facto* only disciplinary liability) therefore.[108]

Fourthly, the provision also does not settle the issue of how to transport the child to the place where the child should be placed once the procedure has been initiated. According to the interpretation of the Ministry of Family, Labour and Social Policy: "It should be presumed that at least one of the services has a car, but technical issues should be resolved in cooperation and by way of joint decision-making by the three family violence prevention services involved in the incident. [...] at the social worker's request, the police are obliged to assist, and this assistance may consist in transportation [...]. At the same time, the official interpretation given to police officers indicates that it is not the duty of the Police to provide the means of transporting the child in such a case. As a result, it can be assumed that this is one of the problems making the procedure more problematic in a situation where the commune has no means of transport that can be used for this purpose and has no financial resources that can be allocated for such a purpose. The literature on the subject as well as the guidelines of the Ministry of Family, Labour and Social Policy indicate that this provision constitutes a formal basis for demanding that officers transport the child in a Police vehicle by.[109] However, it appears, as is noted by P. Piskozub as well, that the

[107] See J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2016, p. 108; J. Słyk, *Odbieranie dzieci rodzicom na podstawie art. 12a ustawy z 29.07.2005 o przeciwdziałaniu przemocy w rodzinie*, "Prawo w Działaniu" 2015, p. 273.

[108] See P. Piskozub, *op. cit.*, p. 194.

[109] A. Kiełtyka, A. Ważny, *Przeciwdziałanie przemocy w rodzinie. Komentarz*, Warszawa 2015, p. 230.

decision in this regard should be preceded each time by a thorough assessment of the situation. The removal of a child always has adverse consequences and is a traumatic event for the child. Being transported in a police vehicle may exacerbate these negative feelings, which would make it reasonable for the participants in the procedure to use alternative solutions, such as transporting the child by taxi.[110]

Still unresolved is the issue of whether or not there is a preferred order of places in which a child is to be placed after being removed remains unresolved. The legislator has not chosen to regulate this matter explicitly. The wording of Article 12a of the UPPD leads to the conclusion that all places mentioned in this provision should be treated equally, which is contrary to the interpretation issued by the Ministry of Family, Labour and Social Policy regarding this provision before the amendment. It is worth noting, as noted by P. Piskozub, that the option to place a child with an adult relative who is not a household member constitutes one of the most important features distinguishing the procedure in question from the removal of a child by a Police officer as part of an intervention carried out independently, without the participation of a social worker.[111]

There are also regulations in the legal order that impose a different sequence of steps to be taken in these situations. For instance, pursuant to Article 100 of the Family and Guardianship Code, an obligation was introduced for the guardianship court and other public authorities to have the duty to assist parents if they need that assistance for the proper exercise of parental authority. Furthermore, under Article 112^3 of the KRO, the placement of a child in foster care is contingent on exhausting all the measures for providing assistance to the child's parents referred to in the provisions on family assistance and the foster care system, unless it is in the child's bests interest to be immediately placed in foster care. This implies that the organisational units in the area of family assistance have the duty to take first those actions which will make it possible to eliminate dysfunctions in the family, even before those pose a direct threat to the health or life of the child.

According to the report of the National Programme for the Prevention of Family Violence for the year 2021 (i.e., for the period from 1 January to

[110] P. Piskozub, *op. cit.*, p. 196.
[111] *Ibidem*.

31 December 2021) that was published in September 2022, in the reporting period 1,335 children were removed in accordance with Article 12a of the Act on Counteracting Family Violence. The number of children that were placed with another relative who is not a household member, within the meaning of Article 115 § 11 of the Criminal Code, amounted to 430 in 2021. The number of children placed in a foster family was 471. The number of children placed in a foster care institution was 607. The data on the placement of children in different forms of care do not add up to the total number of children removed from their families (*i.e.*, 1,335), since in some cases children removed were placed in more than one form of care in a given calendar year (e.g., a foster care institution and then a foster family).[112]

The data provided above, which serve to illustrate how to deal with a child who has been removed from his or her family, are not compatible with the recommendations formulated by the then Ministry of Labour and Social Policy (currently, the Ministry of Family and Social Policy) regarding the application of Article 12a of the UPPD, according to which: in the first instance, the situation of the child should be secured by placing the child with the closest person, within the meaning of Article 115 § 11 of the Criminal Code (i.e., spouse, ascendant, descendant, sibling, relative in the same line or degree, person in an adoption relationship as well as their spouse, and also a person actually living in cohabitation, who does not reside together with the child). Only then are a foster family or a foster care institution mentioned.

The measure consisting in the removal of a child from his or her family is direct and the most restrictive. It is also an extremely important instrument that is necessary in order to immediately stop violence against the child; however, its application raises numerous doubts, not only ethical, but also of an organisational and formal nature, which may constitute an obstacle to the achievement of its stated aim, i.e., the protection of the child's best interests, health and life. Some of the doubts have been clarified by the 2023 amendment, but others, which have been mentioned above, still remain and thus necessitate further legislative action in the future.

[112] The data originate from the following website: https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021 (accessed on: 01.06.2023).

5. Conclusion

The Polish family law, in particular the Family and Guardianship Code, does not (*expressis verbis*) address the issue of preventing family violence or domestic violence. Without any doubt, the measures that have been provided for in these regulations, permitting the guardianship court to interfere with parental authority or contacts with the child, are of great importance for the *ad hoc* decisions which may be taken pursuant to the Act on Counteracting Domestic Violence. Domestic violence undoubtedly constitutes a violation of the best interests of the child and family members, regardless of whether these persons are victims or witnesses of this violence.

The procedure applicable in custody cases makes it possible for guardianship courts to determine a solution which serves the best interests of the child, as it comprises evidentiary proceedings in which the court may take advantage of expert knowledge of the Forensic Opinion Team, but it is nevertheless time-consuming, leading to a situation where the victim of violence, including, in particular, children, remain in a limbo, a state of uncertainty, with their sense of safety being in jeopardy, even if the guardianship court issues orders during the proceedings that are immediately enforceable. Not all of the measures discussed in this paper, as provided for by family law, will be suitable as means of family violence prevention; others may prove ineffective or have only a short-term effect. The range of measures is thus not perfect. This state of affairs is compounded by issues of not only legal but also of an organisational nature.

The amended Act on Counteracting Domestic Violence gives some hope that cases of domestic violence will be met with a quick and prompt response thanks to the procedure for removal of a child from the family. It should, however, be noted that even in this regard several sensitive issues still remain unregulated, i.e., formal and organisational matters, the extent of rights of the persons participating in the intervention, and the manner of documenting the course of the intervention. The definition of domestic violence is still extremely broad. Terminological changes (to the definition of domestic violence) and the introduction of a non-exhaustive list of behaviours constating violence have not solved the problem. In addition, the legislator has failed to specify the order the places to which a child is to be taken, which is of particular importance in this case. Indeed, it should be noted that being taken away from the family constitutes

a traumatic experience for the child, and this may be exacerbated by making an incorrect decision on placing the child not with people known to child but in care institutions.

References

Sources of law

Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979 (Journal of Laws of 1982, No. 10, item 71).
Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Journal of Laws of 1993 No. 61, item 284, as amended).
Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence of 11 May 2011 (Journal of Laws of 2015, item 961).
The Family and Guardianship Code of 25 February 1964 (Journal of Laws of 2020, item 1359).
The Civil Procedure Code of 17 November 1964 (Journal of Laws of 1964, No. 43, item 296, as amended).
Convention on the Rights of the Child of 20 November 1989 (Journal of Laws of 1991, No. 120, item 526).
The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483).
The Criminal Code of 6 June 1997 (Journal of Laws of 2022, item 1138, 1726, 1855, 2339 and 2600 and of 2023, item 289).
The Act of 27 July 2001 on Court Probation Officers (Journal of Laws of 2014, item 795, as amended).
The Act on Counteracting Family Violence of 29 July 2005 (Journal of Laws of 2020, item 218).
The Act of 29 July 2005 on Counteracting Domestic Violence (Journal of Laws of 2005, No. 180, item 1493).
The Family Assistance and Foster Care System Act of 9 June 2011 (Journal of Laws of 2011, No. 149, item 887).
The Act of 9 March 2023 on amendment of the Act on Counteracting Domestic Violence and certain other acts (Journal of Laws of 2023, item 535).

Court decisions

The decision of the Supreme Court of 15 October 1970, III CRN 275/70, Lex Polonica no. 325840, OSNCP 1971.
The resolution of the Supreme Court of 17 December 1970, VI KZP 43/68, OSNKW 1971.
The resolution of the Supreme Court of 2 October 1991, III CZP 92/91, OSNC 1992.
The resolution of the Supreme Court of 12 June 1992, III CZP 48/92, OSNC 1992/10/179.
The decision of the Supreme Court of 19 June 1997, III CKN 122/97, unpublished, LEX no. 1402785.
The decision of the Supreme Court of 4 March 1999, II CKN 1106/98, SIP no. 1125073.
The decision of the Supreme Court of 12 January 2000, III CKN 834/99, Lexis.pl no. 1517567.
The decision of the Supreme Court of 2 June 2000, II CKN 960/2000, Lexis.pl no. 379813.
The decision of the Supreme Court of 7 September 2000, I CKN 931/2000, Lexis.pl no. 7297899.
The judgment of the Constitutional Court of 28 April 2003, K 18/02 (Journal of Laws of 2003 No. 83, item 772).
The judgment of the Constitutional Court of 12 April 2011, SK 62/08 (Journal of Laws of 2011, No. 87, item 492).
The judgment of the Appellate Court in Białystok of 28 October 2010, I ACa 458/10, OSAB 2010.
The resolution of the Civil Chamber of the Supreme Court of 9 June 1976, III CZP 46/75, OSNC 1976.

Literature

Andrzejewski M., Dolecki H., Lutkiewicz-Rucińska A. *et. al.* (eds.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2010.
Banaszak B., Żukowski Ł.*, Prawo dziecka do ochrony przed przemocą, okrucieństwem, wyzyskiem i demoralizacją – rozwiązania polskie na tle standardów Konwencji o Prawach Dziecka,* [in:] *Konwencja o prawach dziecka. Wybór zagadnień (artykuły i komentarze),* (ed.) S.L. Stadniczeńko, Warszawa 2015.
Bieliński A.K., Pannert M., *Prawo rodzinne*, Warszawa 2011.
Ciepła H. *et al.* (eds.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2011, Articles 109, 111 and 113.

Ciepła H., Ignaczewski J., Skibińska-Adamowicz J., *Komentarz do spraw rodzinnych*, Warszawa 2012.

Dudziak A., *Zespoły interdyscyplinarne. Budowanie koalicji na rzecz przeciwdziałania przemocy domowej,* [in:] *Zagrożenia bezpieczeństwa społecznego. Wybrane problemy*, (eds.) B. Boniek, A. Dudziak, Bydgoszcz 2015, p. 18.

Gajda J. *et al.*, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2012, Article 109.

Gajda J., *Kodeks rodzinny i opiekuńczy. Akty stanu cywilnego. Komentarz*, Warszawa 2002, Article 109.

Gajda J., *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2000, Article 109.

Garlicki L., *Artykuł 18*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz 1*, (ed.) M. Zubik, Warszawa 2016.

Goettel M., *Ingerencja sądu opiekuńczego w sprawowanie władzy rodzicielskiej a prawo rodziców do osobistej styczności z dzieckiem*, "Nowe Prawo" 1983, No. 9–10.

Goettel M., *Prawo rodzinne w pytaniach i odpowiedziach*, Warszawa 2012.

Grobel S., Łukasiewicz R., Wiktor J., *Instytucje prawa rodzinnego*, Warszawa 2014, Lex 205309.

Gromek K., *Władza rodzicielska. Komentarz*, Warszawa 2008.

Haak H., *Władza rodzicielska. Komentarz*, Toruń 1995.

Holewińska-Łapińska E., *Orzeczenie zakazu kontaktów z dzieckiem*, Warszawa 2018.

Holewińska-Łapińska E., *Orzecznictwo w sprawach o pozbawienie władzy rodzicielskiej*, "Prawo w Działaniu. Sprawy Cywilne" 2013, No. 14.

Holewińsk-Łapińska E., *Ustalanie dobra dziecka jako przesłanki ograniczenia kontaktów z dzieckiem w praktyce sądów rodzinnych*, Warszawa 2022.

Ignaczewski J. (ed), *Sądowe Komentarze Tematyczne. Władza rodzicielska i kontakty z dzieckiem*, Warszawa 2015.

Ignatowicz J., Nazar M., *Prawo rodzinne*, Warszawa 2012.

Ignatowicz J., Nazar M., *Prawo rodzinne*, Warszawa 2016.

Jarosz E., Nowak A., *Dzieci ofiary przemocy w rodzinie: raport Rzecznika Praw Dziecka: funkcjonowanie znowelizowanej ustawy o przeciwdziałaniu przemocy w rodzinie*, Warszawa 2012.

Jędrejek G., *Kodeks rodzinny i opiekuńczy. Komentarz aktualizowany*, LEX/el. 2019.

Kawala E., *Kodeks rodzinny i opiekuńczy. Tekst, orzecznictwo*, Toruń 2003.

Kiełtyka A., Ważny A., *Przeciwdziałanie przemocy w rodzinie. Komentarz*, Warszawa 2015.

Kilińska-Pękacz A., *Ograniczenie, zawieszenie i pozbawienie władzy rodzicielskiej jako instytucje prawa rodzinnego służące ochronie dzieci*, "Studia z Zakresu Prawa, Administracji i Zarządzania Uniwersytetu Kazimierza Wielkiego w Bydgoszczy" 2013, Vol. 4, pp. 255–269.

Kociucki L., *Ochrona dziecka przed złym traktowaniem,* [in:] *Konwencja o prawach dziecka. Analiza i wykładnia*, (ed.) T. Smyczyński, Poznań 1999.

Kosek M., Stojanowska W., *Komentarz do niektórych przepisów Kodeksu rodzinnego i opiekuńczego,* [in:] *Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 r. i 10 czerwca 2010 r. Analiza. Wykładnia. Komentarz*, Warszawa 2011.

Krajewski R., *Podstawy prawa rodzinnego*, Warszawa 2003.

Lawson D.M., *Family Violence: Explanations and Evidence-Based Clinical Practice*, "American Counseling Association" 2013, p. 3.

Łapiński A., *Ogólna problematyka ograniczenia władzy rodzicielskiej według art. 109 k.r.o.*, "Palestra" 1974, No. 3.

Moszczyński J., Solodov D., Sołtyszewski I. (ed.), *Przestępczość. Dowody. Prawo. Księga jubileuszowa Prof. Bronisława Młodziejowskiego*, Olsztyn 2016.

Nowicka U., *Pozbawienie władzy rodzicielskiej w polskim porządku prawnym*, "Ius Matrimoniale" 2017, Vol. 28, No. 4, pp. 15–28.

Piątowski J.S. (ed.), *System prawa rodzinnego i opiekuńczego*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1985.

Piskozub P., *Procedura odebrania dziecka na podstawie przepisów ustawy o przeciwdziałaniu przemocy w rodzinie. Problemy praktyczne i postulaty de lege ferenda*, "Teka Komisji Prawniczej PAN Oddział w Lublinie" 2019, Vol. 12, No. 1, pp. 191–199.

Pospiszyl I., *Przemoc w rodzinie*, Warszawa 1994.

Radwański Z., *Prawo cywilne – część ogólna*, Warszawa 2009, pp. 50–65.

Ruszewski J., *Prawo rodzinne*, Suwałki 2011.

Sawicka K., *Model kurateli sądowej*, "Biuletyn Polskiego Towarzystwa Kryminologicznego im. Profesora Stanisława Batawii" 1996, No. 5, pp. 12–21.

Słyk J., *Odbieranie dzieci rodzicom na podstawie art. 12a ustawy z 29.07.2005 o przeciwdziałaniu przemocy w rodzinie*, "Prawo w Działaniu" 2015, No. 24, pp. 263–326.

Smyczyński T., (ed.), *Prawo rodzinne i opiekuńcze*, Warszawa 2014.

Smyczyński T.*, Prawo rodzinne i opiekuńcze*, Warszawa 2012.

Sokołowski T., *Artykuł 113(1)*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, (eds.) H. Dolecki, T. Sokołowski, Warszawa 2013.

Spurek S., *Przeciwdziałanie przemocy w rodzinie. Komentarz,* Warszawa 2021, art. 12a.

Sterna-Zielińska K., *Zakres semantyczny pojęcia rodzina w prawie polskim*, "Krytyka Prawa" 2016 Vol. 8, No. 1, pp. 99–117.

Stojanowska W., Kosek M., *Rola i zadania organów pomocniczych sądu rodzinnego*, "Prawo w Działaniu. Sprawy Cywilne" 2022, No. 50, pp. 73–89.

Stojanowska W., Kosek M., *Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 r. i 10 czerwca 2010 r. Analiza – Wykładnia – Komentarz*, Warszawa 2011.

Stojanowska W., *Rozwód a dobro dziecka*, Warszawa 1979.

Strzebinczyk J., [in:] *System Prawa Prywatnego*, (ed.) T. Smyczyński, Warszawa 2011.

Strzebinczyk J., *Prawo rodzinne*, Warszawa 2013.

Szlendak T., *Socjologia rodziny. Ewolucja, historia, zróżnicowanie*, Warszawa 2012.

Szymczak M., *Słownik Języka Polskiego*, Warszawa 1993.

Trybulska-Skoczelas E., *Artykuł 96(1)*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, (ed.) J. Wierciński, Warszawa 2014.

Tuleja P., *Artykuł 18*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, (eds.) P. Czarny, M. Florczak-Wątor, B. Naleziński, P. Radziewicz, P. Tuleja,LEX/el. 2021.
Węgliński A., *Skuteczność i jakość oddziaływań wychowawczych w warunkach nadzorów kuratorskich,* [in:] *Sukcesy i porażki poprawiania niepoprawnych*, (ed.) I. Pospiszyl, Kielce 2009.
Winiarz J., *Prawo rodzinne*, Warszawa 1996, p. 58.
Wójcik S., *Przemoc fizyczna wobec dzieci*, "Dziecko Krzywdzone" 2012, No. 2(39).
Zajączkowska-Burtowy J., *Artykuł 113(3)*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, (eds.) M. Fras, M. Habdas, Warszawa 2021.
Żelichowski M., *Prawnokarna ocena pobierania embrionalnych komórek macierzystych*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2000, No. 2, pp. 69–82.

ABOUT AUTHOR

Nina Maciejczyk-Krysiak – Graduate of Law at the Faculty of Law and Administration of Cardinal Stefan Wyszynski University in Warsaw, doctoral student, advocate, member of the Bar Association in Warsaw. Author of academic articles and co-author of academic publications in the field of international law and the European Union. Participant of academic conferences and research projects in the field of law.
ORCID: 0000-0001-5473-522X

Michał Poniatowski
CARDINAL STEFAN WYSZYŃSKI UNIVERSITY IN WARSAW

Counteracting domestic violence as part of the collaboration between public and non-public entities

1. Introduction

Acts of unlawful violence within contemporary democratic societies, which acknowledge human dignity, are not universally accepted. It is being combated gradually by the society itself, and consequently, through successive changes in the legal order.[1] Regrettably, notwithstanding numerous legal revisions, the

[1] It is noteworthy that the Constitution, guided by constitutional axiology (welfare of the child) incorporates a standard obliging public authorities to ensure the protection of children from violence. *Cf.* also Article 72(1) of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997 No. 78, item 483, as amended). This obligation is absolute. *Cf.* the judgement of the Supreme Court of 14 April 2021 (ref. I NSNc 36/21, published on www.sn.pl, Legalis No. 2558040, Lex No. 3162700). Furthermore, the Constitution encompasses numerous standards safeguarding additional values, including dignity (Article 30), life (Article 38), and health (Article 68(1), a facet of considerable importance within the framework of addressing domestic violence. *Cf.* also M. Grabowski, *Konstytucyjne obowiązki państwa w zakresie ochrony osób zagrożonych lub pokrzywdzonych przestępczością jako wyraz aksjologii systemu prawnego*, [in:] *Podstawy przeciwdziałania przestępczości oraz pomocy osobom pokrzywdzonym. Interpretacja i kierunki zmian*, P. Sobczyk, (ed.), Warszawa 2020, pp. 39–51; B. Majchrzak, *Podstawy aksjologiczne regulacji prawnych dotyczących przeciwdziałania przemocy w rodzinie*, [in:] *Podstawy przeciwdziałania przestępczości oraz pomocy osobom pokrzywdzonym. Konkretyzacja i realizacja*, P. Sobczyk (ed.), Warszawa 2020, pp. 133–144. Due to their inherent structure, constitutional norms necessitate specificity in subordinate norms for optimal efficacy. It is imperative to note that constitutional axiology emanates from the societal axiology, subsequently finding

eradication of violence from societal dynamics remains elusive, and practical expectations for such elimination in the future are challenging. New forms of violence are constantly appearing which necessitates prompt and imminent responses from the legislator.[2] Domestic violence is among manifold expressions of violence. Moreover, the endeavour to combat such violence gives rise to corresponding normative modifications. Presently, the endeavour to combat domestic violence is integral to the fabric of European legal culture.[3] Such violence is often complex and with a multifaceted nature.[4]

It is noteworthy that various entities, encompassing both public and non-public spheres, aspire to the objective of preventing domestic violence. However, the well-intentioned efforts of private entities or the determined initiatives of public entities to address domestic violence in isolated cases may prove

expression in the operational activities of non-governmental organisations, churches, and other religious associations. This holds significance within the context of establishing the foundation for collaboration between public and non-public entities in the realm of preventing domestic violence.

[2] For example, in cyberspace. It cannot be ruled out that emerging manifestations of domestic violence may be linked to the utilisation of artificial intelligence (e.g., individuals employing such violence could potentially be aided by algorithms to amplify its occurrence, even if solely through psychological inquiries).

[3] In comparative terms, it is worth noting the judgement of the European Court of Human Rights of 15 June 2021 [Grand Chamber] *Kurt v. Austria,* § 99 (application No. 62903/15, published on HUDOC), in which the Court analysed data on the laws of 42 member states of the Council of Europe. Notably, each of these countries has implemented a range of protective or preventative measures pertaining to domestic violence within various legal domains, including criminal, civil, or administrative law. Among them, 28 countries have instituted distinct regulations addressing domestic violence, specifically in relation to proscribing access to or proximity with affected individuals, along with arrangements for the placement of victims in shelters (14 countries) or instructing perpetrators in adopting non-violent behaviour (7 countries). It is also worth mentioning international law of regional scope in the form of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, drawn up on 11 May 2011 in Istanbul (Journal of Laws of 2015, item 961), hereinafter referred to as Istanbul Convention. The fight against domestic violence extends beyond the confines of Europe, as evidenced by the provisions articulated in numerous international acts. *Cf.* Articles 17, 19(1) Convention on the Rights of the Child, drawn up on 20 November 1989 in New York (Journal of Laws of 1991, No. 120, item 526) and Article 16(1) of the Convention on the Rights of Persons with Disabilities, drawn up on 13 December 2006 in New York (Journal of Laws of 2012, item 1169).

[4] Simultaneously, it is characteristic for instances of domestic violence to be concealed, both by the perpetrators and victims, as well as by the bystanders. Consequently, the prevention of domestic violence itself becomes inherently intricate.

insufficient. In such instances, it becomes apparent that effective outcomes may only be realised through the collaborative engagement of these entities.

This collaboration stems, on the one hand, from the obligation to carry out tasks defined by law on the part of public entities.[5] On the other hand, there is no such direct obligation on the part of a non-public entity.[6] Non-public entities have the opportunity to engage in collaboration with public entities during the execution of statutory obligations. The obligation for this collaboration currently derives, among other things, *expressis verbis* from Articles 9, 18(2) of the Istanbul Convention and Article 9(1) of the Act on Counteracting Domestic Violence of 29 July 2005.[7] This manuscript aims to analyse the interplay between public and non-public entities in the realm of counteracting domestic violence within the scope of the Polish legal framework, placing particular emphasis on the collaborative dynamics delineated by the Act on Counteracting Domestic Violence.

2. Historical outline

At this point, it is imperative to ascertain whether the collaboration between public and non-public entities for the prevention of domestic violence constitutes a novel development within the Polish legal framework. First, it is necessary to address the collaboration itself as a legal principle. Examples of such collaboration include constitutional, international, community or statutory norms. In the first case, one can point to Article 25(3) of the Constitution of 1997, according to which: "*The relationship between the State and churches and other religious*

[5] In the case law of the European Court of Human Rights, there exists a viewpoint positing the state's affirmative duty to establish and effectively implement a punitive system for all manifestations of domestic violence, coupled with the provision of adequate guarantees for the victim. *Cf.* ECHR judgement of 9 June 2009, *Opuz v. Turkey,* § 145 (application No. 33401/02, published on HUDOC). The obligation to prevent domestic violence stems from Article 8 of the Convention, which protects private and family life. *Cf.* ECHR judgement of 5 March 2009, *Janković v. Croatia,* § 45 (application No. 38478/05, published on HUDOC).

[6] *Cf.* also I. Sierpowska, *Pomoc społeczna. Komentarz*, Warszawa 2014, p. 35.

[7] *Cf.* Article 9(1) of the Act on Counteracting Domestic Violence. This obligation applies only to public entities, as non-public entities may or may not undertake such collaboration. *Cf.* also I. Sierpowska, *Pomoc społeczna. Komentarz*, Warszawa 2014, p. 35.

organisations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of collaboration for the individual and the common good."[8] This provision is general and applies to all religious associations. At this point, it is pertinent to add that while the Constitution does not explicitly incorporate such a principle concerning non-governmental organisations, the collaboration between the state and non-governmental organisations can be inferred from the principle of subsidiarity, encompassed, among other things, within the preamble.[9] Thus, the collaboration between non-governmental organisations, churches and other religious associations generally derives from norms of constitutional rank. Illustratively, as a specimen of an international legal norm, reference can be made to Article 1 of the Concordat of 1993, wherein the Republic of Poland and the Holy See mutually committed to collaborate for human development and the common good.[10] It is noteworthy that the prevention of domestic violence unequivocally falls within the ambit of considerations for human welfare, development, and the common good. Ensuring human welfare and the common good necessitates the prevention of domestic violence. The collaborative dynamics between public and non-public entities are also delineated by Community law, which, subsequent to Poland's accession to the European Union in 2004, is applicable within the Polish legal framework. This legal framework does not remain indifferent to the endeavours of non-governmental organisations. According to Article 11(2) of the Treaty on European Union of 7 February 1992[11] and with reference to

[8] Some representatives of the doctrine assess that the constitutional principle of collaboration promulgated in Article 25(2) of the Constitution is a significant declaration by the Polish legislature. *Cf.* P. Sobczyk, *Konstytucyjne podstawy współdziałania państwa i Kościoła na rzecz ochrony i opieki nad małżeństwem i rodziną*, [in:] *Katolickie zasady relacji państwo–Kościół a prawo polskie*, J. Krukowski, M. Sitarz, H. Stawniak (eds.), Lublin 2015, p. 190.

[9] *Cf.* also M. Bielecki, *Współdziałanie podmiotów samorządowych z podmiotami wyznaniowymi. Wybrane aspekty*, "Studia z Prawa Wyznaniowego" 2008, Vol. 11, p. 195. Among legal scholars, there is a perspective that the principle of subsidiarity incorporates a positive dimension (obligation to render assistance), and a negative dimension (prohibition of assistance when a subordinate entity does not need it). *Cf.* M. Piechowiak, *Komentarz preambuły*, [in:] *Konstytucja RP. Vol. 1. Komentarz, Art. 1–86*, M. Safjan, L. Bosek (ed.), Warszawa 2016, p. 149.

[10] Concordat between the Holy See and the Republic of Poland of 28 July 1993 (Journal of Laws of 1998, No. 51, item 318).

[11] Consolidated version, Journal of Laws of 2004, No. 90, item 864, as amended.

associations: "*Institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.*"[12]

At the legislative level, many more norms mandate public entities to engage in specific collaboration with non-governmental organisations, churches, other religious associations, or their organisational units. Such collaboration can assume a general or specific nature. In the former instance, one can cite the overarching obligation of municipalities, counties, or provinces to collaborate with non-public entities.[13] Conversely, in the latter scenario, both concerning subject matter and chronological aspects, these norms pertain, among other considerations, to collaborative efforts in counteracting alcoholism,[14] family planning

[12] In the context of the European Union's functioning, the European Economic and Social Committee serves as an arena for collaborative action among non-public entities, notably including representatives of civil society (known as "Group III"). *Cf.* https://www.eesc.europa.eu/pl/o-komitecie [accessed on 15.06.2023]. *Cf.* also Articles 301–304 of the Treaty on the Functioning of the European Union of 25 March 1957 – consolidated version (Journal of Laws of 2004, No. 90, item 864, as amended).

[13] *Cf.* Article 7(19) of the Act of 8 March 1990 on Communal Self-Government (consolidated text Journal of Laws of 2023 item 40, as amended); Article 4(1)(22) of the Act of 5 June 1998 on Poviat Self-Government (consolidated text Journal of Laws of 2022, item 1526, as amended); Article 12(1)(4) of the Act of 5 June 1998 on Voivodeship Self-Government (consolidated text Journal of Laws of 2022, item 2094, as amended). The collaboration set forth in these acts is not precluded by taking up collaboration in the field of counteracting domestic violence. *Cf.* also A. Olejniczak, *Standardy i procedury związane ze współpracą trzeciego sektora z administracją publiczną*, [in:] A. Olejniczak, R. Barański, *Standardy i procedury w organizacjach pozarządowych. Dokumentacja stanowiąca narzędzie skutecznej i zgodnej z prawem działalności*, Warszawa 2013, p. 163; S. Spurek, *Komentarz do art. 9*, [in:] *Konwencja o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej. Komentarz*, E. Bieńkowska, L. Mazowiecka (eds.), Warszawa 2016, p. 188. Within the scope of a powiat, one can also find collaboration between public and non-public entities in the field of foster care. *Cf.* Article 76(4)(8) of the Act of 9 June 2011 on Family Support and the Foster Care System (consolidated text, Journal of Laws of 2022, item 447, as amended).

[14] *Cf.* Article 1(2)–(3) of the Act of 26 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism (consolidated text, Journal of Laws of 2023, item 165, as amended). It is noteworthy that the initial formulation of this act of 1982 already incorporated, notwithstanding the prevalent model of "hostile separation" in effect at that time, the obligation of state authorities and administration to cooperate with the Catholic Church and other churches and religious associations in the sphere of upbringing in sobriety and counteracting alcoholism. This is indeed surprising, given that the government of that time prohibited charitable activities by Caritas, which only resumed after 1989. The literature highlights that one practical challenge in counteracting alcoholism is the absence of coordinated collaboration between non-governmental entities and public and local administration. *Cf.* Z. Zarzycki, *Współdziałanie Kościołów i innych związków*

(encompassing the establishment of foster families),[15] safeguarding health against the consequences of tobacco consumption,[16] public benefit endeavours,[17] and social assistance.[18] Each of these acts did not neglect to consider churches and other religious associations as potential counterparts for collaboration with public entities. It is noteworthy that the incorporation of these collaboration principles into acts occurred both prior to and subsequent to the promulgation of the Constitution itself. In the historical context, it is noteworthy to include that collaboration could be conducted, among other avenues, already based on Article 1(3) of the Act of 26 October 1982, on Upbringing in Sobriety and Counteracting Alcoholism (also in its original iteration). However, it was only after 1989, due to political transformation, that the collaboration between public and non-public entities saw greater fruition facilitated by the introduction of numerous norms in religious law, which in turn allowed for more extensive charitable and welfare activities.[19] A subsequent enhancement of potential

wyznaniowych w zakresie wychowania w trzeźwości i przeciwdziałania alkoholizmowi. Wybrane zagadnienia prawne, "Studia z Prawa Wyznaniowego" 2007, Vol. 10, pp. 26–27.

[15] *Cf.* Article 3(1) of the Act of 7 January 1993 on Family Planning, Protection of Human Fetus and Conditions for Permissibility of Abortion (consolidated text, Journal of Laws of 2022, item 1575).

[16] *Cf.* Article 1 of the Act of 9 November 1995 on Health Protection Against the Consequences of Using Tobacco and Tobacco Products (consolidated text, Journal of Laws of 2023, item 700).

[17] *Cf.* Article 5(1) of the Act of 24 April 2003 on Public Benefit Activities and Voluntary Work (consolidated text, Journal of Laws of 2023, item 571).

[18] *Cf.* Article 2(2) of the Act of 12 March 2004 on Social Assistance (consolidated text, Journal of Laws of 2023, item 901, as amended). It is worth adding that domestic violence is a stand-alone premise for providing social assistance to individuals and families. *Cf.* Article 7(7) of the Act on Social Assistance. *Cf.* also the judgement of the Constitutional Tribunal of 6 May 2008, (ref. K 18/05, publ. OTK ZU 4A/2008, item 56; Journal of Laws of 2008, No. 82, item 503).

[19] For example, according to Article 39(5) of the Act of 17 May 1989 on the Relationship between the State and the Catholic Church in the Republic of Poland: *"Charitable and welfare activities of the Church include, in particular:* [...] *running nurseries, day care centres, boarding schools and shelters."* It is noteworthy that the traditional provision of shelters by religious associations, including those catering to victims of domestic violence, plays a crucial role in the efforts to counter domestic violence. On a comparative note, it is worth mentioning that concerning Austria, the Committee operating under the Convention on the Elimination of All Forms of Discrimination against Women (adopted in 1979 by the United Nations General Assembly), in its concluding observations on Austria's ninth periodic report dated 30 July 2019, recommended fostering collaboration with non-governmental organisations offering shelter and rehabilitation services for victims. *Cf.*

collaboration occurred with the regulation of public benefit activities upon the enactment of the norms outlined in the Act of 24 April 2003 on Public Benefit Activity and Voluntary Work.[20] It is of course pertinent to acknowledge the undertakings of foundations and associations under preceding legislations.[21] Simultaneously, it is crucial to highlight that within the Polish legal framework, prior to the implementation of the Act on Counteracting Domestic Violence (initially family violence) on 21 November 2005, efforts to combat this phenomenon centred on the application of Article 207 of the Act of 6 June 1997, the Criminal Code.[22] During that period, the collaboration between non-public and public organisations could encompass, among other aspects, the involvement of social organisations in criminal proceedings.[23] However, criminal regulations alone have proven insufficient.[24]

ECHR judgement of 15 June 2021, [Grand Chamber] *Kurt v. Austria* § 92. The act of individuals affected by domestic violence leaving their homes and seeking refuge elsewhere may potentially be construed as a breach by public authorities of their affirmative obligation to undertake suitable measures to ensure their protection. *Cf.* ECHR judgement of 15 September 2009, *E.S. and Others v. Slovakia* § 51 (application No. 8227/04, published on HUDOC). *Cf.* also the judgement of the Constitutional Tribunal of 4 November 2010 (ref. K 19/06, publ. OTK ZU 9A/2010, item 96, Journal of Laws of 2010, No. 215, item 1418).

[20] Consolidated text, Journal of Laws of 2023, item 571. For example, such an activity is the prevention of addiction and social pathologies. *Cf.* Article 4(1)(32) of the Act on Public Benefit Activities and Voluntary Work.

[21] *Cf.* the Act of 6 April 1984 on Foundations (consolidated text, Journal of Laws of 2023 item 166), the Act of 7 April 1989, Law on Associations (consolidated text, Journal of Laws of 2020, item 2261).

[22] Consolidated text, 2022, item 1138, as amended). The explanatory statement to the bill on counteracting family violence highlights that such violence may manifest in other criminal offences, encompassing impairment of the functioning of a bodily organ or health disturbances (Article 157 of the Penal Code), unlawful threats (Article 190 of the Penal Code), battery (Article 217 of the Penal Code), and the crime of rape (Article 197 of the Penal Code). At the same time, it is noteworthy that norms were already introduced in the pre-war period with the aim of combating the abuse of a minor or a powerless person. *Cf.* Article 246(1) of the Regulation of the President of Poland of 11 July 1932, Penal Code (Journal of Laws 1932, No. 60, item 571).

[23] According to the original wording of Article 90 § 1 of the Act of 6 June 1997, the Code of Criminal Procedure (consolidated text, Journal of Laws of 2022, item 1375, as amended): "*In judicial proceedings, prior to the commencement of the judicial examinations, the right to participate in the proceedings may be petitioned by a representative of a community organisation, if there is a need to defend a community interests within the statutory purposes of such an organisation, especially in matters pertaining to the protection of human rights and freedoms.*"

[24] The case law of the European Court of Human Rights underscores the duty of the authorities to avoid a dangerous domestic violence situation as soon as possible (immediately).

In general, the collaboration between public and non-public entities in the Polish legal framework concerning shared objectives is not a recent development, as these entities already possess experience in such collaboration (in particular, the centuries-long experience of religious associations should be noted).[25] Notably, the extensive scope of this collaboration allows public and non-public entities to delineate it in specific terms. Additionally, the statutory norms outlined above indicate that, beyond cooperating with churches and other religious associations, public entities are presently authorised to explicitly collaborate with other non-public entities. The collaboration of public and non-public entities is an important and traditional element of the Polish legal order.[26]

At this point, it becomes essential to explore the potential for collaboration between public and non-public entities in the realm of counteracting domestic violence. Such collaboration may result: 1) implicitly from the aforementioned norms that generally outline the scope of collaboration and norms that specifically outline the scope of collaboration, albeit within a similar domain (such as social assistance, counteracting alcoholism, or public benefit activities); or 2) explicitly from norms pertaining to collaboration in the domain of counteracting domestic violence.

In instances where explicit norms delineate the collaboration between public and non-public entities in the domain of counteracting domestic violence, it is imperative to underscore, adhering to the criterion of the hierarchy of sources of common law, the significance of norms at both the international and statutory levels. Based on Article 9 of the Istanbul Convention: "*Parties shall recognise,*

Cf. ECHR judgement of 2 March 2017, *Talpis v. Italy,* § 114 (application No. 41237/14, published on HUDOC); ECHR judgement of 15 June 2021, [Grand Chamber] *Kurt v. Austria,* § 165. Failure to do so can lead to impunity for the violent person. *Cf.* ECHR judgement of 28 June 2016, *Halime Kılıç v. Turkey,* § 99 (application No. 63034/11, published on HUDOC). In this context, it is imperative to emphasise the significance of implementing existing legal measures. *Cf.* ECHR judgement of 28 June 2016, *Halime Kılıç v. Turkey,* § 98. Investigation of domestic violence cases must be prompt and thorough and conducted with due diligence. *Cf.* ECHR judgement of 9 July 2019, *Volodina v. Russia,* § 92 (application No. 41261/17, published on HUDOC).

[25] *Cf.* also I. Sierpowska, *Prawo pomocy społecznej*, Warszawa 2011, pp. 88–89.

[26] Simultaneously, it is noteworthy to observe the utilisation, in laws enacted subsequent to the promulgation of the Constitution, namely the Act on Public Benefit Activity and Volunteerism and the Act on Social Assistance, of the term "cooperation" (*współpraca*) instead of the consistent "collaboration" (*współdziałanie*) employed in Article 25(3) of the Constitution.

encourage and support, at all levels, the work of relevant non-governmental organisations and of civil society active in combating violence against women and establish effective collaboration with these organisations."[27] It is worth noting the recognition of the past activities of non-governmental organisations to combat violence against women as part of domestic violence. In addition, the phrase "*cooperation*" was used. Thus, the convention recognised the past achievements and experience of non-governmental organisations in this area. It is also pertinent to consider and determine the extent of collaboration. This is because this determination is supposed to be effective (and not any kind). Effectiveness can be spoken of when the phenomenon of violence is reduced. If this is not the case, a conclusion should be drawn to increase the degree of cooperation between public and non-public entities. In addition, it should be noted that collaboration cannot be narrowed down to a bilateral relationship only. The convention refers to the collaboration of all relevant state authorities with non-governmental organisations and other entities competent to provide protection and support to victims and witnesses of all forms of violence as defined in the convention. Thus, multi-stakeholder cooperation is emerging.

Within the context of the Polish legal framework and considering the historical perspective, the aforementioned cooperation should not be viewed as a catalyst for revolutionary changes in the Polish legal order. For almost 18 years, there has existed a norm that explicitly mandates public entities to engage in

[27] At the same time, in the explanatory statement to the government's bill on ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, drawn up in Istanbul on 11 May 2011, it was pointed out in the context of Article 9 of the Convention, that in Poland, the majority of efforts aimed at preventing domestic violence are conducted in collaboration with non-governmental organisations. *Cf.* Druk sejmowy No. 2515 (seventh term). Additionally, in accordance with Article 18(2) of the Convention: *"Parties shall take the necessary legislative or other measures, in accordance with internal law, to ensure that there are appropriate mechanisms to provide for effective cooperation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities, in protecting and supporting victims and witnesses of all forms of violence covered by the scope of this Convention, including by referring to general and specialist support services as detailed in Articles 20 and 22 of this Convention."* It is worth mentioning that the collaboration of non-governmental organisations and public entities in the field of domestic violence was also noted by the Court in the case of *Opuz v. Turkey*. *Cf.* ECHR judgement of 9 June 2009, *Opuz v. Turkey,* § 156.

collaboration with non-public entities in the counteracting domestic violence.[28] According to the original wording of Article 9(1) of the Act of 29 July 2005 on Counteracting Domestic Violence:[29] "*Government and self-government bodies collaborate with non-governmental organisations and churches and religious associations in providing assistance to people affected by violence, influencing those who use violence and raising public awareness of the causes and consequences of family violence*." Compared to the Istanbul Convention, this norm does not include a minimum degree of collaboration, which must be marked as critical. In practice, it might transpire that concealing the collaboration by public entities could be construed as fulfilling their mandated responsibilities. The act employs the term "collaboration" instead of the convention's usage of "cooperation".[30] Furthermore, explicit reference was made to churches and religious associations, which, within the Polish legal framework, constitute a significant subjective element in terms of contributing to human welfare and the common good. The enumeration of three collaboration scopes should be construed as an illustrative list. Consequently, the entities mentioned can engage to a greater extent in the context of counteracting domestic violence. Simultaneously, considering the essence of counteraction, it is prudent to reverse the order of the exemplary collaboration framework delineated in that norm. Initially, there is a need to raise awareness and influence those who perpetrate violence, thereby minimising the necessity to assist those affected. Only then is the counteraction effective. The current wording of the act points to examples of raising the above-mentioned public awareness, as well as changing the criticised phrase "*family violence*" to "*domestic*

[28] It is worth noting that the Act on Counteracting Domestic Violence was modeled, according to the text of the law's explanatory memorandum, among other things, on the 1997 Austrian solutions.

[29] Consolidated text, Journal of Laws of 2021 item 1249, as amended.

[30] However, the act also uses the term cooperation. In accordance with Article 10a(3)(8) of the Act on Counteracting Domestic Violence, the tasks of the Monitoring Team for Counteracting Domestic Violence is to create, in cooperation with non-governmental organisations and churches and religious associations, mechanisms for informing about the standards for providing assistance to persons experiencing domestic violence and work with those who perpetrate domestic violence. *Cf. ibid.*, Article 9d(3). It seems that the correct concept is the consistent use of the term of collaboration (*współdziałanie*), which is used, among other things, in the Constitution itself. The difference between the concepts of collaboration and cooperation was analysed among representatives of the law on religious denominations, among others.

violence,"[31] which corresponds to the terms used in the Istanbul Convention[32] and the case law of the European Court of Human Rights.[33] The change in terms does not mean that family violence no longer exists. In the same way, it does not mean that there was no previous violence in communities other than the family. Thus, the Act on Counteracting Domestic Violence has made a certain concentration of norms for this counteraction. However, it is not exhaustive to this day, and the counteracting of domestic violence is regulated by many norms of different branches of the law. The comment on the dispersion of norms also applies to the very collaboration of public and non-public entities.

Taking the aforementioned into consideration, one can deduce that counteraction in the domain of domestic violence within the framework of collaboration between public and non-public entities is firmly established in the Polish legal order. This collaboration was in place even before the current Constitution came into force. Prior norms facilitated the aforementioned counteraction initially implicitly and subsequently explicitly within the context of the principle of collaboration, articulated in various formulations. On one hand, it pertains to collaboration with churches and other religious associations or their organisational units, as well as non-governmental organisations in the broadest sense (in both cases at the levels of constitutional, international, and statutory norms). The absence of explicit inclusion in the broadly formulated principle of collaboration does not preclude engagement in collaborative efforts for the prevention of domestic violence. While providing specific details regarding collaboration

[31] The inconsistent use of the terms of domestic violence and family violence was also pointed out by the Supreme Court in its resolution of 31 March 2021 (ref. I KZP 7/20, published on www.sn.pl, Legalis No. 2554559, Lex No. 3154245).

[32] *Cf.* Article 3(b) of the Istanbul Convention.

[33] It is worth noting that the case law of the European Court of Human Rights primarily uses the term "domestic violence". *Cf.* ECHR judgement of 2 March 2017, *Talpis v. Italy,* § 76; ECHR judgement of 9 July 2019, *Volodina v. Russia,* § 92; ECHR judgement of 15 June 2021, [Grand Chamber] *Kurt v. Austria,* § 99. However, one can find judgements that also use the term of family violence as a form of general violence. *Cf.* ECHR judgement of 25 June 2019 [Grand Chamber] *Virgiliu Tănase v. Romania,* § 119 (application No. 41720/13, published on HUDOC). At the same time, it is worth noting that the term "violence" in *"close relationships"* is also at use. *Cf.* paragraph 18) of the preamble of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA (OJ EU L 2012, No. 315).

in the realm of counteracting domestic violence facilitates its execution, such precision may encounter the possibility of conflicting norms. Therefore, it is crucial to interpret the principle of collaboration as stipulated in Article 9 of the Act on Counteracting Domestic Violence in a comprehensive context, with particular consideration given to the guidance of historical, systemic, and functional interpretation.[34] In the historical context, it is also noteworthy to mention that the examined collaboration between public and non-public entities has manifested in varying degrees. While by its inherent nature it should be executed effectively, the degree of implementation is explicitly guaranteed in the Istanbul Convention. As a result, statutory collaboration should also be implemented to the extent ensuring its effectiveness.

3. Subjective aspect

At this point, it is imperative to acknowledge the parties involved in the collaboration between public and non-public entities in the Polish legal framework, as this collaboration cannot exist by its very nature without them. Public entities, guided by the principle of legality, must operate on a specific legal foundation.[35] In its absence, the collaboration between public and non-public entities in the

[34] The subsidiarity of these types of interpretation is pointed out in the case law of administrative courts. *Cf.* also the resolution of the Supreme Administrative Court of 17 January 2011 (ref. II FPS 2/10, published on CBOSA). This observation pertains specifically to the content of the Act on Counteracting Domestic Violence, often scrutinised without reference to other normative acts.

[35] *Cf.* Article 7 of the Constitution. According to the judgement of the Voivodeship Administrative Court in Wrocław of 7 March 2012 (ref. IV SA/Wr 710/11, published on CBOSA): *"In the rule of law, organs of public authority shall function on the basis of, and within the limits of, the law. It follows from the constitutional principle of the law and order (Article 7) that the tasks and competencies, the manner in which they are exercised, and the ties between public administration entities are regulated by law. In exercising the competence, the authority must take into account the content of the statutory norm. Deviation from this rule generally constitutes a material violation of the law." Cf.* also the judgement of the Constitutional Tribunal of 14 June 2000 (ref. P 3/00, publ. OTK ZU 5/2000, item 138, Official Journal of 2000, No. 50, item 600). According to the Constitutional Tribunal, the principle of legality is the essence of a democratic rule of law. *Cf.* the judgement of the Constitutional Tribunal of 20 April 2020 (ref. U 2/20, publ. OTK ZU A/2020, item 61, Monitor Polski 2020, item 376).

field of counteracting domestic violence is not feasible. Consequently, not every public entity is capable of engaging in such collaboration. In terms of public entities, it is possible to list entities directly listed in the Act on Counteracting Domestic Violence ("statutory" entities) as well as entities that are not listed in the act, but collaborate on different legal grounds with non-public entities in the field of counteracting domestic violence ("non-statutory" entities).

In the first case, self-government bodies should be pointed to. In the case of self-government units, they execute, among other responsibilities, their own tasks and, correspondingly, tasks mandated in the realm of counteracting domestic violence, which will be expounded upon in the subsequent section of the manuscript focusing on the objective aspect.

In the realm of collaboration between self-government bodies and non-public entities, the institution that holds a distinctive position for practical reasons is the one operating in the municipality known as the "interdisciplinary team", appointed by a bailiff, mayor, or city president.[36] The broad membership of this team also includes representatives of non-governmental organisations.[37] Within the framework of the team's operation, representatives of non-governmental organisations play a role in shaping various aspects, including the development and approval of regulations specifying the detailed conditions for the team's functioning, the method and procedure for appointing diagnostic and assistance groups, and the overall functioning of the team itself. It is worth adding that representatives of non-governmental organisations may be part of the diagnostic and assistance group appointed by the interdisciplinary team.[38] The procedure

[36] The resolution of the communal council, which determines the procedure and manner of appointment and dismissal of this team, constitutes an act of local law. *Cf.* the judgement of the Voivodeship Administrative Court in Gdańsk of 27 March 2020 (ref. III SA/Gd 35/20, published on CBOSA). However, the communal council itself cannot appoint members of the interdisciplinary team, including representatives of non-governmental organisations. *Cf.* the judgement of the Voivodeship Administrative Court in Bydgoszcz of 5 February 2020 (ref. II SA/Bd 1052/19, published on CBOSA).

[37] *Cf.* Article 9a (3)(6) of the Act on Counteracting Domestic Violence. It would be inaccurate to explicitly limit the scope of this norm solely to representatives of non-governmental organisations while neglecting representatives of churches and other religious associations or their organisational units, who should be regarded on an equal basis. Therefore, it is imperative to advocate for an amendment to this standard to ensure the participation of representatives from these entities as well. On the other hand, non-public entities do not need to "delegate" representatives. This is their right, but not their obligation.

[38] *Cf. ibid.*, Article 9a(11d).

and manner of appointing and dismissing members of the interdisciplinary team is determined by resolution of the communal council.[39] The activities of a representative of a non-governmental organisation who is a member of the interdisciplinary team, or a member of the diagnostic and assistance group, may be complained about by a person subject to the "*Niebieska Karta*" (Blue Card) procedure.[40] Representatives of non-governmental organisations within the interdisciplinary team and the diagnostic and assistance group undertake various tasks in collaboration with representatives of public entities.[41]

In addition to self-government administrative bodies, the Act on Counteracting Domestic Violence lists government administrative bodies. The first entity to be mentioned is the Council of Ministers, which have adopted the Governmental Programme for Counteracting Domestic Violence.[42] It is executed at the central level by the National Coordinator for the Implementation of the Governmental Programme for Counteracting Domestic Violence, holding the rank of secretary or undersecretary of state in the office serving the minister in charge of social security.[43] However, the implementation of this programme

[39] *Cf. ibid.*, Article 9a(15).

[40] *Cf. ibid.*, Article 9a(7h), Article 9b(16).

[41] According to Article 9b(2) of the Act on Counteracting Domestic Violence, the tasks of the interdisciplinary team include "[...] *creating conditions that enable the implementation of tasks in the field of counteracting domestic violence and integrating and coordinating the activities of the entities referred to in Article 9a(3)–(5), in particular by: 1) diagnosing the problem of domestic violence at the local level; 2) initiating preventive, educational and informational activities aimed at counteracting domestic violence and entrusting their implementation to relevant entities; 3) initiating activities in relation to persons experiencing domestic violence and those perpetrating domestic violence; 4) developing a draft communal programme to prevent domestic violence and protect persons experiencing domestic violence; 5) disseminating information on institutions, persons and opportunities for assistance in the local environment; 6) establishing diagnostics and assistance groups and non-governmental ongoing monitoring of their tasks; 7) monitoring of the "Niebieska Karta" procedure; 8) providing information referred to in Article 9e(3), and the documentation referred to in Article 9c(5a); 9) directing a person perpetrating domestic violence to participate in a correctional-educational programme for persons perpetrating domestic violence or a psychological and therapeutical programme for persons perpetrating domestic violence; 10) submitting, at the request of the diagnostics and support group, a notification of the commission of an offence by a person using domestic violence, as referred to in Article 66c of the Act of 20 May 1971 – Code of Petty Offences* [...]." An open-ended catalogue of tasks of the diagnostics and support groups is specified in Article 9b(8) of the Act on Counteracting Domestic Violence.

[42] *Cf. ibid.*, Article 10(1).

[43] *Cf. ibid.*, Article 10(2).

at the voivodeship level is the responsibility of the Voivodship Coordinator for the Implementation of the Governmental Programme for Counteracting Domestic Violence.[44] It is crucial to highlight the duties of the voivode, which include, among other responsibilities, overseeing the execution of tasks in the realm of countering domestic violence carried out by non-public entities based on agreements with government and self-government bodies.[45] Another entity is the Monitoring Team for the Counteracting Domestic Violence, which is a consultative and advisory body of the minister in charge of social security. The tasks of this team include, among others, expressing opinions on public tasks in the area of counteracting domestic violence and on the commissioning of these tasks for implementation by non-governmental organisations, churches and religious associations,[46] as well as creating, in cooperation with these entities, mechanisms for informing about the standards for providing assistance to persons experiencing domestic violence and working with persons perpetrating domestic violence,[47] expressing opinions on the commissioning of public tasks in the area of counteracting domestic violence for implementation by non-governmental organisations, churches and religious associations.[48] The task of the aforementioned team is also to cooperate with non-governmental organisations, churches, and religious associations to develop mechanisms for disseminating information about the standards for providing assistance to individuals experiencing domestic violence and engaging with domestic violence.[49] It is noteworthy that this team comprises twelve representatives from non-governmental organisations, unions, and associations of non-governmental organisations, as well as churches and religious associations, who are appointed by the minister in charge of social security from among individuals proposed by these entities.[50]

---

[44] *Cf. ibid.*, Article 10(3).

[45] *Cf. ibid.*, Article 7(1)(6). The voivode may supervise the analysed collaboration for compliance with common law.

[46] *Cf. ibid.*, Article 10a(1)(6).

[47] *Cf. ibid.*, Article 10a(1)(8).

[48] *Cf. ibid.*, Article 10a(3)(6).

[49] *Cf. ibid.*, Article 10a(3)(8). In relation to this information, it is pertinent to highlight that religious associations, in particular, possess an organisational structure that facilitates the dissemination of specific information to a broad audience. For instance, parishes can play a helpful role in such an information dissemination process.

[50] *Cf. ibid.*, Article 10b(1)(4).

Public entities engaging in collaboration with non-public entities in the field of counteracting domestic violence may encompass various entities that are not explicitly enumerated in the Act on Counteracting Domestic Violence. These entities may include courts, prosecutors, and law enforcement agencies, which can engage in collaboration with non-public entities within the context of applied proceedings, as will be outlined later.[51]

Subjectively, it is also crucial to allude to the complementary side of the collaboration, namely non-governmental organisations and churches and other religious associations. Many legal definitions of a non-governmental organisation can be found in the Polish legal order. One such definition is articulated in Article 3(2) of the Act of 24 April 2003 on Public Benefit Activity and Voluntary Work,[52] wherein non-governmental organisations are described as entities: "*1) not being units of the public finance sector within the meaning of the Act of 27 August 2009 on Public Finances or enterprises, research institutes, banks and commercial law companies that are state or self-government legal persons, 2) operating not for profit – legal persons or organisational units without legal personality, to which a separate act grants legal capacity, including foundations and associations, subject to paragraph 4*."[53] Public benefit activities may also be carried

[51] *Cf.* also Article 18(2) of the Istanbul Convention.

[52] Consolidated text, Journal of Laws of 2023, item 571.

[53] Another legal definition of a non-governmental organisation can be found in Article 2(2) of the Act of 19 July 2019 on Counteracting Food Waste (consolidated text, Journal of Laws of 2020 item 1645), in which a non-governmental organisation is understood as: "[...] *a non-governmental organisation and an entity referred to, respectively, in Article 3(2) and in Article 3(3)(1) of the Act of 24 April 2003 on Public Benefit Activity and Voluntary Work* [...], *whose statutory purpose is to perform tasks in the sphere of public tasks in the field of: a) social assistance, including assistance to families and individuals in difficult life situations and equalisation of opportunities for these families and individuals, b) support for the family and the system of foster care, c) charitable activities, consisting in particular in the provision of food to those in need or running mass catering establishments for those is need".* However, according to Article 2(3) of the Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities (consolidated text, Journal of Laws of 2023 item 100 as amended) a non-governmental organisation is a non-governmental organisation and entities listed in Article 3(3) of the Act on Public Benefit Activities and Voluntary Work. *Cf.* also Article 2(6) of the Act of 27 August 2009 on Public Finance (consolidated text, Journal of Laws of 2023, item 1270). These definitions confirm that the concept of a non-governmental organisation should be understood broadly, taking into account the entities referred to in Article 3(3) of the Act on Public Benefit Activities and Voluntary Work.

out by organisational units of churches and other religious associations.[54] In the Act on Counteracting Domestic Violence, churches and religious associations are specifically enumerated as a distinct category of entities eligible to engage in collaboration with government and self-government bodies in the domain of counteracting domestic violence. In this context, it is essential to highlight that churches and other religious associations are involved in charitable and welfare activities, encompassing, among other things, providing assistance to individuals affected by domestic violence or preventing such violence. It is also worth pointing out the law on religious denominations. The right to carry out charitable and welfare activities is general in nature.[55] Additionally, it is crucial to highlight several individual religious acts, wherein the implementation of charitable and welfare activities is ensured for specific religious associations.[56]

[54] Churches and other religious associations are religious communities established for the purpose of professing and spreading religious faith, with their own system, doctrine, and rituals of worship. *Cf.* Article 2(1) of the Act of 17 May 1989 on Guarantees of Freedom of Conscience and Religion (consolidated text, Journal of Laws of 2023, item 265).

[55] *Cf. ibid.*, Article 19(2)(15).

[56] *Cf.* Article 8 of the Regulation of the President of the Republic of Poland of 22 March 1928, on the Relationship between the State and the Eastern Old Believers' Church, which has no clerical hierarchy (Journal of Laws of 1928 No. 38, item 363, as amended); Article 35 of the Act of 21 April 1936, on the Relationship between the State and the Muslim Religious Association in the Republic of Poland (Journal of Laws of 1936 No. 30, item 240, as amended); Article 28(1) of the Act of 21 April 1936, on the Relationship between the State and the Karaite Religious Association in the Republic of Poland (Journal of Laws of 1936 No. 30, item 241, as amended); Articles 38–40 of the Act of 17 May 1989 on the Relationship between the State and the Catholic Church in the Republic of Poland (consolidated text, Journal of Laws of 2019, item 1347, as amended); Article 32 of the Act of 4 July 1991 on the Relationship between the State and the Polish Autocephalous Orthodox Church (consolidated text, Journal of Laws of 2023, item 544); Article 25 of the Act of 13 May 1994 on the Relationship between the State and the Evangelical Church of the Augsburg Confession in the Republic of Poland (consolidated text, Journal of Laws of 2023, item 509); Article 10 of the Act of 13 May 1994 on the Relationship between the State and the Evangelical and Reformed Church in the Republic of Poland (consolidated text, Journal of Laws of 2015, item 483); Article 22 of the Act of 30 June 1995 on the Relationship between the State and the Evangelical Methodist Church in the Republic of Poland (consolidated text, Journal of Laws of 2023, item 85); Article 22 of the Act of 30 June 1995 on the Relationship between the State and the Baptist Church in the Republic of Poland (consolidated text, Journal of Laws of 2015, item 169, as amended); Article 20 of the Act of 30 June 1995 on the Relationship between the State and the Seventh-day Adventist Church in the Republic of Poland (consolidated text, Journal of Laws of 2022, item 2616); Article 18 of the Act of 30 June 1995 on the Relationship between the State and the Polish Catholic Church in the Republic of Poland (consolidated text, Journal of Laws

Therefore, there is an extensive catalogue of entities that can, through their charitable and welfare activities, engage in collaboration with public entities for the purpose of counteracting domestic violence.[57]

Considering the above, it can be deduced that the range of public and non-public entities capable of engaging in collaboration in the realm of domestic violence is extensive. There is a greater diversity of entities on the non-public side when considering the type criterion. This diversity stems from the ability to counteract domestic violence within the framework of public benefit, charitable, and welfare activities. The latter is further distinguished by a notable variety of entities involved in such activities, influenced by the existing religious pluralism. The matter is further complicated by the potential for some entities to conduct public benefit activities as well as charitable and welfare activities simultaneously, or exclusively engage in charitable and welfare activities. At this point it should be noted that in terms of entities, various configurations of collaboration are possible, i.e., bilateral or multilateral (e.g., participation of a representative of multiple non-governmental organisations in a communal interdisciplinary team or implementation of training by a non-governmental organisation as a subcontractor of an organisational unit of a religious association). Collaboration in this regard may consist of collective or non-collective action. In the first case, the parties to the cooperation operate within a single entity, such as a communal interdisciplinary team. In the second case, the parties to the collaboration may

of 2023 item 51); Article 18 of the Act of 20 February 1997 on the Relationship between the State and the Jewish Religious Communities in the Republic of Poland (consolidated text, Journal of Laws of 2014, item 1798); Article 17 of the Act of 20 February 1997 on the Relationship between the State and the Catholic Mariavite Church in the Republic of Poland (consolidated text, Journal of Laws of 2023 item 8); Article 18 of the Act of 20 February 1997 on the Relationship between the State and the Old Catholic Mariavite Church in the Republic of Poland (consolidated text, Journal of Laws of 2023 item 47); Article 21 of the Act of 20 February 1997 on the Relationship between the State and the Pentecostal Church in the Republic of Poland (consolidated text, Journal of Laws of 2015, item 13).

[57] For example, Caritas organisational units, parishes, convents, Orthodox confraternities, Orthodox diocesan mercy centres, evangelical and methodist organisation, Jewish communities, Christian Charitable Service, etc. Crucially, these entities have the capacity to establish new entities independently or collaboratively, such as a limited liability company that operates a shelter for individuals affected by domestic violence as part of its public benefit activities and can receive financial support from public entities within the context of the discussed collaboration.

act, among other things, on the basis of a contract and the resulting partner relationship. Simultaneously, it should be noted that the roster of public and non-public entities eligible for collaboration in the sphere of countering domestic violence is not exclusively defined by the Act on Counteracting Domestic Violence and is augmented by other norms of statutory rank, as well as international and constitutional provisions. In the future, modifications to the catalogue of entities eligible to participate in the collaboration are anticipated, encompassing both public and non-public entities.

4. Material aspect

Concerning the material aspect, collaboration can be deemed to occur when there is an alignment within the relevant scope between the execution of tasks by public entities under the law and the carrying out of statutory activities by non-public entities. Regarding public entities, it should be emphasised that the Act on Counteracting Domestic Violence delineates responsibilities for counteracting domestic violence and establishes guidelines for addressing both perpetrators and victims of such violence.[58] Importantly, the act applies not only when such violence occurs, but also at an earlier stage. The mere threat or suspicion of domestic violence is enough.[59] Nonetheless, this act does not stand alone as the sole legal foundation for public entities to execute their tasks. The elucidation of how these tasks are carried out necessitates consideration, and this is the collaboration under scrutiny. Legal definitions of domestic violence can be found in the Polish legal order. According to Article 3(b) of that Convention: "*«Domestic violence» means any act of physical, sexual, psychological or economic violence occurring within a family or household, or between former or current spouses or partners, regardless of whether or not the perpetrator and victim share or have shared a residence.*" The Act on Counteracting Domestic Violence furnishes a legal definition of domestic violence, encompassing: "[...] *a single or repeated intentional act or omission, using physical, psychological or*

[58] *Cf.* Article 1(1) of the Act on Counteracting Domestic Violence.
[59] *Cf. ibid.*, Article 1(2).

economic advantage, violating the rights or personal property of a person suffering domestic violence, in particular: (a) exposing the person to danger of loss of life, health or property, (b) violating the person's dignity, bodily inviolability or freedom, including sexual freedom, (c) causing damage to the person's physical or mental health, causing the person suffering or harm, (d) limiting or depriving that person of access to financial resources or the ability to work or become financially independent, (e) significantly violating that person's privacy or inducing a sense of threat, humiliation or anguish in that person, including those undertaken by means of electronic communication."[60] The definition employs an open catalogue. This approach results in a very expansive definition of domestic violence. The fulfilment of at least one of the above prerequisites is sufficient for the violence to occur. Consequently, the scope of countering domestic violence within the framework of the collaboration between public and non-public entities is correspondingly comprehensive. Furthermore, the definition does not specify the infringement of a right or personal interest of the person experiencing domestic violence. It is essential to highlight that this definition is in relation to the definition included in a higher-tier normative act, namely the Istanbul Convention. The comparison of these two definitions leads to the inference that the statutory definition is more extensive, broader, and more precise than the convention.[61] This should not come as a surprise, as the act, by its inherent nature, is more precise and tailored to the Polish legal system than the Convention, which is applicable to numerous European countries. Additionally, the act includes a legal definition of a person experiencing domestic violence, enumerated in a comprehensive closed catalogue.[62] Notably, domestic violence can occur even when not

[60] *Ibid.*, Article 2(1)(1).

[61] The statutory definition delineates domestic violence within a unilateral relationship, encompassing both the perpetrator of domestic violence and the person experiencing such violence. Indeed, the statutory definition does not contemplate a two-way relationship involving violence from both sides. The Supreme Court's case law on Article 207 of the Criminal Code, which states that mutual abuse between spouses is not possible, may be helpful. *Cf.* the judgement of the Supreme Court of 13 September 2005 (ref. WA 24/05, published on Legalis No. 140676, Lex No. 200263).

[62] The act also includes a legal definition of a person experiencing domestic violence. A closed catalogue of persons subject to the condition of domestic violence against them encompasses: 1) a spouse, including where the marriage has ceased or has been annulled, and their ascendants, descendants, siblings and their spouses, 2) ascendants and descendants and their spouses, 3) siblings and their ascendants, descendants and their spouses, 4) an

directed at current household members. This extensive catalogue significantly influences the material scope of collaboration between public and non-public entities in the realm of countering domestic violence.

The material scope of this collaboration includes: 1) providing assistance to people experiencing domestic violence, 2) influencing domestic violence perpetrators, and 3) raising public awareness of the phenomenon of domestic violence.[63] Providing assistance to those experiencing domestic violence can therefore take place in a wide range of ways. The act contains an open catalogue of forms of free assistance for people experiencing violence.[64] These people should be informed

adoptee and their spouse and their ascendants, descendants, siblings and their spouses, 5) a person currently or formerly in a cohabitation relationship and their ascendants, descendants, siblings and their spouses, 6) a person in a joint occupation and household and their ascendants, descendants, siblings and their spouses, 7) a person currently or formerly in a lasting emotional or physical relationship regardless of joint occupation or household, 8) minors. *Cf.* Article 2(1)(2) of the Act on Counteracting Domestic Violence The act also contains a closed catalogue of domestic violence perpetrators, which should be understood as adults who use domestic violence against persons experiencing domestic violence as defined by the act. *Cf.* Article 2(1)(3) of the Act on Counteracting Domestic Violence According to the Supreme Court's decision of 4 February 2022 (ref. II CSKP 1196/22, published on www.sn.pl, Legalis No. 2657771, Lex No. 3303876), incidents of physical aggression on the part of another child placed in an institution do not constitute acts referred to in the Act on Counteracting Family Violence.

[63] Nevertheless, this catalogue seems to be open-ended. This is mainly attributed to the conclusions drawn from systemic interpretation (the principle of collaboration under consideration is part of the principle of collaboration for the benefit of human welfare and the common good) and functional interpretation (broader collaboration allows for an increased degree of counteracting domestic violence).

[64] According to Article 3(1) of the Act on Counteracting Domestic Violence: *"A person experiencing domestic violence shall be provided free assistance, in particular in the form of: 1) medical, psychological, legal, social, vocational and family counseling; 2) crisis intervention and support; 3) protection from further harm, by preventing the person perpetrating domestic violence from using the jointly occupied apartment with the person suffering domestic violence and prohibiting contact and approach to the person suffering domestic violence; 4) providing the person experiencing domestic violence with safe shelter in a specialised support centre for persons experiencing domestic violence; 5) providing a medical examination to determine the causes and type of injuries related to the perpetration of domestic violence and issuing a medical certificate in this regard; 6) providing the person experiencing domestic violence who does not have legal title to the premises jointly occupied with the person perpetrating domestic violence with assistance in obtaining housing."* This catalogue aligns with the standards adopted in European countries, emphasising the provision of shelter for those experiencing domestic violence. Additionally, the free provision of assistance pertains to the relationship between the person affected by domestic violence and the public and non-public entities, respectively. Non-public entities can offer assistance entirely free of

about these forms.[65] Information can be conveyed in various forms, expanding the range of entities involved in countering domestic violence; for example, posters informing about the rights of people affected by domestic violence can be placed in the premises of organisational units of religious associations or police headquarters. Such assistance as part of collaboration can manifest through the operation of an interdisciplinary team, which, for instance, may disseminate information about institutions, individuals, and opportunities for assistance in the local environment.[66]

The influence on domestic violence perpetrators may involve the interdisciplinary team referring a domestic violence perpetrator to participate in a correctional and educational programme for domestic violence perpetrators or a psychological and therapeutical programme for domestic violence perpetrators.[67] These programmes are specifically designed to halt the perpetration of domestic violence, helping individuals develop self-control and non-violent problem-solving skills.[68] The programmes in question are implemented in the form of individual or group meetings and are conducted by specialists in the field of counteracting domestic violence.[69] Specialists such as psychologists, educators, or psychotherapists, among others, may be engaged by non-governmental organisations or churches and other religious associations or their organisational units, fostering an appropriate level of collaboration between public and non-public

charge using their existing resources or secure funding from a public entity to provide free assistance.

[65] *Cf. ibid.*, Article 3(1a).

[66] *Cf. ibid.*, Article 9b(2)(5).

[67] *Cf. ibid.*, Article 9b(2)(9).

[68] *Cf. ibid.*, Article 4(4). It is hard to expect such programmes to be effective in practice when such people are homeless. The Constitutional Tribunal highlighted the issue of homelessness resulting from eviction and emphasised that the legislation at the time imposed an obligation to relocate the perpetrator of violence to a facility providing accommodation. *Cf.* the judgement of the Constitutional Tribunal of 18 October 2017 (ref. K 27/15, published OTK ZU A/2017, item 74; Journal of Laws of 2017, item 1954). Perpetrators of domestic violence are not entitled to social housing as well as can be evicted regardless of the season. *Cf.* Article 17 of the Act of 21 June 2001 on the Protection of the Rights of Tenants, the Housing Stock of the Commune and the Amendment to the Civil Code (consolidated text, Journal of Laws of 2023, item 725). *Cf.* also E. Bończak-Kucharczyk, *Ochrona praw lokatorów i najem lokali mieszkalnych. Komentarz*, Warszawa 2013, p. 354; R. Dziczek, *Ochrona praw lokatorów. Dodatki mieszkaniowe. Komentarz. Wzory pozwów*, Warszawa 2012, p. 131.

[69] *Cf.* Article 4(5) of the Act on Counteracting Domestic Violence

entities.[70] The impact on such people in addition to the above programmes can be indirect, for example, through the issuance of relevant guides. It also seems important to level, in some cases, the sources of domestic violence, which includes alcohol.[71] In this context, the collaboration between public and non-public entities can occur based on various legal grounds, notably the Act on Counteracting Domestic Violence and the Act on Upbringing in Sobriety and Counteracting Alcoholism.

Raising public awareness of domestic violence can take place through, among other things, the commissioning of tasks by public entities to non-governmental organisations, churches and religious associations, or the joint organisation of conferences, etc. by public and non-public entities. However, it is worth noting that historical experience has shown that awareness campaigns, conferences, and existing legal instruments may not have been sufficient for the protection of victims of violence, as mentioned in the explanatory statement to the bill.[72] Nonetheless, this does not imply discontinuing such activities; rather, they should be advanced concurrently with the previously outlined scopes of activity. Enhancing public awareness may involve, among other aspects, raising the legal

[70] It is worth noting that psychological assistance is indispensable due to the background and consequences of domestic violence. *Cf.* also B. Hołyst, *Psychologia kryminalistyczna*, Warszawa 2009, pp. 941–954. Furthermore, it is acknowledged that personnel in non-public entities demonstrate commitment despite receiving lower remuneration compared to their counterparts in the private sector. *Cf.* S. Spurek, *Przeciwdziałanie przemocy w rodzinie. Komentarz*, Warszawa 2021, p. 178. Hence, the collaboration between public and non-public entities has the potential to both lower public expenditures and enhance the quality of substantive content. However, inexperienced non-governmental organisations might miscalculate administrative costs, leading to the potential non-execution of assigned tasks in the realm of counteracting domestic violence. Another practical problem may concern the lack of ability to account for public projects.

[71] *Cf.* the judgement of the Supreme Court of 4 March 2005 (ref. III 441/07, published on Legalis No. 108121, Lex No. 447245).

[72] The explanatory statement to the bill emphasises that government administration bodies and self-government units are obliged to cooperate with social organisations and religious associations on: 1) assisting those affected by violence, 2) influencing perpetrators of violence, and 3) raising public awareness of the causes and consequences of domestic violence. *Cf.* Druk sejmowy No. 3639 (fourth term). This part of the explanatory statement presents an accurate constatation. Counteracting domestic violence requires more than unilateral actions by public administration bodies.

consciousness of the public, constituting the execution of a public task achievable through collaboration between non-public and public entities.[73]

The implementation of these three areas of collaboration does not necessarily have to be narrowed down to just one of them. For instance, a simultaneous effort to address domestic violence perpetrators and raise public awareness can occur through the publication of relevant guides or by organising scientific conferences. Counteracting domestic violence demands action in various domains, including those explicitly outlined in this act. The provisions of Article 9 of the Act establish a legal foundation for public entities to undertake these actions. The extent of this collaboration, as outlined by the act, can be categorised into internal and external spheres. Internally, the collaborating entities offer support to individuals affected by domestic violence and engage with the perpetrators of such violence. Externally, the collaborating entities collaborate to raise public awareness of the domestic violence.[74]

Additionally, it should be noted that self-government units execute responsibilities related to countering domestic violence in accordance with the provisions of the Act on Social Assistance or the Act on Upbringing in Sobriety and Counteracting Alcoholism. This is important, because in these acts one of the principles is the collaboration of public and non-public entities.[75] In terms of own tasks at the communal, powiat and voivodeship levels, analogous and specific tasks can be distinguished. The catalogues of tasks assigned to these entities are open in the context of counteracting domestic violence. In the first case, programmes for the prevention of domestic violence and the protection of domestic violence victims are developed and implemented at the appropriate level.[76] Additionally, a powiat is obligated to develop and implement programmes for preventive measures aimed at providing specialised assistance,[77] while the voivodeship self-government is obligated to develop framework programmes for the protection of persons experiencing domestic violence, framework correctional and educational programmes, as well as framework psychological and therapeutical

[73] *Cf.* Article 4(1)(1b) Act on Public Benefit Activities and Voluntary Work.
[74] *Cf.* Article 9(1) of the Act on Counteracting Domestic Violence.
[75] *Cf. ibid.*, Article 6(1).
[76] *Ibid.*, Article 6(2)(1), Article 6(3)(1), Article 6(6)(1). In case of a voivodeship, only the development of this programme is mentioned. Unlike the commune and the powiat, its implementation was omitted.
[77] *Cf. ibid.*, Article 6(3)(2).

programmes for persons perpetrating domestic violence.[78] In addition to programmatic issues, self-government units are required to provide places in specialised centres. In the case of communes and powiats (2nd tier administrative units), it is their own responsibility to provide domestic violence victims with places in support centres.[79] In addition, a powiat is required to provide domestic violence victims with places in crisis intervention centres.[80] Specific tasks include, in the case of a powiat, the provision of counselling and intervention against domestic violence and the creation of interdisciplinary teams.[81] In the case of a voivodeship self-government, specific tasks include inspiring and promoting new solutions in the field of countering domestic violence, as well as organising training for those carrying out tasks related to countering domestic violence, including mandatory training for members of the interdisciplinary team and diagnostics and assistance groups.[82] In addition, in the case of a powiat, there may be government-mandated tasks that are financed from the state budget.[83] Such tasks include the creation and operation of specialised support centres for people experiencing domestic violence, the development and implementation of programmes (corrective and educational programmes for domestic violence perpetrators, as well as psychological and therapeutical programmes for such individuals), and the issuance of certificates for domestic violence perpetrators' enrolment in and completion of these programmes.[84] However, this catalogue is open-ended.

At the same time, on the other hand, certain statutory activities of non-governmental organisations, churches and religious associations are necessary for the collaboration. In the case of non-governmental organisations, it is important to point out the sphere of public tasks, which includes many tasks, among others: 1) social assistance, including assistance to families and individuals in

[78] *Cf. ibid.*, Article 6(6)(3).
[79] *Cf. ibid.*, Article 6(2)(3), Article 6(3)(3).
[80] *Cf. ibid.*, Article 6(3)(4). However, according to the information on the results of the audit carried out by the Supreme Audit Office (KPS.430.004.2021), in more than half of the self-government units at the county level (210, i.e., 55.3%) there were no crisis intervention centres in operation. https://www.nik.gov.pl/plik/id,24457,vp,27203.pdf (accessed on: 15.06.2023).
[81] *Cf.* Article 6(2)(2) and (4) of the Act on Counteracting Domestic Violence.
[82] *Cf. ibid.*, Article 6(6)(2) and (4).
[83] *Cf. ibid.*, Article 6(5).
[84] *Cf. ibid.*, Article 6(4).

difficult life situations and equalisation of opportunities for these families and individuals;[85] 2) support for the family and the system of foster care;[86] 3) providing free legal aid and increasing legal awareness within the society[87]; 4) charitable activities[88]; 5) protection and promotion of health, including therapeutical activities;[89] 6) activities for equal rights of women and men;[90] 7) activities for children and youth, including recreation of children and youth;[91] 8) dissemination and protection of freedom, human rights and civil liberties, as well as activities supporting the development of democracy;[92] 9) activities for the benefit of family, maternity, parenthood, propagation and protection of children's rights;[93] 10) counteracting addictions and social pathologies;[94] 11) activities in favour of non-governmental organisations and entities listed in Article 3(3) of the Act on Public Benefit Activities and Volunteerism, in the aforementioned

[85] *Cf.* Article 4(1)(1) of the Act on Public Benefit Activities and Voluntary Work. For example a non-governmental organisation may provide accommodation to individuals affected by domestic violence, acquired either through inheritance or donation.

[86] *Cf. ibid.*, Article 4(1)(1a). Non-public entities may provide training in counteracting domestic violence.

[87] Cf. *ibid.*, Article 4(1)(1b). For example, a foundation may use a volunteer lawyer to provide *pro publico bono* legal advice to poor people affected by domestic violence.

[88] Cf. *ibid.*, Article 4(1)(3). For example, an organisational unit of a religious association may donate food free of charge to persons affected by domestic violence (e.g. in the form of financial violence).

[89] *Cf. ibid.*, Article 4(1)(6). In this regard, a non-governmental organisation can undertake an informational campaign elucidating the process of securing legal redress for victims of domestic violence. This type of campaign could also qualify as a so-called social campaign.

[90] *Cf. ibid.*, Article 4(1)(9). An example of such an activity could involve organisation of an academic conference (coupled with outreach endeavors), focused on the promotion of gender equality within domestic spheres or within the context of domestic violence proceedings.

[91] *Cf. ibid.*, Article 4(1)(15). In this scope, a religious legal entity involved in public benefit activities may, among other things, arrange recreational activities for young individuals affected by domestic violence within its own facilities or allocate funds from its own resources for such recreational pursuits.

[92] *Cf. ibid.*, Article 4(1)(22). For example, a registered association can publish a guidebook on counteracting domestic violence after receiving a prior free license from the authors.

[93] *Cf. ibid.*, Article 4(1)(31). A foundation may establish a shelter for people affected by domestic violence for this purpose.

[94] *Cf. ibid.*, Article 4(1)(32). A limited liability company engaged in public benefit activities can set up a telephone line or chat room for this purpose, where people affected by domestic violence can receive appropriate legal or psychological assistance.

scope.[95] It should be noted that in this broad catalogue, unfortunately, counteracting domestic violence is not mentioned explicitly. Expanding the catalogue to include the possibility of implementing such collaboration should contribute to facilitating the collaboration of public and non-public entities. It should also be borne in mind that some non-public entities have the status of a non-governmental organisation, through which they can receive additional funds under the so-called 1.5% tax.[96] The categorisation of addressing domestic violence as a responsibility within the domain of public obligations is unequivocal, as it inherently emanates from the tasks delineated above.

Public benefit activities may be undertaken as supplementary statutory endeavours by churches, other religious associations, or their organisational units. In this scenario, it is imperative that public benefit activities be distinctly and accountably delineated from the other statutory undertakings of these entities.[97] Nevertheless, for these entities, the predominant undertaking is charitable and welfare work, safeguarded by religious law. Consequently, the prevention of domestic violence within the purview of churches, other religious associations, or their organisational units may constitute statutory activities manifesting as charitable and welfare endeavours, or additionally, as public benefit activities. It is plausible that an entity may opt to exclusively engage in public benefit activities (e.g., a foundation endowed with a public benefit status established by a religious legal entity). For both non-governmental organisations and churches, as well as other religious associations or their organisational units, the mere absence of an explicit provision in the statute mandating engagement in activities counteracting domestic violence does not preclude these entities from participating in such preventative measures. It is imperative, in each instance, to meticulously scrutinise the content of their statutes, as the prevention of domestic violence may emanate indirectly from various standard statutory provisions, including but

[95] *Cf. ibid.*, Article 4(1)(33). A church legal entity may make a financial donation to the foundation in order for the foundation to purchase food products and distribute them to those affected by domestic violence.

[96] *Cf. ibid.*, Article 20. Campaigns conducted by non-governmental organisations encouraging individuals to include the organisation's specific Krajowy Rejestr Sądowy (National Court Register) number in their annual tax returns frequently entail substantial publicity, which may contribute to, at the very least, higher public awareness of domestic violence.

[97] Such a distinction is made in the statute or other internal act. *Cf. ibid.*, Article 10(3).

not limited to charitable activities, assistance to the indigent, or the prevention of social pathologies.

Bearing the above in mind, it is appropriate to come to the conclusion that the material scope of collaboration between public and non-public entities is extensive, encompassing numerous potential areas of collaboration in the sphere of counteracting domestic violence. Regarding the subject matter of collaboration, non-public entities exhibit greater flexibility, necessitating a modification of their statute (or equivalent internal document) for any change in the scope of their activities. This flexibility empowers non-public entities to respond promptly and offer assistance in accordance with current demand. In contrast, public entities lack such flexibility due to the principle of legality. This flexibility also influences the variability in the degree of implementation of the principle of collaboration on domestic violence. Primarily, the number of organisations expressing interest in undertaking such collaboration is subject to variation.

5. Formal aspect

The collaboration of public and non-public entities in the field of counteracting domestic violence may adopt a multitude of forms. This collaboration can be contractual or non-contractual. In the first case, it should be pointed out that in accordance with Article 9(2) of the Act on Counteracting Domestic Violence: "*Government or self-government administration bodies may commission the implementation of tasks specified in the Act in accordance with the procedure provided for in the Act of 24 April 2003 on Public Benefit Activity and Voluntary Work* [...]." The mode of commissioning the implementation of these tasks is, therefore, conducted in accordance with the norms stipulated in the Act on Public Benefit Activity and Voluntary Work.[98] The commissioning of public tasks can adopt two forms: 1) entrusting the performance of public tasks, together with providing a grant to finance their implementation, or 2) supporting the performance

[98] As P. Staszczyk aptly noted, the very initiation of cooperation between a public administration body and a non-governmental organisation, as a rule, does not require a special procedure. *Cf.* P. Staszczyk, *Ustawa o działalności pożytku publicznego i o wolontariacie. Komentarz*, Warszawa 2013, p. 24.

of public tasks, together with providing a grant to finance their implementation.[99] In accordance with this act, public administration bodies delegate the execution of public tasks in the aforementioned domain to non-governmental organisations and entities enumerated in Article 3(3) of the Act on Public Benefit Activities and Voluntary Work, provided they are engaged in statutory activities within the relevant domain.[100] Such entrustment is executed either through the conduct of an open tender procedure or without such a procedure, contingent upon circumstances such as a natural disaster, natural catastrophe, or technical failure, as delineated in Article 3(1) of the Act of 18 April 2002 on the State of Natural Disaster,[101] or due to paramount public interest.[102] The omission of the procedure is also permissible when such tasks are entrusted by the minister in charge of internal affairs, particularly in instances pertaining to tasks within the domain of civil protection and salvage.[103] Furthermore, the executive body of the self-government unit has the discretion to forego the open tender procedure when the funding amount does not surpass PLN 10,000, and the completion of the public task is anticipated within a period of no more than 90 days.[104] However, even in such a case, a corresponding agreement is concluded.[105] Such agreements shall be made in writing under pain of nullity.[106] Within 30 days of the completion of the public task, a report on the performance of this task must be prepared.[107] It is imperative that the agreements adhere to

[99] *Cf.* Article 5(4) of the Act on Public Benefit Activities and Voluntary Work. This is a closed catalogue. *Cf.* also the judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski of 5 December 2006 (ref. I SA/Go 1302/06, published on CBOSA).

[100] *Cf.* Article 11(1) of the Act on Public Benefit Activities and Voluntary Work. Article 11(2) of the act incorporates the principle of the universality of application concerning the entitlement to undertake tasks funded from public resources. *Cf.* the judgement of the Voivodeship Administrative Court in Gliwice of 2 July 2010, (ref. III SA/Gl 1444/10, published on CBOSA).

[101] Consolidated text, Journal of Laws of 2017 item 1897, as amended. *Cf.* Article 11a of the Act on Public Benefit Activities and Voluntary Work.

[102] *Cf. ibid.*, Article 11b(1).

[103] *Cf.* also *ibid.*, Article 11c.

[104] *Cf. ibid.*, Article 19a(1).

[105] *Cf. ibid.*, Article 19a(5).

[106] *Cf. ibid.*, Article 16(2). The requirements for contractual provisions are contained, among others, in Article 151(2) of the Act on Public Finance of 27 August 2009.

[107] *Cf. ibid.*, Article 18(1). It is good practice to create partial reports on a given fiscal year, if only for the internal use of a non-public entity which facilitates the proper maintenance of accounts and preparation of reports on the activities of the entity.

the general principles of collaboration between public administration bodies and non-governmental organisations, as well as entities specified in Article 3(3) and Article 4 of the Act on Public Benefit Activities and Voluntary Work, encompassing subsidiarity, sovereignty of the parties, partnership, efficiency, fair competition, and publicity. The principle of partnership holds particular practical significance for ensuring equality among contracting parties.[108] The application of these principles to the formulation and execution of agreements is warranted by the nature of commissioning public tasks through agreements, as it constitutes a mode of cooperation between these entities. However, this form of cooperation is not exclusive. In the absence of a specific catalogue of cooperation examples in the Act on Counteracting Domestic Violence, it is noteworthy to refer to the catalogue of cooperation forms outlined in the Act on Public Benefit Activity and Voluntary Work. In practical terms, public benefit contracting bears semblance to an adhesion agreement, wherein only one party establishes its terms.

Identifying fundamental contractual provisions in the tender procedure phase is a prudent strategy, while refining the structure of the agreement can be accomplished through a collaborative dialogue that underscores partnership and simultaneous transparency. This will afford non-public entities the opportunity to contribute to the formulation of agreements aimed at countering domestic violence, thereby enhancing the level of collaboration between the involved parties.[109]

---

[108] It is precise to assert that a concerning trend involves the overall shift in the focus of collaboration towards the formal aspect, potentially compromising its substantive quality. *Cf.* A. Olejniczak, *Współpraca z organami administracji publicznej*, [in:] A. Olejniczak, R. Barański, *Fundacje i stowarzyszenia. Współpraca organizacji pozarządowych z administracją publiczną*, Warszawa 2012, p. 268. The partnership nature of the relationship is equally pivotal for the collaboration between public and non-public entities in the realm of social assistance, which may, in turn, indirectly encompass the counteracting domestic violence. *Cf.* Z. Zarzycki, *Rola kościołów i związków wyznaniowych w realizacji wybranych zadań z ustawy o pomocy społecznej z dnia 12 marca 2004 r.*, "Studia z Prawa Wyznaniowego" 2005, Vol. 8, p. 77.

[109] The regulations overseeing public procurement, inherently analogous to the assignment of public tasks for public benefit activities, can provide valuable guidance. The Act of 11 September 2019, Public Procurement Law (consolidated text 2022 item 1710, as amended), provides for draft contractual provisions (Article 134(1)(20)) and even collaboration in the execution an agreement (Article 431).

In addition to the commissioning of public tasks, the following forms can be mentioned: 1) mutual information on planned directions of activity;[110] 2) consultations with non-governmental organisations and entities mentioned in Article 3(3) of the Act on Public Benefit Activities and Voluntary Work on draft normative acts in the areas relating to the statutory activities of these organisations;[111] 3) consulting draft normative acts concerning the domain of public tasks, referred to in Article 4 of the Act on Public Benefit Activities and Voluntary Work, with public benefit activity councils, if they are created by competent self-government units; 4) development of joint advisory and initiative teams, composed of representatives of non-governmental organisations, entities mentioned in Article 3(3) of the Act on Public Benefit Activities and Voluntary Work and representatives of relevant public administration bodies;[112] 5) agreement on the implementation of a local initiative according to the principles set forth in the act; 6) a partnership agreement specified in Article 28a(1) of the Act of 6 December 2006 on the Principles of Development Policy;[113] Agreement or Partnership Agreement specified in Article 33(1) of the Act of 11 July 2014 on the Principles of Implementation of Programmes on Cohesion Policy Financed in the Financial Perspective 2014–2020[114] and agreement or partnership agreement specified in Article 39(1) of the Act of 28 April 2022 on the Principles of Implementation of Tasks Financed from European Funds in the Financial Perspective 2021–2027.[115] Furthermore, a public administration body may establish and manage organisational units dedicated to functioning for the benefit of non-governmental organisations and entities enumerated in Article 3,

[110] For instance, this could entail a straightforward exchange of correspondence addressing the issue of domestic violence.

[111] Consultation represents a highly practical stage in the legislative process. Attending to the perspectives of non-governmental organisations and religious associations possessing pertinent expertise and qualified personnel in the realm of countering domestic violence not only facilitates the identification of flaws in such initiatives, such as impractical solutions, normative conflicts, and issues related to equality, but also enables the incorporation of effective remedies.

[112] These teams can, through the ongoing course of their efforts, glean insights from previously suggested and implemented measures for counteracting domestic violence.

[113] Consolidated text, Journal of Laws of 2023 item 225, as amended.

[114] Consolidated text, Journal of Laws of 2020 item 818, as amended.

[115] Journal of Laws of 2022 item 1079, as amended. *Cf.* Article 5(2) of the Act on Public Benefit Activities and Voluntary Work.

paragraph 3 of the Act on Public Benefit Activities and Voluntary Work within the realm of public tasks.[116] It is also noteworthy that self-government units may extend loans, guarantees, or warranties to these entities for the execution of tasks in the public benefit sphere, thereby constituting an additional form of collaboration. Another practical occurrence is the utilisation of an unnamed agreement, often in the form of a collaboration agreement, between public and non-public entities. Essentially, these provisions involve the parties making declarations to undertake specific actions without entering into binding commitments, such as expressing their intent to collaborate in counteracting domestic violence. Due to its flexibility, it can serve as a complementary mechanism to the examples outlined by the legislator in the domain of counteracting domestic violence.

In addition, it should be mentioned that non-governmental organisations, churches and other religious associations or their organisational units, respectively, can be a party to various proceedings related to the broadly defined phenomenon of counteracting domestic violence, e.g., within the framework of administrative proceedings,[117] judicial and administrative proceedings,[118] criminal proceedings,[119] civil proceedings,[120] and even proceedings governed

[116] *Cf. ibid.*, Article 5(6).

[117] Pursuant to Article 29 of the Act of 14 June 1960, Code of Administrative Procedure (uniformed text, Journal of Laws of 2023, item 775, as amended).

[118] *Cf.* Article 9 of the Act of 30 August 2002, Law of the Administrative Courts Procedure (consolidated text, Journal of Laws of 2023, item 259, as amended). Participation in this procedure is contingent upon the concurrent satisfaction of two conditions: alignment of the case with the statutory activities of the social organisation and the fulfillment of the public interest through such involvement. *Cf.* the decision of the Supreme Court of 7 March 2019 (ref. I OSK 72/18, published on CBOSA).

[119] *Cf.* Article 90(1) of the Act of 6 June 1997, Code of Criminal Procedure (uniformed text, Journal of Laws of 2022, item 1375). A community organisation must demonstrate a social or individual interest in being allowed to participate in the proceedings, as well as demonstrate the relevant scope of its statutory activities. *Cf.* the decision of the Supreme Court of 26 February 2021 (ref. I KZP 12/20, published on www.sn.pl, Legalis No. 2580135, Lex No. 3126065). Among representatives of the doctrine, there exists a perspective suggesting that community organisations may present written statements in the form of an amicus curiae opinion pursuant to Article 91 of the act. *Cf.* C. Kulesza, *Strony procesowe i inni uczestnicy procesu*, [in:] C. Kulesza, P. Starzyński, *Postępowanie karne*, Warszawa 2022, p. 147.

[120] *Cf.* Article 8 of the Act of 17 November 1964, Code of Civil Procedure (consolidated text, Journal of Laws of 2021, item 1805, as amended). Statutory objectives are also important for granting a given organisation the status of an organisation authorised to act in civil

by international law.[121] Their involvement in these proceedings often proves beneficial for individuals affected by domestic violence and for the justice system itself. However, the efficacy of their interventions may hinge on the actions undertaken by the entity overseeing the respective proceedings. In such instances, an additional manifestation of collaboration between public and non-public entities in the domain of counteracting domestic violence may indirectly arise. It is noteworthy that, within the framework of Polish procedures, the term "non-governmental organisation" is presently employed only in civil proceedings.[122] The broader concept of a community organisation is used in administrative, administrative court and criminal procedure.

Considering this, it can be asserted that the formal aspect of collaboration within the domain of domestic violence is consequential to the subjective aspect and the parties' material arrangements. Typically, collaboration involves public entities funding the execution of counteracting domestic violence tasks by non-public entities on a contractual basis or providing them with a suitable grant. The nature of collaboration is not solely limited to the financial dimension; it is predominantly manifested in the exchange of information and positions between public and non-public entities. The execution of agreements by non-public entities may be risky in practice, as these agreements entail a high level of responsibility for the non-public entity (such as the imposition of contractual penalties or the obligation to achieve specific benchmarks under the risk of fund repayment). Establishing a mechanism to delineate material contractual provisions and determine the final content of the contract through a partnership dialogue could prove beneficial. Neglecting the principle of partnership in the formulation of agreements for counteracting domestic violence may initially curtail the involvement of potential non-public entities interested in collaboration and subsequently impede the effectiveness of counteracting domestic

proceedings. *Cf.* the judgement of the Supreme Court of 30 June 2021 (ref. I PSKP 31/21, published on www.sn.pl, Legalis No. 2691615, Lex No. 3342483).

[121] For example, in proceedings before the European Court of Human Rights. As M.A. Nowicki aptly noted, non-governmental organisation interventions have had a major impact on the Court's case law. *Cf.* M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2021, p. 241.

[122] Previously, from 1 October 1990 until 3 May 2012, the phrase "community organisations" was also used. In contrast, the original language adopted in the act of 1964 utilised the term "community organisations of the working people".

violence itself. Simultaneously, it should be acknowledged that the proposed agreements often fail to consider the specific undertakings of churches and other religious associations or their organisational units, which, as previously indicated, are formally recognised in the act as one of the participating parties in the collaboration. Furthermore, in the formal context, it should be stressed that the parameters of potential collaboration are defined by the principle of legality on the part of public entities and statutory activity on the part of non-public entities (further supplemented by internal regulations).

6. Specific issues

In the context of the collaboration between public and non-public entities in counteracting domestic violence, numerous specific issues arise in practical application. Due to the limited scope of this manuscript, only a subset of these challenges will be addressed. One notable issue is the handling of personal data, which occurs in various facets. For instance, representatives of non-governmental organisations within communal interdisciplinary teams process relevant personal data concerning both victims and perpetrators of domestic violence. In this regard, they should possess the appropriate authorisation. It is important to note that the involvement of a representative in such work does not automatically imply the participation of the non-governmental organisation as a whole.[123] Hence, a representative of a non-governmental organisation should refrain from transferring personal data to the organisation it represents (e.g., for discussions with other staff members) unless a separate agreement is established, entrusting the processing of personal data based on specific grounds (e.g., consent from the individual experiencing domestic violence). Additionally, issues regarding the processing of personal data may arise, especially in the execution of public tasks through an agreement for the entrustment of personal data processing. In such instances, non-governmental organisations, churches, and

[123] In accordance with Article 9c(3) of the Act on Counteracting Domestic Violence, representatives of non-governmental organisations within interdisciplinary teams are obligated to maintain the confidentiality of all information and data acquired in the course of their duties, both during and after their membership.

other religious associations or their organisational units should provide proper authorisations to their staff members for processing personal data. In practical terms, a common challenge in the commissioning of public tasks lies in determining the entity serving as the controller of personal data, necessitating the provision of appropriate information on personal data processing to beneficiaries. It is advisable to formally inquire with the public entity to clarify its position on this matter.

Another practical issue related to counteracting domestic violence involves the recruitment of qualified personnel. While it is crucial to hire specialists, it is also advisable, in the context of counteracting domestic violence, to engage coordinators who approach the issue of domestic violence from a broader perspective than is stipulated in the Act on Counteracting Domestic Violence or the Act on Public Benefit Activities and Voluntary Work. Practical assistance often necessitates the support of individuals affected by domestic violence, especially during various proceedings before authorities and courts. This support may involve providing relevant information, including model letters, and aligning with a non-governmental organisation, churches and other religious associations or their organisational units to assert the rights of a party in a particular proceeding, requiring, among other things, appropriate jurisprudential knowledge. In acknowledging the personnel of non-governmental organisations and religious associations or their organisational units, it is essential to highlight the contribution of volunteers, whose effective involvement, coordinated by these entities, can significantly contribute to reaching individuals affected by domestic violence and subsequently aiding them, particularly in their collaboration with public entities.

Another practical concern is the occasional incorrect narrowing down by public authorities of the scope of activities of churches and religious associations or their organisational units, restricting their statutory activities related to the counteracting domestic violence solely to public benefit activities as defined in the Act on Public Benefit Activity and Voluntary Work. An instance of this is the announcement of a tender procedure for the commissioning of a public task to prevent domestic violence exclusively targeting non-governmental organisations. Such a formulation is inaccurate as it implies the exclusion of churches and unions or their religious organisational units engaged in charitable and welfare activities from the tender procedure, despite the broad guarantee of such

activities under religious law. In the realm of counteracting domestic violence, public authorities should engage in cooperation on an equitable basis with both non-governmental organisations and churches, as well as other religious associations or their organisational units.[124]

Considering the aforementioned, there seems to be a necessity for public entities to approach non-public entities individually within the framework of collaboration in counteracting domestic violence, fostering a horizontal relationship. It should be advocated that tender procedures formulate a broad catalogue of entities that can participate, rather than narrowing it down to non-governmental organisations only.

7. Evaluation of existing solutions and proposals for change

The existing norms related to counteracting domestic violence, concerning the collaboration between public and non-public entities, necessitate clarification and supplementation despite their inherent complexity, and concurrently, the perceived unnecessary fragmentation. First of all, it is necessary to call for an amendment to Article 9(1) of the Act on Counteracting Domestic Violence, which introduces the principle of collaboration between public and non-public bodies in the field of counteracting domestic violence, by changing the phrase "*churches and religious associations*" to "*churches and other religious associations or their organisational units*". This change is dictated by the fact that in religious law, the term of "*religious association*" is broader than the term "*churches*". According to Article 8 of the Act on Guarantees of Freedom of Conscience and Religion: "*Churches and other religious associations in Poland operate within the constitutional system framework of the Republic of Poland; their legal and property situation is governed by regulations of statutory rank.*"[125] In addition, it is possibly worth adding the phrase "*organisational units*" after the term "*churches and other religious associations,*" for religious associations can operate through their organisational units. For example, a church legal entity can enter the tender

[124] *Cf. ibid.*, Article 9(1).
[125] *Cf.* also Article 25(3) of the Constitution.

procedure for the commissioning of a public task concerning the counteracting domestic violence.[126]

In addition, for equal treatment of non-public entities, it is worth changing the wording of Article 9(2) of the Act on Counteracting Domestic Violence to the following: "*Government or self-government administration bodies may commission the implementation of the tasks specified in the Act in accordance with the procedure provided for in the Act of 24 April 2003 on Public Benefit Activity and Voluntary Work to non-governmental organisations, churches and other religious associations or their organisational units* [...]." Such a change should contribute to public entities formulating a more extensive framework for competitions, considering not only non-governmental organisations but also churches and other religious associations or their organisational units.

It is also worth considering the addition of paragraph 3 to Article 9 of the Act on Counteracting Domestic Violence, delineating examples of collaboration forms in countering domestic violence akin to Article 5(2) of the Act on Public Benefit Activities and Voluntary Work.[127] The proposed paragraph could read as follows: "*The collaboration referred to in paragraph 1 is carried out in particular in the following forms: 1) commissioning non-governmental organisations, and churches and other religious associations or their organisational units to carry out*

[126] According to Article 5 of the Act on the Relationship between the State and the Catholic Church in the Republic of Poland, the Church's organisational structure includes the legal entities listed in Articles 6–10 of the act. The legal personality of the Caritas of the diocese is recognised under Article 7(2)(3) of this act.

[127] It is also worth noting that in the jurisprudence of administrative courts it is acknowledged that the legislator did not restrict local government units in the forms of cooperation with non-governmental organisations, and the constituent bodies of these units may consider additional forms of collaboration. *Cf.* the judgement of the Voivodeship Administrative Court in Wrocław of 6 June 2014 (ref. III SA/Wr 162/14, published on CBOSA), the judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski of 14 December 2016 (ref. II SA/Go 771/16, published on CBOSA). *Cf.* also J. Blicharz, *Ustawa o działalności pożytku publicznego i o wolontariacie. Komentarz*, Warszawa 2012, p. 68. Closed, however, are the forms of commissioning of public tasks. *Cf.* the judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski on 14 December 2016 (ref. II SA/Go 771/16). It is also important to point out the obligation of public consultation. According to the judgement of the Voivodeship Administrative Court in Gliwice of 5 July 2013 (ref. IV SA/Gl 1/13, published on CBOSA), obligatory consultation for a local government body intending to adopt a local law on public benefit activities may occur within the framework of a specially created public benefit activities council or through an alternative form in the absence of such a council.

public tasks in the field of counteracting domestic violence according to the principles set out in the Act of 24 April 24 2003 on Public Benefit Activity and Voluntary Work; 2) informing each other about the planned directions of activity; 3) consulting with non-governmental organisations, churches and other religious associations or their organisational units any draft normative acts in the field of counteracting domestic violence; 4) participation of representatives of non-governmental organisations and organisational units of churches and other religious associations in communal interdisciplinary teams and the Monitoring Team for Counteracting Domestic Violence; 5) creating joint teams of an advisory and initiative nature acting to counteracting domestic violence, composed of representatives of non-governmental organisations and organisational units of churches and other religious associations and representatives of relevant public administration bodies." While such a catalogue can be interpreted through systemic analysis, its explicit inclusion should, in practice, enhance the implementation of the collaboration principle between public and non-public entities in counteracting domestic violence. Additionally, it appears necessary to introduce a norm mandating local government bodies to formulate, after consultation with non-governmental organisations and churches, as well as other religious associations or their organisational units, an annual collaboration program with these entities in the realm of counteracting domestic violence.[128]

Moreover, for the effective realisation of the collaboration principle, it may be beneficial to introduce paragraph 4 to Article 9 of the Act on Counteracting Domestic Violence (in view of the above proposal to add paragraph 3) reading as follows: "*The collaboration referred to in paragraph 1 shall be based on the principles of equality, subsidiarity, sovereignty of the parties, partnership, efficiency, fair competition and publicity.*" This wording should primarily contribute to formulating the content of agreements with contractual balance.

Another change addresses an extremely important practical problem. Although the Act on Counteracting Domestic Violence contains many synthetic norms, it is still not exhaustive. The norms related to counteracting domestic violence are found in many different branches of law and can be said to be widely dispersed. Merely providing information to individuals affected by domestic violence, with various excerpts from the act, may not suffice. It would be more practical to draft model letters, among other formats, in the form of a decree

[128] *Cf.* also Article 5a of the Act on Public Benefit Activities and Voluntary Work.

of the Council of Ministers (e.g., by incorporating paragraph 6 into Article 9d with an appropriate competence norm). Such a regulation could encompass a set of templates for various procedures, including criminal proceedings (e.g., templates for body inspection requests, notice of the possibility of a crime, victim's motions for evidence, request for the appointment of an attorney *ex officio*, request for the application of criminal measures, request for damages reparation, request for referral to an authorised institution or person for mediation, appeals in criminal proceedings), civil proceedings (e.g., templates for social assistance requests, motions for evidence, appeals in administrative, judicial and administrative proceedings, model applications for social benefits, requests for evidence, appeals in administrative and administrative court proceedings), and administrative as well as administrative and court proceedings (e.g., specimens of a summons for payment, a lawsuit for payment, a lawsuit for an order of alimony obligation, a request for restriction of parental authority, a request for deprivation of parental authority, appeals in civil proceedings).[129]

It is also worth expanding the catalogue of tasks from the domain of public tasks referred to in Article 4(1) of the Act on Public Benefit Activity and Voluntary Work by adding item 31a), which reads "*counteracting domestic violence*".

It is also recommended to propose an amendment to the text of Article 9a(3)(6) of the Act on Counteracting Domestic Violence, introducing a straightforward alternative by allowing the inclusion in the composition of the municipal interdisciplinary team of representatives from "*non-governmental organisations or churches and other religious associations or their organisational units.*"

Considering the aforementioned, it is evident that counteracting domestic violence necessitates the modification of several norms. Simultaneously, the incorporation of conflict rules into the Act on Counteracting Domestic Violence, considering their dispersion and occasional repetition in different branches of law, would be beneficial. On the other hand, within the existing set of norms addressing domestic violence, it is crucial to maintain a balance regarding the rights of individuals who might be unjustly accused of domestic violence, e.g., within the context of "*strategies*" employed in family court cases, such as those concerning the custody of children. In addition to the inherent right to defend

[129] *Cf.* also M. Poniatowski, *Przeciwdziałanie przemocy domowej. Wzory pism*, Warszawa 2023.

such individuals at any stage of the proceedings, it is imperative to deliberate on the accountability framework for those who unreasonably classify a situation as domestic violence within the context of the collaboration between public and non-public entities.

8. Conclusion

The collaboration between public and non-public entities in the context of counteracting domestic violence within the Polish legal framework is a multifaceted issue that extends beyond the specific provisions of the Act on Counteracting Domestic Violence. Primarily, it is evident that counteracting domestic violence through the collaboration between public and non-public entities has been well-established in the Polish legal order, operating even before the current Constitution came into force. Metaphorically, one could describe the situation as the expansion of an existing structure rather than laying a foundation from scratch. In terms of historical context, it is noteworthy that the previous regulations initially permitted the aforementioned counteraction implicitly and later explicitly, within the framework of the principle of collaboration, which has been articulated in various forms. The degree of collaboration also varied. Presently, the collaboration between public and non-public entities in the domain of countering domestic violence is either implicit or explicit in constitutional, international, community, and statutory norms. The diverse norms governing this collaboration maintain both vertical and horizontal relationships within the framework of the Polish legal order. Consequently, the application of pertinent conflict of laws rules and intricate interpretation becomes necessary. Restricting this collaboration solely to the Istanbul Convention or the Act on Counteracting Domestic Violence is not appropriate.

Incorporating this principle into the aforementioned act should not be construed as an acknowledgment by public structures of the ineffectiveness in counteracting domestic violence but rather as a pragmatic approach to an evolving phenomenon in a changing society. Utilising non-public entities, often engaged in less formalised relationships with their beneficiaries, including those experiencing domestic violence, becomes indispensable. These entities frequently

inspire greater trust than public entities. Moreover, such entities exhibit a diversity of statutory activities, often encompassing specialised areas, and possess qualified personnel. They also have relevant experience in statutory activities. The legislator itself underscored, prior to the ratification of the Istanbul Convention, that the majority of activities in counteracting domestic violence are carried out in collaboration with non-governmental organisations.

Regarding the subjective aspect of the principle of collaboration, it is noteworthy that the Act on Counteracting Domestic Violence recognises the contributions of churches and other religious associations in counteracting domestic violence, obliging governmental and local authorities to cooperate with these entities on par with non-governmental organisations. Simultaneously, the subjective aspect is notably diverse on the side of non-public entities, which may engage in public benefit activities, charitable and welfare activities, or both concurrently. Relevant public entities bear the responsibility to recognise their right to conduct statutory activities related to the prevention of domestic violence. It is essential to acknowledge that various configurations of collaboration among entities are possible, such as bilateral or multilateral arrangements.

The object of collaboration is determined by the overlapping, to an appropriate extent, of task implementation by the public entity and the execution of statutory tasks by the non-public entity. There are many potential fields of collaboration in the field of counteracting domestic violence. The execution of public tasks demands a suitable legal foundation, as demonstrated by self-government bodies, illustrating the potential for collaboration under both the general norms of self-government and the Act on Counteracting Domestic Violence. Conversely, non-public entities, in the realm of collaboration, exhibit greater flexibility, enabling them to respond swiftly and offer assistance based on current demands.

However, the principle of collaboration outlined in the Law on Counteracting Domestic Violence is formulated in broad terms and lacks specific examples of its forms. This could potentially lead to a reduced level of implementation of the collaboration principle. Hence, it is advisable to revise the wording of the Law on Counteracting Domestic Violence by incorporating an open catalogue that includes examples of collaboration forms between government and self-government bodies, as well as churches and other religious associations or their organisational units. One such form could entail the obligation to consult

draft normative acts on counteracting domestic violence with non-governmental organisations, churches and other religious associations or their organisational units. Furthermore, the existing norms within the Polish legal order pertaining to the collaboration of public and non-public entities in counteracting domestic violence should be contemplated for modification due to other considerations. Primarily, these norms are currently dispersed, and it would be beneficial to consolidate them in the Act on Counteracting Domestic Violence or include relevant references to other normative acts. Conflict of law rules can turn out to be useful as well. The modification of norms should also be directed at properly recognising the nature of the statutory activities of both non-governmental organisations and churches and other religious associations or their organisational units. On a positive note, the open catalogues of the scope of collaboration of these entities allow for an adequate joint response to the phenomenon of domestic violence.

The collaboration of public and self-government bodies and non-governmental organisations and churches and religious associations referred to in Article 9 of this law should be qualified as a legal principle. However, this principle is not isolated from other legal principles, particularly those defining the collaboration of public and non-public entities for the betterment of human welfare and the common good. It represents some refinement of the constitutional and international principle of collaboration. At the same time, this norm is *lex generalis* in relation to other norms in this act and other acts that complement it in the field of counteracting domestic violence. It should be assumed that the greater the degree of this collaboration, the less domestic violence will occur. In this regard, proposed changes to the existing norms in the British legal order may be beneficial.

References

Sources of law

Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997 No. 78, item 483, as amended).
Convention on the Rights of the Child, drawn up on 20 November 1989 in New York (Journal of Laws of 1991, No. 120, item 526).
Concordat between the Holy See and the Republic of Poland of 28 July 1993 (Journal of Laws of 1998, No. 51, item 318).
Convention on the Rights of Persons with Disabilities, drawn up on 13 December 2006 in New York (Journal of Laws of 2012, item 1169).
Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence drawn up on 11 May 2011 in Istanbul (Journal of Laws of 2015, item 961).
Treaty on the Functioning of the European Union of 25 March 1957 – consolidated version (Journal of Laws of 2004, No. 90, item 864, as amended).
Treaty on European Union of 7 February 1992 – consolidated version (Journal of Laws of 2004, No. 90, item 864, as amended).
Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA (OJ EU L 2012, No. 315).
Regulation of the President of the Republic of Poland of 22 March 1928, on the Relationship between the State and the Eastern Old Believers' Church, which has no clerical hierarchy (Journal of Laws of 1928, No. 38, item 363, as amended).
Regulation of the President of Poland of 11 July 1932, Penal Code (Journal of Laws of 1932, No. 60, item 571).
The Act of 21 April 1936, on the Relationship between the State and the Muslim Religious Association in the Republic of Poland (Journal of Laws of 1936, No. 30, item 240, as amended).
The Act of 21 April 1936, on the Relationship between the State and the Muslim Religious Association in the Republic of Poland (Journal of Laws of 1936, No. 30, item 241, as amended).
The Act of 14 June 1960, Code of Administrative Procedure (uniformed text, Journal of Laws of 2023, item 775, as amended).
The Act of 17 November 1964, Code of Civil Procedure (consolidated text, Journal of Laws of 2021, item 1805, as amended).
The Act of 26 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism (consolidated text, Journal of Laws of 2023, item 165, as amended).

The Act of 6 April 1984 on Foundations (consolidated text, Journal of Laws of 2023, item 166).
The Act of 11 September 2019, Public Procurement Law (consolidated text, Journal of Laws of 2020, item 2261).
The Act of 17 May 1989 on the Relationship between the State and the Catholic Church in the Republic of Poland (consolidated text, Journal of Laws of 2019, item 1347, as amended).
The Act of 17 May 1989 on Guarantees of Freedom of Conscience and Religion (consolidated text, Journal of Laws of 2023, item 265).
The Act of 8 March 1990 on Commune Self-government (consolidated text, Journal of Laws of 2023, item 40, as amended).
The Act of 4 July 1991 on the Relationship between the State and the Polish Autocephalous Orthodox Church (consolidated text, Journal of Laws of 2023, item 544).
The Act of 7 January 1993 on Family Planning, Protection of Human Fetus and Conditions for Permissibility of Abortion (consolidated text, Journal of Laws of 2022, item 1575).
The Act of 13 May 1994 on the Relationship between the State and the Evangelical Church of the Augsburg Confession in the Republic of Poland (consolidated text, Journal of Laws of 2023, item 509).
The Act of 13 May 1994 on the Relationship between the State and the Evangelical and Reformed Church in the Republic of Poland (consolidated text, Journal of Laws of 2015, item 483).
The Act of 30 June 1995 on the Relationship between the State and the Evangelical Methodist Church in the Republic of Poland (consolidated text, Journal of Laws of 2023, item 85).
The Act of 30 June 1995 on the Relationship between the State and the Baptist Church in the Republic of Poland (consolidated text, Journal of Laws of 2015, item 169, as amended).
The Act of 30 June 1995 on the Relationship between the State and the Seventh-day Adventist Church in the Republic of Poland (consolidated text, Journal of Laws of 2022, item 2616).
The Act of 30 June 1995 on the Relationship between the State and the Polish Catholic Church in the Republic of Poland (consolidated text, Journal of Laws of 2023, item 51).
The Act of 9 November 1995 on Health Protection Against the Consequences of Using Tobacco and Tobacco Products (consolidated text, Journal of Laws of 2023, item 700).
The Act of 20 February 1997 on the Relationship between the State and the Jewish Religious Communities in the Republic of Poland (consolidated text, Journal of Laws of 2014, item 1798).

The Act of 20 February 1997 on the Relationship between the State and the Catholic Mariavite Church in the Republic of Poland (consolidated text, Journal of Laws of 2023, item 8).
The Act of 20 February 1997 on the Relationship between the State and the Old Catholic Mariavite Church in the Republic of Poland (consolidated text, Journal of Laws of 2023, item 47).
The Act of 20 February 1997 on the Relationship between the State and the Pentecostal Church in the Republic of Poland (consolidated text, Journal of Laws of 2015, item 13).
The Act of 6 June 1997, Penal Code (consolidated text, 2022, item 1138, as amended).
The Act of 6 June 1997, Code of Criminal Procedure (consolidated text, Journal of Laws of 2022, item 1375, as amended).
The Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities (consolidated text, Journal of Laws of 2023, item 100, as amended).
The Act of 5 June 1998 on Voivodeship Self-government (consolidated text, Journal of Laws of 2022, item 2094, as amended).
The Act of 5 June 1998 on Poviat Self-government (consolidated text, Journal of Laws of 2022, item 1526, as amended).
The Act of 21 June 2001 on the Protection of the Rights of Tenants, the Housing Stock of the Commune and the Amendment to the Civil Code (consolidated text, Journal of Laws of 2023, item 725).
The Act of 18 April 2002 on the State of Natural Disaster (consolidated text, Journal of Laws of 2017, item 1897, as amended).
The Act of 30 August 2002, Law of the Administrative Courts Procedure (consolidated text, Journal of Laws of 2023, item 259, as amended).
The Act of 24 April 2003 on Public Benefit Activities and Voluntary Work(consolidated text, Journal of Laws of 2023, item 571).
The Act of 12 March 2004 on Social Assistance (consolidated text, Journal of Laws of 2023, item 901, as amended).
The Act of 29 July 2005 on Counteracting Domestic Violence (consolidated text, Journal of Laws of 2021, item 1249, as amended).
The Act of 6 December 2006 on the Principles of Development Policy (consolidated text, Journal of Laws of 2023, item 225, as amended).
The Act of 27 August 2009 on Public Finance (consolidated text, Journal of Laws of 2023, item 1270).
The Act of 9 June 2011 on Family Support and the Foster Care System (consolidated text, Journal of Laws of 2022, item 447, as amended).
The Act of 11 July 2014 on the Principles of Implementation of Programmes in the Field of Cohesion Policy Financed in the Financial Perspective 2014–2020 (consolidated text, Journal of Laws of 2020, item 818, as amended).

The Act of 19 July 2019 on Counteracting Food Waste (consolidated text, Journal of Laws of 2020, item 1645).
The Act of 11 September 2019, Public Procurement Law (consolidated text, 2022, item 1710, as amended).
The Act of 28 April 2022 on the Principles of Implementation of Tasks Financed from European Funds in the Financial Perspective 2021–2027 (consolidated text, 2022, item 1079, as amended).

Case law

European Court of Human Rights

ECHR judgment of 9 June 2009, *Opuz v. Turkey* (application No. 33401/02, published on HUDOC).
ECHR judgement of 5 March 2009, *Janković v. Croatia* (application No. 38478/05, published on HUDOC).
ECHR judgement of 15 September 2009, *E.S. and Others v. Slovakia* (application No. 8227/04, published on HUDOC).
ECHR judgement of 28 June 2016, *Halime Kılıç v. Turkey* (application No. 63034/11, published on HUDOC).
ECHR judgement of 2 March 2017, *Talpis v. Italy* (application No. 41237/14, published on HUDOC).
ECHR judgement of 25 June 2019, [Grand Chamber] *Virgiliu Tănase v. Romania* (application No. 41720/13, published on HUDOC).
ECHR judgement of 9 July 2019, *Volodina v. Russia* (application No. 41261/17, published on HUDOC).
ECHR judgement of 15 June 2021, [Grand Chamber] *Kurt v. Austria* (application No. 62903/15, published on HUDOC).

Constitutional Tribunal

Judgement of the Constitutional Tribunal of 14 June 2000 (ref. P 3/00, published OTK ZU 5/2000, item 138, Official Journal of Laws of 2000, No. 50, item 600).
Judgement of the Constitutional Tribunal of 6 May 2008 (ref. K 18/05, OTK ZU 4A/2008, item 56; Journal of Laws of 2008, No. 82, item 503).
Judgement of the Constitutional Tribunal of 4 November 2010 (ref. K 19/06, published OTK ZU 9A/2010, item 96; Journal of Laws of 2010, No. 215, item 1418).

Judgement of the Constitutional Tribunal of 18 October 2017 (ref. K 27/15, published OTK ZU A/2017, item 74; Journal of Laws of 2017, item 1954).
Judgement of the Constitutional Tribunal of 20 April 2020 (ref. U 2/20, published OTK ZU A/2020, item 61, Monitor Polski 2020, item 376).

Supreme Court

Judgement of the Supreme Court of 13 September 2005 (ref. WA 24/05, published on Legalis No. 140676, Lex No. 200263).
Judgement of the Supreme Court of 4 March 2005 (ref. III 441/07, published on Legalis No. 108121, Lex No. 447245).
Decision of the Supreme Court of 26 February 2021 (ref. I KZP 12/20, published on www.sn.pl, Legalis No. 2580135, Lex No. 3126065).
Resolution of the Supreme Court of 31 March 2021 (ref. I KZP 7/20, published on www.sn.pl, Legalis No. 2554559, Lex No. 3154245).
Judgement of the Supreme Court of 14 April 2021 (ref. I NSNc 36/21, published on www.sn.pl, Legalis No. 2558040, Lex No. 3162700).
Judgement of the Supreme Court of 30 June 2021 (ref. I PSKP 31/21, published on www.sn.pl, Legalis No. 2691615, Lex No. 3342483).
Decision of the Supreme Court of 4 February 2022 (ref. II CSKP 1196/22, publ. www.sn.pl, Legalis No. 2657771, Lex No. 3303876).

Administrative Courts

Resolution of the Supreme Court of 17 January 2011 (ref. II 2/10, published on CBOSA).
Decision of the Supreme Court of 7 March 2019 (ref. I OSK 72/18, published on CBOSA).
Judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski of 5 December 2006 (ref. I SA/Go 1302/06, published on CBOSA).
Judgement of the Voivodeship Administrative Court in Gliwice of 2 July 2010, (ref. III SA/Gl 1444/10, published on CBOSA).
Judgement of the Voivodeship Administrative Court in Wrocław of 7 March 2012 (ref. IV SA/Wr 710/11, published on CBOSA).
Judgement of the Voivodeship Administrative Court in Gliwice of 5 July 2013, (ref. IV SA/Gl 1/13, published on CBOSA).
Judgement of the Voivodeship Administrative Court in Wrocław of 6 June 2014 (ref. III SA/Wr 162/14, published on CBOSA).
Judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski of 14 December 2006 (ref. II SA/Go 771/16, published on CBOSA).

Judgement of the Voivodeship Administrative Court in Bydgoszcz of 5 February 2020 (ref. II SA/Bd 1052/19, published on CBOSA).

Judgement of the Voivodeship Administrative Court in Gdańsk of 27 March 2020 (ref. III SA/Gd 35/20, published on CBOSA).

Literature

Bielecki M., *Współdziałanie podmiotów samorządowych z podmiotami wyznaniowymi. Wybrane aspekty*, "Studia z Prawa Wyznaniowego" 2008, Vol. 11, pp. 193–209.

Blicharz J., *Ustawa o działalności pożytku publicznego i o wolontariacie. Komentarz*, Warszawa 2012.

Bończak-Kucharczyk E., *Ochrona praw lokatorów i najem lokali mieszkalnych. Komentarz*, Warszawa 2013.

Dziczek R., *Ochrona praw lokatorów. Dodatki mieszkaniowe. Komentarz. Wzory pozwów*, Warszawa 2012.

Grabowski M., *Konstytucyjne obowiązki państwa w zakresie ochrony osób zagrożonych lub pokrzywdzonych przestępczością jako wyraz aksjologii systemu prawnego*, [in:] *Podstawy przeciwdziałania przestępczości oraz pomocy osobom pokrzywdzonym. Interpretacja i kierunki zmian*, P. Sobczyk (ed.), Warszawa 2020, pp. 31–60.

Hołyst B., *Psychologia kryminalistyczna*, Warszawa 2009.

Kulesza C., *Strony procesowe i inni uczestnicy procesu*, [in:] C. Kulesza, P. Starzyński, *Postępowanie karne*, Warszawa 2022, pp. 100–149.

Majchrzak B., *Podstawy aksjologiczne regulacji prawnych dotyczących przeciwdziałania przemocy w rodzinie*, [in:] *Podstawy przeciwdziałania przestępczości oraz pomocy osobom pokrzywdzonym. Konkretyzacja i realizacja*, P. Sobczyk (ed.), Warszawa 2020, pp. 127–150.

Nowicki M.A., *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2021.

Olejniczak A., *Standardy i procedury związane ze współpracą trzeciego sektora z administracją publiczną*, [in:] A. Olejniczak, R. Barański, *Standardy i procedury w organizacjach pozarządowych. Dokumentacja stanowiąca narzędzie skutecznej i zgodnej z prawem działalności*, Warszawa 2013, pp. 163–202.

Olejniczak A., *Współpraca z organami administracji publicznej*, [in:] A. Olejniczak, R. Barański, *Fundacje i stowarzyszenia. Współpraca organizacji pozarządowych z administracją publiczną*, Warszawa 2012, pp. 183–276.

Piechowiak M., *Komentarz preambuły*, [in:] *Konstytucja RP. Vol. 1. Komentarz Art. 1–86*, M. Safjan, L. Bosek (eds.), Warszawa 2016, pp. 118–158.

Poniatowski M., *Przeciwdziałanie przemocy domowej. Wzory pism*, Warszawa 2023.

Sierpowska I., *Pomoc społeczna. Komentarz*, Warszawa 2014.

Sierpowska I., *Prawo pomocy społecznej*, Warszawa 2011.

Sobczyk P., *Konstytucyjne podstawy współdziałania państwa i Kościoła na rzecz ochrony i opieki nad małżeństwem i rodziną*, [in:] *Katolickie zasady relacji państwo–Kościół a prawo polskie*, J. Krukowski, M. Sitarz, H. Stawniak (eds.), Lublin 2015, pp. 187–204.
Spurek S., *Komentarz do art. 9*, [in:] *Konwencja o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej. Komentarz*, E. Bieńkowska, L. Mazowiecka (eds.), Warszawa 2016, pp. 187–191.
Spurek S., *Przeciwdziałanie przemocy w rodzinie. Komentarz*, Warszawa 2021.
Staszczyk P., *Ustawa o działalności pożytku publicznego i o wolontariacie. Komentarz*, Warszawa 2013.
Zarzycki Z., *Rola kościołów i związków wyznaniowych w realizacji wybranych zadań z ustawy o pomocy społecznej z dnia 12 marca 2004 r.*, "Studia z Prawa Wyznaniowego" 2005, Vol. 8, pp. 73–102.
Zarzycki Z., *Współdziałanie Kościołów i innych związków wyznaniowych w zakresie wychowania w trzeźwości i przeciwdziałania alkoholizmowi. Wybrane zagadnienia prawne*, "Studia z Prawa Wyznaniowego" 2007, Vol. 10, pp. 23–60.

Webography

https://www.nik.gov.pl/plik/id,24457,vp,27203.pdf (accessed on: 15.06.2023).
https://www.eesc.europa.eu/pl/o-komitecie (accessed on: 15.06.2023).

Databases

http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx
https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRAND-CHAMBER%22,%22CHAMBER%22]}
https://ipo.trybunal.gov.pl/ipo/Szukaj?cid=1
https://isap.sejm.gov.pl/isap.nsf/search.xsp
https://orzeczenia.nsa.gov.pl/cbo/query
Legalis 2023
Lex 2023

ABOUT AUTHOR

Michał Poniatowski – Doctor of Jurisprudence in Canon Law, an attorney at law, and an assistant professor at the Faculty of Canon Law at Cardinal Stefan Wyszyński University in Warsaw (UKSW). He specialises in offering continuous services to business entities and non-governmental organisations, as well as representing mandators before courts and authorities.
ORCID 0000-0002-7263-4550

dr Paulina Banaszak-Grzechowiak
UNIWERSYTET OPOLSKI, INSTYTUT WYMIARU SPRAWIEDLIWOŚCI

Counteracting domestic violence in the criminal perspective of the court practice

1. Introduction

The currently binding definition of family violence is provided in the Act of 25 July 2005 on Counteracting Family Violence and more specifically, in Article 2 par. 2. Pursuant to this provision family violence is understood as a single or repeated, intended action or omission infringing the rights or personal interests of family members enumerated in Article 2 par. 1[1] of the Act on Counteracting Family Violence, in particular, exposing these persons to the threat of losing life or health, violating their dignity, bodily integrity, freedom, including sexual freedom, causing damages to their physical or mental health, as well as suffering and moral damages of persons affected by domestic violence. In literature it is indicated that in Article 2 par. 2 of the Act on Counteracting Family Violence, the legislator defined the phenomenon of family violence according to a factual and not normative criterion.[2] In fact, the essence of family violence consists in

[1] It concerns the concept of "a family member", which should be understood as the loved one pursuant to Article 115 par. 11 of the Penal Code (a spouse, an ascendant, a descendant, siblings, a relative by lineal affinity or degree of affinity, a person in the adoption relationship and their spouse, as well as a person living together), as well as another person living together or co-managing the household.

[2] T. Kozioł, *Przestępstwo z użyciem przemocy jako przesłanka orzeczenia środka karnego z art. 41a § 1 Kodeksu karnego*, "Przegląd Sądowy" 2013, No. 11–12, p. 32.

the perpetrator manifesting dominance over a victim in various forms – starting from physical dominance manifested by hitting, through mental violence and ending with, for example, sexual or financial violence.[3]

As soon as at the very beginning of this paper it should be underlined that it was for a long time postulated in the doctrine to replace the term "family violence" with "domestic violence". It was emphasised that the phrase "family violence" could suggest that it is directed only against family members and therefore, against persons tied with a blood or legal relationship as, for instance, in the case of spouses or relatives. Such an understanding of this phrase would be, however, too narrow, since the legislator stipulated in the definition of "a family member" provided in Article 2 par. 1 of the Act on Counteracting Family Violence that the term "family member" also refers to a loved one living together or co-managing the household with the perpetrator. The term "domestic violence" is, therefore, more adequate since it emphasises the fact of the perpetrator and the injured person living together, and not their blood or legal relationship.[4] Thus, whenever "domestic violence" is referred to herein, this term should be understood the same as "family violence" included in Article 2 par. 2 of the Act on Counteracting Family Violence.

In response to the postulates of replacing the term "family violence" with "domestic violence", under the Act of 9 March 2023 on amendment of the Act on Counteracting Family Violence and certain other acts, the legislator changed the title of the Act from "the Act on Counteracting Family Violence" to "the Act on Counteracting Domestic Violence". Changes introduced by the Act of 9 March 2023 on amendment of the Act on Counteracting Family Violence and certain other acts entered into force on 22 June 2023. However, it is worth mentioning that within this amendment, in Article 2 par. 1 subpar. 1 of the Act, the legislator introduced a new, more extended definition of domestic violence, specifying that this term should be understood as "(...) a single or repeated, intended action or omission that uses physical, mental or economic advantage, infringing the rights or personal interests of a person experiencing domestic violence, in particular: a) exposing this person to the threat of losing life, health

[3] A. Kowalczuk, *Stosowanie instytucji warunkowego umorzenia postępowania karnego wobec sprawców przemocy domowej*, "Prokurator" 2008, No. 2–3, p. 128.

[4] M. Żbikowska, *Warunkowy dozór Policji*, "Prokuratura i Prawo" 2011, No. 7–8, p. 21.

or property, b) violating their dignity, bodily integrity or freedom, including sexual freedom, c) causing damages to their physical or mental health resulting in suffering or moral damages, d) limiting or depriving this person of access to funds or the possibility to take up employment or gain financial independence, e) significantly violating the privacy of such a person or causing a feeling of a threat, humiliation or torment, including actions undertaken through the agency of means of electronic communication.

In the amended Act, and more specifically in Article 2 par. 1 subpar. 2, the legislator also introduced the definition of "a person experiencing domestic violence" stipulating that it should be understood as: a) a spouse, also in the case that the marriage has terminated or has been annulled, as well as their ascendants, descendants, siblings and their spouses, b) ascendants, descendants and their spouses, c) siblings and their ascendants, descendants and spouses, d) a person in an adoption relationship and their spouses as well as ascendants, descendants, siblings and their spouses, e) a person currently or in the past staying in a cohabitation as well as their ascendants, descendants, siblings and their spouses, f) a person living together and co-managing the household and their ascendants, descendants, siblings and their spouses, g) a person currently or in the past staying in a long-term romantic or physical relationship regardless of living together and co-managing the household, h) a minor against whom domestic violence is used. Furthermore, a definition of a person using domestic violence was provided in the amended Act. Pursuant to Article 2 par. 1 subpar. 3 of the new Act, such a person should be understood as an adult who uses domestic violence against people referred to in Article 2 par. 1 subpar. 2.

Deliberations constituting the subject of this paper should start with a specification that four basic types of violence are differentiated: mental violence, physical violence, sexual violence and economic violence. Physical violence is understood as infringing bodily integrity, purposeful bodily injury or causing pain to the injured person. Whereas, mental violence, also referred to as emotional violence, is related to infringement of personal dignity.[5] It means "(...) repeated humiliation and ridicule, manipulation for own purposes, engagement in conflicts, a lack of proper support, deriding opinions, religion, origin,

[5] J. Helios, W. Jedlecka, *Współczesne oblicza przemocy. Zagadnienia wybrane*, Wrocław 2017, p. 9.

imposing own opinions, punishing by refusing interest, feelings or respect, constant criticism, suggesting mental illness, social isolation that includes controlling and forbidding or limiting contacts with others, demanding obedience, limiting sleep and food, threats, verbal degradation".[6] Sexual violence, in general terms, is understood as a contact of a sexual nature, made without consent of the injured person that can be manifested in, among others: coercing sexual relations with the perpetrator of this type of violence, unacceptable sexual behaviours, coercing sexual relations with third parties or criticism of sexual behaviours.[7] Whereas, economic violence can be manifested by, among others: depriving the injured person of livelihood, limiting access to money or rationing money to the injured person, limiting the possibility of using common material goods, or controlling expenditures.[8] It should be underlined that the aforementioned types of violence very often occur jointly – in various configurations, e.g., physical violence is often accompanied by mental violence or sexual violence, while economic violence is often combined with mental violence.

However, it should be borne in mind that regardless of the type of violence, it is always aimed at injuring the victim, causing them pain and suffering, or humiliating them. The perpetrator is fully aware of the consequences of their actions, since violence is an intentional action which is aimed at controlling and subordinating the victim.[9] It was already indicated in the preamble to the previously binding Act on Counteracting Family Violence that "(...) family violence infringes basic human rights, including the right to life and health and respect for personal dignity".

Due to the fact that consequences of violence are far-reaching and can be observed in many areas such as, for example, the injured person losing their self-esteem, the injured person's belief that they are at fault, a lack of the possibility of receiving assistance and protection, life in constant stress, sometimes struggling with depression or even self-harm, or suicidal attempts,[10] it is necessary to undertake effective measures aimed at counteracting violence. It is, however,

[6] *Ibidem*, p. 9.
[7] W. Jedlecka, *Formy i rodzaje przemocy*, [in:] *Przemoc w prawie i polityce*, M. Sadowski, A. Spychalska, K. Sadowa (ed.), Wrocław 2017, pp. 19–20.
[8] W. Jedlecka, *Formy i rodzaje*..., p. 22.
[9] *Ibidem*, p. 14.
[10] J. Helios, W. Jedlecka, *op. cit.*, p. 34.

impossible not to notice that undertaking measures aimed at counteracting domestic violence is faced with special difficulties, since the essence of domestic violence consists in the fact that acts of violence are committed by the perpetrator against a person with whom the perpetrator has a special bond and a close relationship.[11] In the justification to the bill on counteracting family violence it was indicated that "The manner of state reaction to domestic violence should be shaped by a clear statement on who is the perpetrator/criminal, and who is the victim. The state's reaction must be unequivocal, demonstrating taking actions against the perpetrator and not against the victim."[12] Effective counteracting of domestic violence is inseparably related to proper reactions of various types of entities, starting from the closest environment of the perpetrator and the victim, through social assistance institutions and prosecuting authorities such as the Police or public prosecutor's office, and ending with courts who are at a disposal of an entire range of criminal reaction instruments, to a prohibited act committed by the perpetrator, satisfying the attributes of domestic violence.

The activity of courts adjudicating in cases concerning domestic violence constitutes the main subject of the deliberations herein. The courts are, in fact, at the disposal of an entire spectrum of various types of instruments and mechanisms which can counteract the phenomenon of domestic violence. It is also impossible not to notice that courts are at the disposal of the broadest scope of measures that can be applied against perpetrators of domestic violence. Therefore, the role of courts adjudicating in criminal cases is invaluable in the context of combating the phenomenon of domestic violence and as such requires further discussion and analysis.

[11] *Ibidem*, p. 34.

[12] Justification to the Government Bill on counteracting family violence, Parliamentary Paper no. 3639, p. 4, http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/3639/$file/3639.pdf (accessed on: 1.03.2023).

2. Prohibited acts that can be included in the scope of behaviours constituting domestic violence

Domestic violence behaviours can meet the attributes of various prohibited acts referred to in the Penal Code. For instance, abuse (Article 207 of the Penal Code), which is by far the most frequently occurring prohibited act included in the scope of domestic violence behaviours. It should be emphasised that violence as one of the most crucial and, at the same time, controversial concepts in the penal law is particularly reflected in the group of statutory attributes of this prohibited act. Although the legislator does not use this concept directly, they describe it as physical or mental abuse.[13]

Other prohibited acts typified in the Penal Code which can be included in the scope of domestic violence behaviours are, among others: detriment to health – slight, moderate and severe (Article 157 par. 1 of the Penal Code, Article 157 par. 2 of the Penal Code, Article 156 of the Penal Code); exposure to danger (Article 160 of the Penal Code); illegal deprivation of freedom (Article 189 of the Penal Code); threat (Article 190 par. 1 of the Penal Code); coercion (Article 191 par. 1 and par. 1a of the Penal Code); crimes against sexual freedom (in particular under Article 197 of the Penal Code, Article 198 of the Penal Code, Article 199 of the Penal Code, Article 200 of the Penal Code, Article 201 of the Penal Code); violation of bodily integrity (Article 217 of the Penal Code); evading the duty of maintenance (Article 209 par. 1 of the Penal Code, Article 209 par. 1a of the Penal Code); or abandonment of an incapacitated person or a minor younger than 15 years of age (Article 210 of the Penal Code).

3. Diagnosis of the scale of domestic violence in Poland

Before proceeding to a detailed analysis of the subject matter of this chapter, that is, counteracting domestic violence from the point of view of mechanisms

[13] M. Romańczuk-Grącka, *Syndrom wyuczonej bezradności w kontekście przestępstwa znęcania się*, "Studia Prawnicze KUL" 2022, No. 3, p. 84.

and instruments at the disposal of courts first, adjudicating in criminal cases, mention should be made first of the scale of domestic violence in Poland.

Data presented in statements on the implementation of National Programmes for Counteracting Family Violence[14] prove that the problem of domestic violence remains valid and measures aimed at preventing this phenomena have not been bringing expected results.

Table No. 1. The number of people affected by family violence[15] in 2015–2021, by adults and children[16]

Year	In total	Adults	Percent	Children	Percent
2015	207,385	160,416	77.4	46,969	22.6
2016	225,164	164,318	73.0	60,846	27.0
2017	224,225	160,255	71.5	63,970	28.5
2018	224,251	158,520	70.7	65,731	29.3
2019	227,826	164,007	72.0	63,819	28.0
2020	207,045	148,085	71.5	58,960	28.5
2021	168,058	124,249	73.9	43,809	26.1

Source: own elaboration on the basis of data posted on the following websites: https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021.

[14] https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021 (accessed on: 25.03.2023).

[15] A person affected by family violence should be understood as any person against whom family violence is used, regardless of whether the perpetrator has been convicted for using such violence. In the amended act (Act on counteracting domestic violence) the concept of "a person affected by family violence" was replaced with a concept of "a person affected by domestic violence".

[16] Persons below 18 years of age.

The analysis of the aforementioned table shows that the number of people affected by family violence in 2015–2021 remained constant at around 200,000 and in following years stayed at a comparable level with the exception of year 2021, when this number fell to just over 168,000. In the vast majority of cases people affected by family violence are adults. The lowest percentage of adults affected by family violence was noted in 2018 (70.7%), while the highest was in 2015 (77.4%). The fact that there is a relatively large share of children among people affected by family violence is particularly worrisome. The lowest percentage figure for children affected by family violence was noted in 2015 (22.6%), while the highest was in 2018 (29.3%). Also noteworthy is that between 2015 and 2018 the number of children affected by violence was growing significantly, whereas between 2019 and 2021 this number dropped by over 20,000.

While analysing data included in the above table it should be also taken into account that data does not include the so-called number of dark crimes, that is, crimes that for various reasons are not reported to the authorities.

Table No. 2. The number of adults affected by family violence in 2015–2021, by sex

Year	In total	Women	Percent	Men	Percent
2015	160,416	126,286	78.7	34,130	21.3
2016	164,318	126,614	77.1	37,704	22.9
2017	160,255	125,341	78.2	34,914	21.8
2018	158,520	122,372	77.2	36,148	22.8
2019	164,007	124,382	75.8	39,625	24.2
2020	148,085	113,178	76.4	34,907	23.6
2021	124,249	100,417	80.8	23,832	19.2

Source: own elaboration on the basis of data posted on the following websites: https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021.

Women are in vast prevalence among adults affected by family violence. The lowest percentage of adult women affected by family violence was noted in 2019

(75.8%), while the highest was in 2021 (80.8%). In the analysed timeframe, men were by far less frequently affected by family violence – their share in the total number of people affected by domestic violence falls within the range between 19.2% in 2021 to 24.2% in 2019.

Table No. 3. The number of people accused of using family violence in 2015–2021 with a consideration of the number of people accused of using family violence meeting the attributes of the act under Article 207 of the Penal Code

Year	Total number of the accused	Number of the accused under Article 207 of the Penal Code	Percent
2015	16,677	12,356	74.1
2016	15,071	11,015	73.1
2017	15,297	11,325	74.1
2018	15,892	11,236	70.7
2019	16,959	11,545	68.1
2020	13,997	10,410	74.4
2021	16,958	12,939	76.3

Source: own elaboration on the basis of data posted on the following websites: https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021.

The analysis of data provided in the table above leads to the conclusion that in the analysed time framework the highest number of people accused of using family violence was observed in 2019. There were as many as 16,959 of them. Furthermore, it should be noticed that in 2021 the number of the accused amounted to only 1 person less than in 2019, i.e., 16,958. The lowest number of accused stood at 13,997, in 2020. In comparison to the previous year the number was lower by 2,962. However, if we take into consideration the percentage share of people accused of using family violence meeting attributes of the act under Article 207 of the Penal Code in the total number of people accused of using family violence, it should be stated that this share stays at a relatively permanent

level of around 70%, while the lowest share was noted in 2019 (68.1%), and the highest was observed in 2021 (76.3%).

Table No. 4. The share of convictions for using family violence in the total number of people accused of using family violence in 2015–2021

Year	Number of the accused	Number of the convicted	Percent
2015	16,677	13,755	82.5
2016	15,071	12,486	82.8
2017	15,297	12,630	82.6
2018	15,892	13,183	83.0
2019	16,959	14,041	82.8
2020	13,997	11,665	83.3
2021	16,958	13,805	81.4

Source: own elaboration on the basis of data posted on the following websites: https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021.

The largest number of convictions due to family violence in the years 2015–2021 was noted in 2019, when 14,041 people were convicted, whereas the lowest number of convictions was noted in 2020 (11,665). In the analysed timeframe the percentage share of convictions for using family violence in the general number of people accused of using family violence stays at a relatively constant level – between 81.4% in 2021 and 83.3% in 2020.

Table No. 5. The number of people convicted for using family violence in the years 2015–2021 according to sex

Year	The total number of the convicted	Women	Percent	Men	Percent
2015	13,755	674	4.9	13,079	95.1
2016	12,486	542	4.3	11,944	95.7
2017	12,630	588	4.7	12,042	95.3

2018	13,183	627	4.8	12,556	95.2
2019	14,041	757	5.4	13,284	94.6
2020	11,665	576	4.9	11,089	95.1
2021	13,805	720	5.2	13,085	94.8

Source: own elaboration on the basis of data posted on the following websites: https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy--w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021.

Men by far prevail among people convicted for using family violence. Their share in convictions stays at the level of approximately 95%, and to be exact, between 94.6% in 2019 and 95.7% in 2016. The number of women convicted for using family violence is low and stays at the level of between 4.3% in 2016 and 5.4% in 2019.

Table No. 6. The share of people convicted for using family violence meeting the attributes of the act under Article 207 of the Penal Code in the total number of people convicted for family violence in the years 2015–2021

Year	The total number of the convicted	Including people convicted under Article 207 of the Penal Code	Percent
2015	13,755	10,263	74.6
2016	12,486	9,173	73.5
2017	12,630	9,445	74.8
2018	13,183	9,297	70.5
2019	14,041	9,603	68.4
2020	11,665	8,683	74.4
2021	13,805	10,535	76.3

Source: own elaboration on the basis of data posted on the following websites: https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy--w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021.

The share of people convicted for using family violence meeting the attributes of the act under Article 207 of the Penal Code in the total number of people convicted for family violence in the years 2015–2021 was constant between 68.4% in 2019 and 76.3% in 2021. It means that approximately 3/4 of convictions for family violence are convictions for acts meeting the attributes of abuse.

Table No. 7. The number of people convicted for using family violence meeting attributes of the act under Article 207 of the Penal Code with a consideration of their sex in the years 2015–2021

Year	In total	Women	Percent	Men	Percent
2015	10,263	380	3.7	9,883	96.3
2016	9,173	292	3.2	8,881	96.8
2017	9,445	348	3.7	9,097	96.3
2018	9,297	340	3.7	8,957	96.3
2019	9,603	389	4.1	9,214	95.9
2020	8,683	330	3.8	8,353	96.2
2021	10,535	459	4.4	10,076	95.6

Source: own elaboration on the basis of data posted on the following websites: https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021.

The analysis of the table presenting the number of people convicted for family violence meeting the attributes of the act under Article 207 of the Penal Code in view of their sex in the years 2015–2021 leads to the conclusion that the vast majority of perpetrators of acts under Article 207 of the Penal Code meeting the attributes of family violence are men. The percentage of convictions of them falls between 95.6% in 2021 and 96.8% in 2016, whereas the share of women in the general number of domestic violence perpetrators convicted for acts meeting the attributes of the crime under Article 207 of the Penal Code falls between 3.2% in 2016 and 4.4% in 2021.

Table No. 8. Resolutions of courts concerning people accused of family violence in the years 2015–2021

Year	Convictions	Percent	Acquittals	Percent	Conditional discontinuance	Percent	Discontinuance	Percent	Other[17]	Percent
2015	13,755	82.5	433	2.7	1,558	9.3	907	5.4	24	0.1
2016	12,486	82.8	364	2.4	1,420	9.4	779	5.3	22	0.1
2017	12,630	82.6	315	2.1	1,540	10.1	796	5.1	16	0.1
2018	13,183	83.0	324	2.0	1,610	10.1	754	4.8	21	0.1
2019	14,041	82.8	368	2.2	1,678	9.9	851	5.0	21	0.1
2020	11,665	83.3	234	1.7	1,303	9.3	781	5.6	14	0.1
2021	13,805	81.4	404	2.4	1,724	10.2	1,002	5.9	23	0.1

Source: own elaboration on the basis of data posted on the following websites: https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021.

Information on the share of convictions for using family violence in the total number of people accused of using family violence in the years 2015–2021 is presented in Table No. 4. Here, it has been included again – this time in comparison with other resolutions issued by courts with regard to people accused of family violence in the specified timeframe, e.g., acquittals, conditional discontinuance of criminal proceedings, and discontinuance of criminal proceedings. Such comparison allows better presentation of the structure of court resolutions issued against people accused of using family violence.

[17] Decisions of the court other than conviction, acquittal, conditional discontinuance of criminal proceedings and discontinuance of criminal proceedings include, for example: change of the legal qualification of an act indicated in the indictment, or remission of a case to the public prosecutor for the purposes of supplementing the investigation or inquiry.

The analysis of data provided in the table above leads to the conclusion that the share of convictions for using family violence in the total number of people accused of family violence in the analysed timeframe remains at a relatively constant level between 81.4% in 2021 and 83.3% in 2020. It is similar to the percentage of people acquitted of committing prohibited acts meeting the attributes of family violence. The lowest percentage of acquittals – 1.7% – was noted in 2020, whereas the highest percentage of acquittals was noted in 2015, when it reached the level of 2.7%.

Furthermore, it should be underlined that the percentage share of court resolutions consisting in conditional discontinuance of criminal proceedings in the analysed timeframe was around 9%. In 2015 and in 2020 it reached its low of 9.3%, while in 2021 the highest level was 10.2%.

If we take into consideration court resolutions consisting in discontinuation of criminal proceedings, it should be indicated that the lowest number of such resolutions was noted in 2018 (4.8%), while the highest was in 2021 (5.9%).

The data presented above clearly shows that in cases concerning domestic violence, acquittals were relatively rare. Although the number of convictions hovered around 81–83%, it should be kept in mind that in these types of cases, conditional discontinuation of criminal proceedings was fairly common (approx. 9%). It is probably related to, among others, the fact that in the vast majority of cases, perpetrators of domestic violence are convicted for a crime stipulated in Article 207 par. 1 of the Penal Code. Due to the fact that this crime is punishable under a custodial sentence of between 3 months and 5 years, it is possible to apply a probation measure in the form of a conditional discontinuance of criminal proceedings. In this case the provision of Article 66 par. 2 of the Penal Code, pursuant to which conditional discontinuance is not applied against a perpetrator of a crime prohibited under penalty exceeding 5 years of imprisonment, does not apply. However, it should be advised that if domestic violence perpetrator is convicted for the act under Article 207 par. 1a of the Penal Code, that is, physical or mental abuse of a person incapacitated due to their age, mental or physical condition, which is punishable under a custodial sentence of between 6 months and 8 years, the possibility under this provision of applying against the convicted benefaction in the form of conditional discontinuance of criminal proceedings would be excluded.

It is worth indicating the Judgement of the Supreme Court of 26 January 2022, file no. IV KK 550/21, in which the Supreme Court underlined that "Pursuant to Article 207 par. 1a of the Penal Code, an incapacitated person means a very young person (a child just a few years old or younger), who due to their very young age and immature mental and physical development is not able to exist independently and requires exceptional, special tenderness, care, respect and attention from legal guardians." Therefore, it seems that in all cases in which people affected by domestic violence are children under the age of five, legal qualification under Article 207 par. 1a of the Penal Code and not under Article 207 par. 1 of the Penal Code would be proper. In the case of qualifying by the court the perpetrator's act under Article 207 par. 1a of the Penal Code there would be no possibility of applying against such a person a probation measure in the form of a conditional discontinuance of the criminal proceedings.

4. Mechanisms functioning in the Polish penal law due to which courts adjudicating in criminal cases can counteract domestic violence

Various types of mechanisms function in the Polish penal law due to which courts adjudicating in criminal cases can undertake measures consisting in counteracting domestic violence. However, it should be emphasised that in cases concerning domestic violence, a special role is played by measures that allow isolating the perpetrator from the injured person. They provide safety to the person affected by violence at the same time preventing the perpetrator from causing further suffering to the injured person. Moreover, it should be also remembered that the perpetrator's isolation from the injured person can also prevent the perpetrator from pressuring the latter while continuing to stay at the same place with the victim, coaxing them to refuse to testify or testify in a manner that is beneficial for the perpetrator.

In the contents of Article 4 par. 3 of the Act on Counteracting Domestic Violence it was stipulated that "Measures stipulated in the Act are applied against people using domestic violence in order to prevent such people from contacting those experiencing domestic violence. Furthermore, corrective-educational

programmes and psychological-therapeutic programmes are applied with regard to people using domestic violence." Nevertheless, it should be underlined that courts are at the disposal not only of the criminal measures enumerated in Article 4 par. 3 of the Act on counteracting domestic violence with regard to behaviours meeting the attributes of domestic violence. Measures that, on the one hand, constitute a reaction to the perpetrator's behaviour constituting domestic violence, and, on the other hand, allow counteracting this type of violence and thus, are characterised with a prospective impact, can be divided into several categories such as: penalties, penal measures, preventive measures or probation obligations.

4.1. Penalties

Due to the characteristics of the penal law, among instruments of counteracting domestic violence at the disposal of the court, penalties should be enumerated in the first place, as they constitute a basic form of legal reaction to violating norms specified in provisions of the Penal Code. They perform a number of functions, including the two most important ones from the point of view of this paper, that is, the preventive function and the protective function.

Isolation-type penalties, i.e., a custodial sentence, 25 years of imprisonment and life imprisonment allow separating the domestic violence perpetrator from the injured person for the duration of such penalties, which primarily allows ensuring the injured person's safety and prevents them from further use of violence by the perpetrator. Nevertheless, it is equally important that adjudicating the custodial sentence against a person using domestic violence is supposed to influence the perpetrator also prospectively – to prevent the commission of prohibited acts in the future. Thus, the convicted should serve the custodial sentence in a relevant system. Pursuant to Article 62 of the Penal Code, while adjudicating the custodial sentence, the court can specify the kind and type of a correctional facility in which the convicted person is to serve the penalty, as well as adjudicate the therapeutic system for serving such a penalty. Whereas, in compliance with Article 81 of the Executive Penal Code, a custodial sentence is served in the following systems: 1) programmed rehabilitation; 2) therapeutic; 3) regular. Serving a penalty outside of the aforementioned systems is impossible, while the

division of these three systems of serving a custodial sentence is based on the criterion of diverse rehabilitation for particular groups of convicts qualified to serve a penalty in a specific system.[18] From the point of view of counteracting domestic violence it is especially important to serve the custodial sentence in a therapeutic system. Article 97 par. 1 of the Executive Penal Code stipulates, in fact, that while serving a penalty in the therapeutic system, especially the need for preventing further development of pathological characteristic features, for the restoring of mental balance and shaping the ability of social coexistence as well as preparing for independent life, are taken into consideration in proceedings with convicts. Article 96 par. 1 of the Executive Penal Code stipulates that the therapeutic system is targeted at convicts with non-psychopathic mental disorders, including people convicted for the crime specified in Articles 197–203 of the Penal Code, committed due to sexual preference disorders, mentally handicapped, addiction to psychoactive substances, or convicts with physical disabilities – who require specialist care, especially psychological, medical and rehabilitation – while, pursuant to Article 96 par. 3 of the Executive Penal Code, in the case of medical and educational concerns, also other convicts, upon their consent, can serve their sentence in a therapeutic ward.

In compliance with par. 15 subpar. 1 of the Regulation of Minister of Justice of 14 August 2003 on the manners of implementing penitentiary measures in correctional facilities and remand prisons, the person referred to a therapeutic ward is placed in a therapeutic ward for convicts: 1) with non-psychotic mental disorders or mental handicap(s); 2) addicted to alcohol; 3) addicted to psychoactive substances other than alcohol; 4) with physical disabilities. In the criminal literature it is underlined that on the basis of numerous research studies it can be clearly stated that co-existence of alcohol with certain types of crimes is explicit and that the criminogenic function of the use of alcohol is grave.[19] For example, in the report titled "Justice Versus Domestic Violence" summarising expert studies, within which files of 315 selected criminal cases were analysed, in which, in the years 2018–2020, a public prosecutor charged

[18] M. Kuć, *Indywidualizacja wykonywania kary pozbawienia wolności (Individualisation of Serving a Custodial Sentence)*, Lublin 2007, p. 60.

[19] B. Hołyst, *Kryminologia (Criminology)*, Warszawa 2009, p. 583; A. Kwieciński, *Prawnokarne aspekty terapii skazanych uzależnionych od alkoholu (Criminal Aspects of Therapy of Convicts Addicted to Alcohol)*, "Ius Novum" 2014, No. 3, pp. 28–29.

the accused with committing the crime pursuant to Article 207 of the Penal Code, it was emphasised that as many as 79% of analysed cases were related to alcohol consumption by the domestic violence perpetrator and moreover, negative consequences of using alcohol usually occurred in the very first words of a testimony given by the injured person.[20] A. Kwieciński underlines that in the situation in which a prohibited act is committed by a person addicted to alcohol, the issue of proceeding with such a person additionally becomes a criminal and penitentiary subject matter, since in such a case it is necessary to resolve the issue of applying against such a person relevant therapeutic measures with a consideration of interests of the justice and purposes of treatment of the perpetrator addicted to alcohol.[21]

Table No. 9. Penalties adjudicated against family violence perpetrators in the years 2015–2021

Year		2015	2016	2017	2018	2019	2020	2021
Fine		750	1,011	1,067	1,211	1,269	1,036	1,166
Restriction of liberty		1,214	2,408	2,558	3,116	3,529	2,787	3,025
Custodial sentence	in total	11,738	8,839	8,758	8,608	8,963	7,483	9,352
	including absolute	2,164	2,681	3,223	3,234	3,774	3,138	3,825
	including conditionally suspended	9,574	6,158	5,535	5,374	5,189	4,345	5,527

Source: own elaboration on the basis of data posted on the following websites: https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021.

Before proceeding to the discussion on data concerning various types of penalties handed out to domestic violence perpetrators in 2015–2021 and the frequency of adjudicating them, in should be emphasised that in 2015, Article 69 of the Penal Code was amended under the Act of 20 February 2015 on

[20] S. Burdziej, Z. Branicka, D. Hofman, *Wymiar sprawiedliwości wobec przemocy domowej. Raport z badań empirycznych (Justice vs Domestic Violence. Report on Empirical Research)*, Toruń 2022, p. 34.

[21] A. Kwieciński, *Prawnokarne aspekty terapii... (Criminal Aspects of Therapy of...)*, pp. 28–29.

amendment of the Act – Penal Code and certain other acts. Pursuant to Article 1 par. 33 letter a of the amending Act, Article 69 par. 1 of the Penal Code obtained the following wording: "The court can conditionally suspend execution of a custodial sentence adjudicated in a term not exceeding a year, if at the time of committing the crime the perpetrator has not been convicted to a custodial sentence, and such suspension is sufficient for achieving purposes of the penalty and especially preventing them from reoffending." This amendment entered into force on 1 July 2015. Before the discussed amendment entered into force, it was admissible pursuant to Article 69 par. 1 of the Penal Code to conditionally suspend execution of a custodial sentence not exceeding 2 years, a penalty of restricted liberty, as well as a fine adjudicated as self-standing punishment, however, on the condition that it was sufficient for achieving the purposes of the punishment for the perpetrator, in particular preventing them from reoffending. As of the entry into life of new provisions it is no longer admissible to issue a judgement conditionally suspending execution of a fine and penalty of restricted liberty, while a conditional suspension of execution of a custodial sentence became possible only in cases in which this penalty was adjudicated in term not exceeding one year.

The analysis of data included in Table No. 9 shows that the most frequently adjudicated penalty against family violence perpetrators in 2015–2021 was the custodial sentence, whereas it should be indicated that the custodial sentence with a conditional suspension of service is much more often adjudicated than the absolute penalty. The second place among penalties the most often adjudicated against family violence perpetrators was held by the penalty of restricted liberty, whereas the penalty of a fine was the least frequently adjudicated against family violence perpetrators.

It is also worth mentioning that a decidedly higher number of custodial penalties with a conditional suspension of execution was adjudicated in 2015 in comparison to consecutive years, which results from the fact that, as has already been mentioned, before the amendment of 20 February 2015 it was possible to conditionally suspend, for a term of up to two years, execution of a penalty adjudicated in a higher term. The discussed amendment entered into force on 1 July 2015, that is, in the middle of the year, therefore, for the purposes of this analysis concerning types of penalties adjudicated for family violence, it should be assumed that penalties adjudicated in 2015 were penalties adjudicated on the

basis of provisions binding before this amendment. This is a certain simplification, however, it seems to be justified due to the contents of Article 4 par. 1 of the Penal Code and due to the fact that even if the act was committed in 2015, but after entry into life of the amending act, there is little probability that a valid sentence was issued in the same year. Due to the above, for the purposes of this analysis, all convictions from 2015 are considered to be convictions on the basis of provisions binding before the amendment.

4.2. Preventive measures

4.2.1. Temporary arrest

A temporary arrest is one of the preventive measures. Pursuant to Article 249 par. 1 of the Code of Criminal Procedure, preventive measures can be applied in order to secure a proper course of proceedings and, exceptionally, also in order to prevent the accused from re-committing a grave crime; they can be applied only when collected evidence indicates high probability that the accused has committed the crime.

In compliance with the contents of Article 258 par. 1 of the Code of Criminal Procedure, a temporary arrest and other preventive measures can be applied if there is: 1) a justified concern that the accused might run away or hide, especially when it is impossible to determine their identity or they have no permanent place of residence in the country; 2) a justified concern that the accused will coax the injured person to provide false testimony or explanations, or otherwise illegally hinder criminal proceedings. Article 258 par. 2 of the Code of Criminal Procedure stipulates that the accused is alleged to have committed a crime or offence prohibited under a custodial sentence, the maximum term of which amounts to at least 8 years, or when the first instance court convicted such a person to a custodial sentence of at least 3 years, the need to apply a temporary arrest in order to secure proper course of proceedings can be justified by the imminent strict penalty.

It should be underlined that regardless of the stage of the criminal proceedings in which this preventive measure is applied, the authority applying the temporary arrest can only be the court, which fact results directly from the

contents of Article 250 par. 1 of the Code of Criminal Procedure. Pursuant to par. 2 of the aforementioned provision, a temporary arrest is applied in preparatory proceedings upon motion of the public prosecutor, by the regional court, in the district of which the proceedings are carried out, and in urgent cases – also other regional courts. Whereas, upon bringing the indictment, a temporary arrest is used by the court resolving the case.

In the context of the subject matter constituting the main subject of deliberations presented herein, particular attention should be paid to the contents of Article 258 par. 3 of the Code of Criminal Procedure. According to this provision, preventive measures can be exceptionally applied also when there is a justified concern that the accused who has been alleged to have committed a crime or deliberate offence, who commits an offence against life and health or offence against public safety, in particular when they threatened to commit such a crime. In the doctrine it is indicated that application of a preventive measure on this basis results in the applied measure having a preventive nature, which constitutes a deviation from the procedural nature of preventive measures.[22] However, this deviation is dictated by the necessity to protect society from the further criminal activity of the accused.[23]

A temporary arrest referred to in Article 258 par. 3 of the Code of Criminal Procedure is the so-called temporary arrest, which is of a relatively pre-tort nature. It remains in compliance with the binding standards of the rule of law and provisions concerning human rights protection. The possibility of applying such a measure is, in fact, provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which in Article 5 par. 1c allows a legal arrest in order to bring the accused before a relevant authority if there is a justified suspicion of committing an act prohibited under penalty or if it is necessary in order to prevent commitment of such an act or prevent the accused from running away after commitment of such an act.[24]

---

[22] K. Eichstaedt, [in:] *Kodeks postępowania karnego. Tom I. Komentarz (Code of Criminal Proceedings. Volume I. Commentary)*, D. Świecki, Lex (accessed on: 15.04.2023).

[23] D. Tarnowska, *Pozaprocesowa funkcja środków zapobiegawczych (Nonprocedural Function of Preventive Measures)*, "Prokuratura i Prawo" 2002, No. 11, p. 73.

[24] A. Szumski, *Funkcja prewencyjna tymczasowego aresztowania (Preventive Function of Temporary Arrest)*, "Prokuratura i Prawo" 2012, No. 7–8, p. 144.

According to A. Szumski, "(...) on the one hand, (...) for preventive reasons a temporary arrest constitutes an important reinforcement of state authorities in combating crime. The need to protect public well-being can exceptionally justify a certain lapse from the principle of presumption of innocence in specific cases. It seems to be a certain choice of «the lesser evil», since commitment of a new grave crime by the accused is an incomparably worse possibility than a temporary deprivation of liberty. It should be, however, strongly emphasised that application of a temporary arrest only for the purposes of a general or specific prevention without the consideration of the securing function, would significantly change the legal nature of a temporary arrest thus resulting in the latter becoming a coercive measure in practice. It is obviously inadmissible from the point of view of the idea of this legal institution and purposes it serves. Therefore, the preventive function should only be a function of an accessorial nature."[25]

In this context, it is also worth mentioning the question asked by D. Tarnowska, who in one of her studies deliberates whether it is admissible for the substantive penal law to prohibit punishment of a perpetrator for the intention of committing a crime, while the procedural penal law provides for the possibility of applying a preventive measure to eliminate carrying out such an intention, extending the intention to all offences against life and health, as well as offences against public safety. Simultaneously, the aforementioned author states that "It does not seem justified for the procedural penal law (aimed at the implementation of the substantive penal law norms) to introduce penitentiary measures stricter than those provided for in the substantive penal law."[26]

Nevertheless, it is impossible not to notice that in Article 258 par. 3 of the Code of Criminal Procedure the legislator did not introduce the possibility of applying a temporary arrest in the situation when the person, who has been accused of committing a crime or a deliberate offence, only had the intention of committing a prohibited act understood as non-externalised intellectual-mental feeling; but only in the case of a justified concern that such a person will commit an offence against life and health or offence against public safety, especially when they have threatened to do so. Therefore, in the case referred to in Article 158

[25] A. Szumski, *Funkcja prewencyjna... (Preventive Function of...)*, pp. 144–145.
[26] D. Tarnowska, *Pozaprocesowa funkcja środków... (Nonprocedural Function of Preventive Measures)*, p. 78.

par. 3 of the Code of Criminal Procedure a measure in the form of a temporary arrest is not applied as a reaction to the intention of committing a prohibited act. In fact, the Article provides for the possibility of applying this measure in response to the perpetrator's behaviour taking *de facto* a form of a threat to commit an offence against life and health or an offence against public safety.

Table No. 10. The number of motions submitted by the public prosecutor to the court for application of a temporary arrest against people using family violence and the number of motions accepted in 2015–2021

Year	Number of submitted motions	Number of accepted motions	Percent
2015	1,398	863	61.7
2016	1,862	784	42.1
2017	2,625	1,004	38.2
2018	2,274	1,075	47.2
2019	3,043	1,291	42.4
2020	3,440	1,444	42.0
2021	3,216	1,566	48.7

Source: own elaboration on the basis of data posted on the following websites: https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021.

Data presented in the table above shows the percentage of motions submitted by the public prosecutor for a temporary arrest against people using family violence, and which were accepted by the court. The analysis of the aforementioned data leads to the conclusion that courts accept relatively few public prosecutor's motions for a temporary arrest. In the analysed timeframe the highest percentage of accepted motions was observed in 2015 (61.7%). In other years the number of accepted motions amounted to less than a half, whereas, the lowest percentage of accepted motions was noted in 2017 and amounted to 38.2%, while the highest – in 2021 – was 48.7%.

4.2.2. Surveillance by the Police

Another preventive measure that can be applied by courts as one of the instruments for counteracting domestic violence is surveillance by the Police. Nevertheless, it should be emphasised that depending on the stage of the proceedings a decision on the surveillance is issued, an authority issuing such a decision can be a public prosecutor (at the preparatory proceedings stage) or court (at the stage of judicial proceedings).

Pursuant to Article 275 of the Code of Criminal Procedure, a person subjected to surveillance is obliged to adhere to the requirements included in the decision of the court or the public prosecutor. This obligation can consist in a ban on leaving a specific place of stay; reporting to a surveillance authority in set time intervals; notifying the authority of planned travels and date of return; a no-contact order concerning the injured or other persons; a restraining order requiring to stay away from certain people at a set distance; a ban on staying in specific places, including other restrictions of the accused person's liberty to facilitate necessary surveillance. The catalogue of obligations that can be imposed on the person against whom surveillance is used is not a closed catalogue, since the legislator used the phrase "as well as other restrictions of the accused person's liberty". In the literature it is underlined that the scope of obligations imposed on the suspect or accused must be justified with the circumstances of the case and possibilities of carrying them out. The imposed obligations should not have a form of repression that has a negative impact on health of the person under surveillance or on their professional life.[27]

In the context of counteracting domestic violence, requirements included in the decision on surveillance should be especially emphasised such as: a ban on leaving a specific place of stay; a no-contact order concerning the injured or other persons; a restraining order requiring to stay away from certain people at a set distance together with a ban on staying in specific places. These bans will be discussed in more detail in the further part of the study, and more precisely in the part discussing penal measures, since the contents thereof is very similar to the contents of a penal measure referred to in Article 39 section 2b of the Penal Code.

[27] K. Dudka, [in:] *Kodeks postępowania karnego. Komentarz (Code of Criminal Procedure. Commentary)*, K. Dudka (ed.), Lex (accessed on: 20.04.2023).

In Article 275 par. 4 of the Code of Criminal Procedure the legislator stipulated that a person subject to Police surveillance is obliged to appear in the specified organisational unit of the Police with an identification document, carry out orders aimed at documenting the course of surveillance and giving information necessary to determine whether such a person complies with requirements imposed in the decision of the court or the public prosecutor. In order to obtain such information, the person subject to surveillance can be called on to appear on a set date. In the case of a failure of the person subject to surveillance to adhere to the requirements specified in the decision, the surveillance authority immediately notifies either the court, or the public prosecutor who issued the decision.

From among all bans that can be imposed on the person against whom surveillance is executed, in practice, the obligation to appear at the surveillance authority is the one most often adjudicated.[28] However, it should be underlined that the frequency of appearance should be specified in the decision on applying the preventive measure, e.g., by specifying how many times a week the suspect or accused (depending on the stage of the criminal proceedings in which this measure is used) has to appear at the surveillance authority.[29]

4.2.3. Conditional surveillance of the Police

One should also pay attention to the fact that in compliance with Article 275 par. 3 of the Code of Criminal Procedure, in the case of premises for applying a temporary arrest against a person accused of a crime committed with the use of violence or an illegal threat to the detriment of a loved one or another person living together with the perpetrator, surveillance can be used instead of a temporary arrest provided that the accused leaves on the set date the premises occupied with the injured person and provides information on the place of their stay. In the aforementioned provision, the legislator regulated the so-called conditional surveillance by the Police. The court at the stage of judicial proceedings, and the public prosecutor at the stage of preparatory proceedings, can apply a conditional surveillance against a perpetrator with regard to whom there occur *de*

[28] K. Eichstaedt, *op. cit.*, ttps://sip.lex.pl/#/commentary/587748553/752561/swiecki-da-riusz-red-kodeks-postepowania-karnego-tom-i-komentarz-aktualizowany?cm=URE-LATIONS (accessed on: 20.03.2023).

[29] *Ibidem*.

facto premises for applying a temporary arrest, however, due to certain reasons, application of this preventive measure would be ineffective.

The essence of the conditional surveillance by the Police is based on protecting the life or health of a loved one of the accused or another person living with the perpetrator from domestic violence, and separating the perpetrator from the injured person.[30] As indicated in the literature, people using domestic violence often do not pose a threat to other people, since they "(...) focus on (...) destroying the lives of their loved ones, often wearing a mask in the society and taking it off as soon as they cross a threshold of their homes".[31] Therefore, in certain cases, despite premises for using a temporary arrest, using this preventive measure would not be effective and thus it can be, to a certain degree, replaced with a conditional surveillance by the Police.

4.3. Penal measures that can be adjudicated by the court against a domestic violence perpetrator

Ensuring protection and safety for domestic violence victims by isolating them from the violence perpetrator constitutes one of the most important legal aspects of counteracting domestic violence.[32] The Penal Code provides for an entire spectrum of penal measures, which can be applied by the courts against domestic violence perpetrators. In the literature it is underlined that measures included in the currently binding Penal Code that are referred to as "penal measures", in previous codifications were defined as auxiliary penalties, which, in a way, conveyed their essence, since they were primarily adjudicated next to penalties constituting the main reaction to the committed crime, at the same time constituting an auxiliary reaction of a supplementary nature. Nonetheless, the currently binding penal code does not treat penal measures as penalties, but provides them with another meaning, although, just as do penalties, they *de facto*

[30] M. Żbikowska, *op. cit.,* pp. 25–26.
[31] *Ibidem*, p. 26.
[32] S. Spurek, *Izolacja sprawcy przemocy w rodzinie od ofiary (Isolation of the Family Violence Perpetrator from the Victim)*, "Prokuratura i Prawo" 2013, No. 7–8, p. 147.

constitute a reaction to the perpetrator's negative behaviour, which constitutes an additional punitive ailment.[33]

Primarily in the context of penal measures that can be adjudicated against a domestic violence perpetrator, the penal measure specified in Article 39 section 2b of the Penal Code should be indicated, that is, a ban on staying in specific environments or places, a no-contact order concerning specific people, a restraining order requiring to stay away from specific people and a ban on leaving a specific place of stay without consent of the court. Furthermore, the penal measure stipulated in Article 39 section 2e of the Penal Code should be mentioned, that is, a domestic violence protection order.

Penal law representatives do not agree on whether the bans enumerated in Article 39 section 2b of the Penal Code constitute one penal measure occurring in four forms or four separate penal measures. R.A. Stefański believes that treating these bans as one measure is primarily justified by the systemic interpretation: since the legislator included the aforementioned bans in the catalogue of penal measures in the same paragraph, despite the fact that he could have undoubtedly separated them, it proves that his intention was to characterise them as one measure occurring in several forms.[34] S. Szyrmer has a different opinion and believes that despite the aforementioned bans having been included in one Article, they are separate penal measures.[35] This opinion is shared by, among others, Z. Sienkiewicz.[36]

---

[33] R.A. Stefański, [in:] *Kodeks karny. Komentarz (Penal Code. Commentary)*, R.A. Stefański (ed.), Warsaw 2017, pp. 363–364.

[34] *Ibidem*, p. 374, similarly: P. Kiziukiewicz, *Problematyka zgodności z Konstytucją RP środka karnego obowiązku powstrzymania się od przebywania w określonych środowiskach lub miejscach, zakazu kontaktowania się z określonymi osobami lub zakazu opuszczania określonego miejsca pobytu bez zgody sądu (cz. 1) (The Issue of Compliance with the Constitution of the Republic of Poland of a Penal Measure Concerning the Obligation to Refrain from Staying in Certain Environments or Places, a No Contact Order Concerning Certain People or a Ban on Leaving a Certain Place of Residence without Court's Consent. Part 1)*, "Palestra" 2009, No. 11–12, p. 19.

[35] S. Szyrmer, *Nowelizacja prawa karnego w świetle ustawy z dnia 27 lipca 2005 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego i ustawy – Kodeks karny wykonawczy (Dz.U. Nr 163, poz. 1363) (Amendment of the Penal Law in the Light of the Act of 27 July 2005 on Amendment of the Act – Penal Code, the Act – Code of Criminal Procedure and the Act – Executive Penal Code (Journal of Laws, No. 163, item 1363))*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2006, No. 1, p. 58.

[36] Z. Sienkiewicz, [in:] *Kodeks karny. Komentarz (Penal Code. Commentary)*, M. Filar (ed.), Warszawa 2008, p. 150.

Regardless whether bans enumerated in Article 39 section 2b of the Penal Code are treated as one penal measure occurring in four different forms or as four separate penal measures, it is important that they can be adjudicated by the court individually and jointly. These bans can be combined by the court in various configurations and, in extreme cases, all bans referred to in Article 39 section 2b of the Penal Code can be adjudicated against the perpetrator.[37]

The penal measure pursuant to Article 39 section 2b of the Penal Code performs a mainly preventive function, its aim being to prevent an individual against whom it was adjudicated from continuing the hitherto criminal behaviour, and in the long-term also accustom the convicted to a specific scheme of conduct. This scheme is aimed at decreasing the probability of the convict committing, in the future, crimes against sexual freedom or morality to the detriment of a minor, as well as crimes with the use of violence, including violence against a loved one.[38] Therefore, this measure also performs an educational function for the perpetrator.[39]

It is worth underlining here that the penal measure referred to in Article 39 section 2e of the Penal Code, i.e., the domestic violence protection order, is a penal measure separate from bans enumerated in Article 39 section 2b of the Penal Code. Although the premises for adjudicating the penal measures referred to in Article 39 section 2b of the Penal Code and in Article 39 section 2e of the Penal Code are the same, including the domestic violence protection order in the catalogue of penal measures provided for in Article 39 of the Penal Code by assigning it with another paragraph, determines that it is an independent penal measure.[40]

One has to agree with the statement that both bans referred to in Article 39 section 2b of the Penal Code and the order stipulated in Article 39 section 2e of the Penal Code are characterised with a high level of privation for the perpetrator, which is expressed by restricting their personal freedom. Due to the above, before proceeding to discussing specific principles of both facultative and

---

[37] R.A. Stefański, *op. cit.*, p. 374.

[38] M. Siwek, *Wykonanie niektórych środków karnych (Execution of Certain Penal Measures)*, "Prokuratura i Prawo" 2010, No. 11, p. 114.

[39] A. Ziółkowska, [in:] *Kodeks karny. Komentarz (Penal Code. Commentary)*, V. Konarska-Wrzosek (ed.), Lex (accessed on: 7.04.2023).

[40] R.A. Stefański, *op. cit.*, p. 374.

obligatory adjudication of the measure referred to in Article 39 section 2b of the Penal Code and measure pursuant to Article 39 section 2e of the Penal Code, it is worth referring in few words to the essence of these particular measures, i.e., the contents of bans enumerated in Article 39 section 2b of the Penal Code and the order stipulated in Article 39 section 2e of the Penal Code.

4.3.1. Prohibition of presence in certain environments or places

The essence of the discussed ban is the obligation of the accused not to spend time in specific environments or places. In this context, 'environment' should be understood in social categories, that is, as a specific group of people characterised with a common feature, i.e., common interests, hobbies, lifestyle, job or education.[41] However, it should be taken into consideration that although adjudicating the discussed ban by the court can restrict certain freedoms of the perpetrator, it cannot deprive them of such freedoms completely. Therefore, it is necessary for the court to specify in the judgement such an environment or places.[42] The legislator did not formulate criteria which should be used by the court while specifying the environment or place in which the convict cannot stay; however, it should be adopted that these should be environments or places in the case of which there might be a threat of re-committing the prohibited act by the perpetrator. As underlined in the literature, for this reason it is impossible to prohibit the convict from staying, e.g., in the territory of the entire town/city or commune.[43] *Ratio legis* of the ban on staying in specific environments or places consists not only in preventing from re-committing a crime by the convict, but also covering the injured person or potential victims of the convict

[41] K. Lipiński, [in:] *Kodeks karny. Część ogólna. Komentarz (Penal Code. General Part. Commentary)*, J. Giezek (ed.), https://sip.lex.pl/#/commentary/587846625/644065/giezek-jacek-red-kodeks-karny-czesc-ogolna-komentarz?cm=URELATIONS (accessed on: 7.04.2023); J. Skupiński, J. Mierzwińska-Lorencka, [in:] *Kodeks karny. Komentarz (Penal Code. Commentary)*, R.A. Stefański (ed.), Warszawa 2017, p. 540.

[42] S. Szyrmer, *op. cit.*, p. 58.

[43] K. Lipiński, *op. cit.*, https://sip.lex.pl/#/commentary/587846625/644065/giezek-jacek-red-kodeks-karny-czesc-ogolna-komentarz?cm=URELATIONS (accessed on: 7.04.2023).

with protection from said individual.[44] Due to the above, the twofold function thereof is indicated – the individual preventive function and protective function.

4.3.2. Prohibition to get in contact with certain persons

Prohibition to get in contact with certain persons can include all forms of contact, that is, personal contact and any forms of remote contact, including via the Internet. The court can adjudicate a restraining order requiring to stay away from both one specific person and a larger number of people, however, these people must be accurately indicated in the judgement.[45] It should be underlined that this order only covers an aware and purposeful contact and not a random meeting which can happen without any initiative of the person against whom this order has been adjudicated by the court.[46] Furthermore, in the literature it is also noticed that in compliance with the *ratio legis* of the commented regulation, the convict cannot initiate contact with people specified in the judgement. However, such a person will not infringe the restraining order adjudicated against them, if the contact is initiated or provoked by the injured.[47] In the context of the penal measure that is the restraining order requiring to stay away from specific persons, the Judgement of the Supreme Court of 15 November 2017, file no. IV KK 382/17 should be paid attention to, where it was indicated that a penal measure in the form of a restraining order requiring to stay away from specific persons is adjudicated in years, from one year to 15 years, therefore, it would be

---

[44] M. Melezini, A. Sakowicz, *Środek karny w postaci obowiązku powstrzymania się od przebywania w określonych środowiskach lub miejscach, zakazu kontaktowania się z określonymi osobami lub zakazu opuszczania określonego miejsca pobytu bez zgody sądu (art. 39 pkt 2b k.k.) (Penal Measure in the Form of the Obligation to Refrain from Staying in Certain Environments or Places, a No Contact Order Concerning Certain People or a Ban on Leaving a Certain Place of Residence without Court's Consent (Article 39 section 2b of the Penal Code)*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2008, No. 2, p. 208.

[45] A. Ziółkowska, *op. cit.*, https://sip.lex.pl/#/commentary/587715655/740468/konarska--wrzosek-violetta-red-kodeks-karny-komentarz-wyd-iv?cm=URELATIONS (accessed on: 7.04.2023).

[46] K. Lipiński, *op. cit.*, https://sip.lex.pl/#/commentary/587846625/644065/giezek-jacek-red--kodeks-karny-czesc-ogolna-komentarz?cm=URELATIONS (accessed on: 11.04.2023).

[47] A. Ziółkowska, *op. cit.*, https://sip.lex.pl/#/commentary/587715655/740468/konarska--wrzosek-violetta-red-kodeks-karny-komentarz-w yd-iv?cm=URELATIONS (accessed on: 7.04.2023).

grossly unjust to uphold in force a judicial decision including a resolution on a termless application of the penal measure against the accused.[48]

4.3.3. Prohibition from approaching certain persons

This order was stipulated by the legislator in a very general manner. The court specifies this order by indicating a person or persons whom the accused cannot approach and the distance which must be kept by the accused from the person(s) indicated by the court. As indicated by R.A. Stefański, having in mind the purpose and premises of this ban, such a person is, as a rule, the person injured as a result of the crime committed with the use of family violence, since the reason for which the court imposes this interdict on the perpetrator is to "(...) save the injured person from upsetting experiences related to reminiscing the crime, which is triggered by seeing the perpetrator".[49] The legislator specifies neither the minimal, nor the maximal distance at which the perpetrator, against whom the discussed ban was imposed, cannot approach the injured person, or another person. This distance, therefore, must be specified by the court in the judgement.

4.3.4. Ban on leaving a specific place of stay without consent of the court

This ban certainly raises a lot of interpretative doubts. Although it is of an extremely repressive nature, the contents thereof seem to be completely unclear, since, in principle, each phrase used to stipulate this ban is imprecise.[50] Due to the non-exhaustive nature of this paper, it is impossible to discuss in detail the interpretative doubts that arise while attempting to explain the contents of this ban. Therefore, I will signal here only that on the basis of this ban it is not clear how "a specific place of residence" should be understood – whether this phrase refers to a city/town, settlement, specific region, street or a flat. R.A. Stefański

[48] The same position was expressed in, among others, Judgement of the Supreme Court of 7 July 2016, file no. V KK 194/16, 17 December 2020, file no. I KK 170/20, or Judgement of the Appellate Court in Warsaw of 4 December 2017, file no. II AKa 348/17.

[49] R.A. Stefański, *op. cit.*, p. 376.

[50] T. Pudo, *Środek karny w postaci zakazu opuszczania określonego miejsca pobytu bez zgody sądu – próba analizy (Penal Measure in the Form of the Ban on Leaving a Certain Place of Residence without Court's Consent – an Analysis Attempt)*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2006, No. 2, pp. 79–80.

indicates in this context that the ban on leaving a specific place of stay is not limited to the place of residence, that is, a city/town where a given person stays with the intention of permanent residence. In fact, the legislator emphasises the actual situation and not the legal situation. Thus, it is insignificant where the accused has a place of permanent residence. It is only important whether they stay in a specific place. At the same time the aforementioned author underlines that this ban cannot cover a flat where the accused stays, since then it would not constitute a penal measure, but a house arrest, which is not known to the Polish legislation.[51]

K. Lipiński believes that the ban on leaving a specific place of stay without consent of the court can cover the entire city/town or a specific administrative part thereof.[52] This opinion is shared by, among others, M. Budyn-Kulik.[53] According to T. Pudo, there is no justification for existence in the Polish law of a ban on leaving a place of residence specified by the court. He believes that this ban should be deleted, "(...) if only to limit the legislator's tendency to draw up provisions that sound grand and strict, but are not practical in use, do not serve anything and are, in fact, extremely bothersome and, in principle, do not comply with human rights that are also vested in a criminal".[54]

4.3.5. Temporary order for eviction from the home of the victim's co-habitant

Contents of the discussed penal measure consists in issuing the domestic violence protection order. What is especially important is the fact that applying this measure by the court against the accused does not deprive them from the ownership right to premises, but only temporarily prevents them from using such premises.[55] In the literature it is specified that for the purposes of assessment whether specific premises are residential, the actual use thereof, and not only the purpose, is of great importance.[56]

[51] R.A. Stefański, *op. cit.*, p. 376.

[52] K. Lipiński, *op. cit.*, https://sip.lex.pl/#/commentary/587846625/644065/giezek-jacek-red-kodeks-karny-czesc-ogolna-komentarz?cm=URELATIONS (accessed on: 5.04.2023).

[53] M. Budyn-Kulik, [in:] *Kodeks karny. Komentarz aktualizowany (Penal Code. Updated Commentary)*, M. Mozgawa (ed.), https://sip.lex.pl/#/commentary/587736890/748518/mozgawa-marek-red-kodeks-karny-komentarz-aktualizowany?cm=URELATIONS (accessed on: 4.05.2023).

[54] T. Pudo, *op. cit.*, p. 87.

[55] R.A. Stefański, *op. cit.*, p. 376.

[56] *Ibidem*.

In the context of the analysed penal measure, particular attention should be paid to the deliberations of the Supreme Administrative Court included in the justification to the Judgement of 17 February 2017, file no. II OSK 1288/15, in which the Supreme Administrative Court indicated that the fact of not adjudicating by the court a penal measure pursuant to Article 39 section 2e of the Penal Code, that is, the domestic violence protection order remains insignificant with regard to determining the premises for deregistering, and contrary to the nature of registration that serves solely the purposes of the records. In the further part of the justification of the aforementioned judgement, the Supreme Administrative Court stated that "The conclusion that the systemic interpretation of Article 15 par. 2 of the Act of 1974 on population records and identity documents requires consideration that if, as a result of applying penal law norms, the accused is separated from their family members, a consequence in this scope is also required in the administrative law, is wrong. Article 15 par. 2 of the Act does not allow depending deregistration on assessment whether a given person should or should not stay at a given place of permanent residence. Such an interpretation is contrary to the purpose of permanent residence that is solely of a records-related nature."

4.4. Principles for adjudicating penal measures referred to in Article 39 section 2b of the Penal Code and Article 39 section 2e of the Penal Code

In Article 41a par. 1 of the Penal Code the legislator regulated specific principles for adjudicating a facultative ban on staying in specific environments or places, a no-contact order concerning specific people, a restraining order requiring to stay away from particular people, a ban on leaving a specific place of stay without the consent of the court, as well as the domestic violence protection order. Pursuant to this provision the court can adjudicate a ban on staying in specific environments or places, a no-contact order concerning specific people, a restraining order requiring to stay away from particular people or a ban on leaving a specific place of stay without the consent of the court, as well as the domestic violence protection order in the case of a sentence for a crime against sexual freedom or morality to the detriment of a minor or other crimes against freedom, as well as in the case of a sentence for premeditated crime with the use

of violence, especially violence against a loved one. A ban or order can be combined with an obligation to report to the Police or another specified authority at specific time intervals, and the restraining order requiring to stay away from specific people can be also controlled in the electronic surveillance system.

Article 41a par. 2 stipulates an obligatory ban on staying in specific environments or places, a no-contact order concerning specific people, a restraining order requiring to stay away from particular people or a ban on leaving a specific place of stay without the consent of the court, as well as the domestic violence protection order. In compliance with Article 41a par. 2 of the Penal Code, the court adjudicates a ban on staying in specific environments or places, a no-contact order concerning specific people, a restraining order requiring to stay away from specific people or a ban on leaving a specific place of stay without the consent of the court, as well as the domestic violence protection order, in the case of a custodial sentence without a conditional suspension of service thereof for a crime against sexual freedom or morality to the detriment of a minor. A ban or order can be combined with an obligation to report to the Police or another specified authority in specific time intervals, and the restraining order requiring to stay away from specific people can be also controlled in the electronic surveillance system.

It is also worth paying attention to the contents of Article 41a par. 3 of the Penal Code, in compliance with which the court can adjudicate a ban on staying in specific environments or places, a no-contact order concerning specific people and a restraining order requiring to stay away from specific people for life in the case of sentencing the perpetrator again under conditions stipulated in Article 41a par. 2.

According to Article 41a par. 3a of the Penal Code, in the case of adjudicating a domestic violence protection order for crimes stipulated in Chapter XXV of the Penal Code (crimes against sexual freedom and morality) and Chapter XXVI of the Penal Code (crimes against family and care), the court adjudicates a restraining order requiring to stay away from the injured person for the same period of time. According to D. Szeleszczuk, "Combining the domestic violence protection order with the restraining order requiring to stay away from the injured person obviously leads to increasing the scope of protection from the accused by extending the space in which the injured person will be able to stay without the necessity of dealing with the perpetrator's presence. The obligatory

nature of this order results in the court not assessing the purposefulness of use thereof. The fact that it is necessary was decided by the legislator, thus preventing the freedom of shaping a penal sanction and adjusting it to the level of fault and social harm."[57] Furthermore, in the literature it is underlined that a penal measure "in the form of a domestic violence protection order fulfils tasks in the scope of individual prevention by making it easier to refrain from committing prohibited acts in the future and is intended to make the perpetrator aware of the extent of caused harm and, due to its onerousness, also influence the perpetrator emotionally, as well as act as a deterrent for others."[58]

While adjudicating the restraining order requiring to stay away from specific people, the court specifies the distance from protected people which the convict is obliged to keep, whereas, while adjudicating the domestic violence protection order, the court specifies the term thereof, referred to, respectively, in Article 41a par. 4 and par. 5 of the Penal Code. Pursuant to Article 43 of the Penal Code referred to in Article 39 section 2b of the Penal Code, i.e., the ban on staying in specific environments or places, the no-contact order, the restraining order requiring to stay away from specific persons or the ban on leaving a specific place of stay without the consent of the court is adjudicated in years – from 1 year to 15 years, while the order referred to in Article 39 section 2e of the Penal Code, i.e., the domestic violence protection order, is adjudicated for a period between 1 year and 10 years.

Here, it is worth referring to the Judgement of the Supreme Court of 25 February 2022, file no. IV KK 696/21, in which the Supreme Court indicated that penal measures require not only indicating the prohibited or ordered behaviour, but also specifying the duration of validity thereof. A failure to specify this period of time in the judgement imposing such obligations on the convict constitutes a gross infringement of Article 43 par. 1 of the Penal Code, and this breach has a significant impact on the contents of the judgement. Since the time has not been specified and thus, the expiration of the validity of penal measures

[57] D. Szeleszczuk, *Środki karne w świetle nowelizacji Kodeksu karnego z dnia 20 lutego 2015 r. (Penal Measures in the Light of the Amendment of the Penal Code of 20 February 2015)*, "Studia Prawnicze KUL" 2015, No. 4, pp. 80–81.

[58] R.A. Stefański, *Środek karny nakazu opuszczenia lokalu zajmowanego wspólnie z pokrzywdzonym (Penal Measure of the Domestic Violence Protection Order)*, "Prokuratura i Prawo" 2011, No. 2, p. 9.

has not been specified, in spite of the legislator's intention, such penal measures are transformed into indefinite measures.

Pursuant to Article 43 par. 2a of the Penal Code, the period for which bans have been adjudicated does not run in the course of serving the custodial sentence, even if adjudicated for another crime. Such a regulation allows extending the period of the perpetrator's isolation from the injured person, since, if the perpetrator is sentenced to a custodial sentence, even if for another crime, execution of the penal measure starts only when such a perpetrator finishes serving the adjudicated penalty.

It is also worth paying attention to the contents of Article 181a of the Executive Penal Code, which stipulates that in the case of adjudicating the ban on staying in specific environments or places, the no-contact order concerning specific people, the restraining order requiring to stay away from specific people, or the ban on leaving a specific place without the consent of the court, as well as the domestic violence protection order, the court sends an extract of the judgement to the Police unit as well as to the relevant authority of government administration or territorial self-government relevant for the convict's place of residence.

The surveillance on serving the ban on staying in specific environments or places, a no-contact order concerning specific people, a restraining order requiring to stay away from specific people or a ban on leaving a specific place of stay without the consent of the court as well as the domestic violence protection order is entrusted to a court-appointed custodian. In cases related to the execution of the ban on staying in specific environments or places, the no-contact order concerning specific people, the restraining order requiring to stay away from specific people or the ban on leaving a specific place of stay without the consent of the court as well as the domestic violence protection order, the regional court in the district of which the convict's place of residence has been determined, is competent.

While deliberating on penal measures, adjudication of which against the perpetrator is aimed at counteracting domestic violence, the contents of Article 244 of the Penal Code should be also mentioned, according to which, the crime of non-adherence to adjudicated penal measures was defined. This crime is prohibited under custodial sentence of between 3 months and 5 years. The behaviour prohibited under penalty and referred to in the aforementioned provision consists in not respecting judicial decisions imposing a certain ban,

obligation or order on the perpetrator, whereas a direct subject of protection is the respect for court resolutions in the scope of imposed penal measures.[59]

Table No. 11. Penal measures adjudicated against domestic violence perpetrators in 2015–2021

Year		2015	2016	2017	2018	2019	2020	2021
Ban on staying in specific environments or places	**in total**	33	22	35	31	45	46	38
	women	0	0	4	1	2	0	1
	men	33	22	31	30	43	46	37
A no-contact order concerning specific persons	**in total**	329	423	666	762	1,021	1,277	1,966
	women	18	11	21	21	27	30	61
	men	311	412	645	741	994	1,247	1,905
A restraining order requiring to stay away from specific persons	**in total**	297	655	995	1,205	1,605	1,953	2,762
	women	18	16	19	28	31	40	78
	men	279	639	976	1,177	1,574	1,913	2,684
Domestic violence protection order	**in total**	269	398	507	604	829	823	1,080
	women	11	9	10	8	13	15	24
	men	258	389	497	596	816	808	1,056

Source: own elaboration on the basis of data posted on the following websites: https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy--w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021.

The analysis of data presented in Table No. 11 leads to the conclusion that the restraining order requiring to stay away from specific people is the most-often adjudicated among bans (and the order referred to in Article 39 section 2e of the Penal Code) imposed on domestic violence perpetrators, within penal measures, in the years 2015–2021. The second place in terms of frequency is held by the no-contact order, whereas the third place is held by the domestic violence

[59] M. Mozgawa, [in:] *Kodeks karny. Komentarz aktualizowany (Penal Code. Updated Commentary)*, M. Mozgawa (ed.), https://sip.lex.pl/#/commentary/587737107/748744/mozgawa-marek-red-kodeks-karny-komentarz-aktualizowany?cm=URELATIONS (accessed on: 19.04.2023).

protection order. The ban on staying in specific environments or places is the least frequently adjudicated.

4.5. Modifications of principles concerning adjudicating probation measures against domestic violence perpetrators

The instruments aimed at counteracting domestic violence also include modifications of principles concerning adjudicating probation measures against domestic violence perpetrators. Although Article 70 par. 1 of the Penal Code stipulates that penalty execution is suspended for a probation period of between 1 year and 3 years and runs as of validation of the judgement, in compliance with Article 70 par. 2 of the Penal Code, as a result of suspending execution of the penalty against a juvenile perpetrator and perpetrator who committed a crime with the use of violence to the detriment of a person living together with them, the probation period amounts to between 2 and 5 years, therefore, the probation period is extended for such a perpetrator. G. Łabuda is of the opinion that the distinction, introduced by the legislator, of a probation period duration with regard to these two categories of perpetrators results from the belief that it is necessary to correct their attitudes and behaviours, and influence such perpetrators in order to prevent them from engaging in illegal behaviour.[60]

Article 70 par. 2 of the Penal Code applies regardless of whether there are any closer relations between a perpetrator and an injured person living together, or not. What matters is whether the perpetrator and the injured person live together. It should be underlined that the term "a person living together" is not equivalent to the term "a person nearest ", the definition of which, as has already been mentioned, has been provided in Article 115 par. 11 of the Penal Code. Therefore, if the perpetrator commits violence against the loved one with whom they do not live together permanently, while conditionally suspending execution of the penalty the court will not be able to set a longer probation period.

[60] G. Łabuda, [in:] *Kodeks karny. Część ogólna. Komentarz (Penal Code. General Part. Commentary)*, J. Giezek (ed.), https://sip.lex.pl/#/commentary/587846668/644108/giezek-jacek-red-kodeks-karny-czesc-ogolna-komenta-rz?cm=URELATIONS (accessed on: 5.05.2023).

4.6. Probation obligations

Striving to increase the effectiveness of measures of counteracting domestic violence, the legislator decided that probation obligations can also perform this role effectively. Such a conviction led to extending the catalogue of these measures, as well as a modification thereof over the years. In the literature it is indicated that the main aims that constitute a common denominator for all probation obligations include: focus on the perpetrator's resocialisation by showing an active social attitude, education and prevention from re-offending.[61]

In Article 67 par. 3 of the Penal Code, the legislator stipulated that by conditionally discontinuing criminal proceedings, the court can impose on the perpetrator obligations such as: the obligation to inform the court or custodian on the course of the probation period; the obligation to apologise to the injured person; the obligation to exercise the duty to provide for another person's living; the obligation to refrain from alcohol abuse or using other intoxicants; the obligation to undergo an addiction therapy; the obligation to undergo a therapy, in particular psychotherapy or psychoeducation; the obligation to participate in corrective--educational treatment; the obligation to refrain from contacting the injured or other persons in a specific manner or approaching the injured or other persons as well as the obligation to leave premises co-occupied with the injured person.

Article 72 par. 1 of the Penal Code stipulates that while suspending the execution of the penalty, the court obliges, and in the case of adjudicating a penal measure, the court can oblige, the convict to: 1) inform the court or the custodian about the course of the probation period, 2) apologise to the injured person, 3) exercise the obligation to provide for another person's living, 4) perform gainful employment, study or exercise a profession, 5) refrain from abusing alcohol or using other intoxicants, 6) undergo an addiction therapy, 6a) undergo a therapy, in particular psychotherapy or psychoeducation, 6b) participate in corrective-educational treatment, 7) refrain from staying in particular environments or places, 7a) refrain from contacting the injured or other persons in a specific manner or approaching the injured or other persons, 7b) leave premises

[61] B. Kolarz, M. Literski, K. Sączek, *Obowiązki probacyjne (istota, założenia, cele oraz stosowanie w praktyce sądowej) (Probation Obligations (the Essence, Assumptions, Purposes and Application in Court Practice))*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2018, No. 1, pp. 69–70.

co-occupied with the injured person, 8) otherwise behave in a specific manner during probation, which can prevent them from re-offending – whereas the court adjudicates at least one of the aforementioned obligations. In the Judgement of the Supreme Court of 10 December 2020, file no. V KK 288/20 it was indicated that not adjudicating one of the obligations enumerated in Article 72 par. 1 of the Penal Code in a situation of sentencing the convicted person to a custodial sentence with a conditional suspension of execution thereof constitutes an insult to this provision of substantive law.[62]

In the context of the catalogue of probation obligations included in Article 72 par. 1 of the Penal Code, the measure referred to in section 8 of the aforementioned provision, i.e., other proper behaviour during probation that can prevent co-offending, deserves particular attention. It is worth underlining that, as justly indicated by the Supreme Court in its decision of 12 March 2020, file no. V KK 19/20, although construction of provision of Article 72 par. 1 section 8 of the Penal Code is broad, it does not mean that on the basis of this regulation, obligations with penal features, proper for penalties or penal measures, can be imposed on the perpetrator. In the Judgement of the Appellate Court in Warszawa of 12 April 2019, file no. II AKa 478/18, it was indicated that while applying Article 72 par. 1 section 8 of the Penal Code, the court is directed and limited by the indication that this has to be an obligation to engage in a behaviour that might in a specific case prevent the perpetrator from re-offending, that is, act as an individual preventive measure.[63]

Here, it is also worth mentioning the Judgement of the Supreme Court of 11 April 2022, file no. IV KK 377/21, in which it was emphasised that catalogues of penal measures stipulated in Article 39 of the Penal Code and probation measures stipulated in Article 72 par. 1 of the Penal Code coincide to a certain extent. They coincide in such instances as, for example, in the case of a probation measure in the form of refraining from contacting the injured or other persons in a specific manner or approaching the injured or other persons (Article 72 par. 1

[62] Similarly: Judgement of the Supreme Court of 27 January 2020, file no. IV K 202/19, Judgement of the Supreme Court of 27 May 2020, file no. V KK 564/19, or Judgement of the Appellate Court in Warsaw of 6 November 2020, file no. II AKa 410/19.

[63] Similarly: Judgement of the Appellate Court in Katowice of 13 July 2017, file no. II AKa 222/17, Judgement of the Appellate Court in Białystok of 29 June 2021, file no. II AKa 17/21, 13, or Judgement of the Appellate Court in Gdańsk of 18 March 2022, file no. II AKa 382/21.

section 7a of the Penal Code), and a penal measure in the form of a ban on staying in particular environments or places, a no-contact order, and a restraining order requiring to stay away from specific persons, or a ban on leaving a specific place of stay without the consent of the court (Article 39 section 2b of the Penal Code). However, at the same time these measures are not identical not only in the objective scope, but also the straightforward phrasing: "ban", "the obligation to refrain from". Therefore, it should be stated that these measures are not equivalent due to the firmness of the statement, but primarily the normative environment. Article 41a of the Penal Code stipulates cases when such a penal measure can be adjudicated, whereas, Article 72 par. 1 of the Penal Code does not include any specific limitations for adjudicating the discussed measure. However, most importantly Article 43 par. 1 of the Penal Code stipulates the possible period of applying penal measures, whereas provisions stipulating the principles of applying probation measures do not include such a time limit. Indicating such a limitation in the second case is unnecessary, since, in essence, probation measures are measures executed during the probation period in the case of suspending the execution of the custodial sentence.

It should be underlined that pursuant to Article 74 par. 1 of the Penal Code, the time and manner of executing probation obligations enumerated in Article 72 of the Penal Code are stipulated by the court upon hearing the convict, while the imposing of obligations such as the obligation to undergo an addiction therapy and the obligation to undergo a therapy, in particular psychotherapy or psychoeducation, also requires consent of the convict. The requirement to obtain consent of the convict to be obliged to undergo the aforementioned therapeutic treatment, introduced by the legislator, is related to the valid assumption that undergoing any therapy without consent of the person who is supposed to go to such a therapy often does not bring any desired effects.

In compliance with Article 72 par. 1a of the Penal Code, while imposing the obligation to refrain from contacting the injured or other persons or to refrain from approaching the injured or other persons, the court specifies the minimal distance from protected persons, which the convict is obliged to keep, and pursuant to Article 72 par. 1b of the Penal Code, while imposing on the perpetrator of a crime committed with the use of violence or an illegal threat against a loved one, the obligation to leave the premises co-occupied with the injured person, the court specifies the way the convict can contact the injured person.

It should be underlined that while conditionally suspending execution of the penalty, the court can, during the probation period, cover the convict with the surveillance of a custodian or a trustworthy person, an association, institution or social organisation, the activity of which includes taking care of education, preventing demoralisation or providing assistance to convicts, however, in the case of a perpetrator who has committed a crime with the use of violence against a person living together, if a conditional suspension of the execution of the penalty is adjudicated, the surveillance is obligatory, which results directly from Article 73 par. 2 of the Penal Code.

Article 75 of the Penal Code regulates in detail the issue of adjudicating execution of a conditionally suspended penalty, specifying when such an adjudication is obligatory and when facultative. Article 75 par. 1 of the Penal stipulates that the court adjudicates execution of a penalty, if during the probation period the convict committed a similar intentional offence, for which the custodial sentence without conditional suspension of execution thereof was validly adjudicated. Nevertheless, in the context of deliberations constituting the main subject of this paper, Article 75 par. 1a of the Penal Code should be referred to herein, since according to this provision, the court obligatorily adjudicates execution of a conditionally suspended penalty if the person convicted for a crime committed with the use of violence or illegal threat against a loved one or another juvenile person living together with the perpetrator, during the probation period grossly violates the legal order by again using violence or an illegal threat against a loved one or another juvenile person living together with the perpetrator.

It should be emphasised that the condition for adjudicating execution of the penalty pursuant to Article 75 par. 1a of the Penal Code does not constitute conviction for a crime, but the behaviour of a perpetrator who has been previously convicted for a crime committed with the use of violence or an illegal threat against a loved one or another juvenile person living together with the perpetrator, consisting in using again violence or an illegal threat against a loved one or another juvenile person living together with the perpetrator, regardless of whether the criminal proceedings have been initiated in such a case against the convict, or the more so, if such a perpetrator has been convicted again.

It is impossible not to notice that regulation of Article 75 par. 1a of the Penal Code provides for a broader protection for the injured person than Article 75 par. 1 of the Penal Code, since in order to adjudicate execution of a conditionally

suspended penalty, it is not necessary for the court to convict such a perpetrator again in the conditions referred to in this provision. Due to this stipulation of conditions of the obligatory adjudication of execution of the penalty, the court's reaction towards the perpetrator, who during the probation period grossly violates the legal order, once again using violence or an illegal threat against a loved one or another juvenile person living together with the perpetrator, might even be immediate. Learning that the convict has used violence or an illegal threat under conditions referred to in Article 75 par. 1a of the Penal Code is sufficient to adjudicate execution of the conditionally suspended penalty. In fact, it means that the statement of an occurrence of such a fact, which does not raise any doubts, e.g., by the Police that have been called for intervention and documented such a fact within the "Blue Card" procedure, is sufficient for obligatory adjudication of execution of the penalty.[64]

According to M. Budyn-Kulik, the aim of the legislator when introducing Article 75 par. 1a to the Penal Code was to "force" courts to adjudicate a penalty against the perpetrator referred to in this provision, and making adjudication of execution of the penalty independent of their re-conviction.[65] Meanwhile, V. Konarska-Wrzosek states that "making another use of violence or an illegal threat a premise obliging the court to adjudicate execution of the suspended penalty demonstrates an uncompromising fight against family violence and an actual will to protect loved ones and children (...) living together with the perpetrator, who are or can become their victims".[66]

Furthermore, it is also indicated in the literature that the perpetrator's behaviour during the probation period does not have to violate interests of the person injured by the crime, which the probation period concerns – it suffices that the perpetrator has used violence or an illegal threat against a loved one

[64] V. Konarska-Wrzosek, [in:] *Kodeks karny. Komentarz (Penal Code. Commentary)*, V. Konarska-Wrzosek (ed.), https://sip.lex.pl/#/commentary/587715699/740518/konarska-wrzosek-violetta-red-kodeks-karny-komentarz-wyd-iv?cm=URELATIONS (accessed on: 5.05.2023).

[65] M. Budyn-Kulik, *op. cit.*, https://sip.lex.pl/#/commentary/587736890/748518/mozgawa-marek-red-kodeks-karny-komentarz-aktualizowany?cm=URELATIONS (accessed on: 4.05.2023).

[66] V. Konarska-Wrzosek, *op. cit.*, https://sip.lex.pl/#/commentary/587715699/740518/konar-ska-wrzosek-violetta-red-kodeks-karny-komentarz-wyd-iv?cm=URELATIONS (accessed on: 5.05 2023).

or another juvenile person living together with them, again.[67] However, if the convict does not live together with the injured person, e.g., in the case of adjudicating the obligation to leave the premises co-occupied with the injured person pursuant to Article 72 par. 1 section 7b of the Penal Code, and they grossly violate legal order under conditions stipulated in Article 75 par. 1a of the Penal Code, the premise constituting the basis for adjudicating the execution of the conditionally suspended penalty is not resumed.

Within considerations concerning probation measures, one should not forget that probation obligations enumerated in Article 72 par. 1 of the Penal Code can be imposed by the court also in the case of using a probation measure that is a conditional release from serving a custodial sentence, which results from Article 159 par. 1 of the Execution Penal Code. Moreover, in the context of mechanisms at the disposal of the court against the domestic violence perpetrator, it should be indicated that in compliance with Article 160 par. 2 of the Penal Code the penitentiary court revokes the conditional release, if the released, convicted for a crime committed with the use of violence or an illegal threat against a loved one or another juvenile person living together with the perpetrator, grossly violates legal order during probation period once again using violence or an illegal threat against a loved one or another juvenile person living together with the perpetrator.

Due to the non-exhaustive nature of this paper, only probation period obligations will be briefly discussed herein, obligations the imposing of which on the perpetrator plays a particularly important role from the point of view of counteracting domestic violence, i.e., the obligation to refrain from alcohol abuse or using other intoxicants; the obligation to undergo therapy; the obligation to undergo addition therapy, in particular psychotherapy or psychoeducation, and the obligation to participate in corrective-educational treatment. It is impossible not to notice that also such probation obligations as the obligation to refrain from staying in specific environments or places, the obligation to refrain from contacting the injured person or other persons in a specific manner or approaching the injured person or other person, or the obligation to leave the premises co-occupied with the injured person, play an extremely important role in the

[67] J. Lachowski, [in:] *Kodeks karny. Część ogólna. (Penal Code. General Part.)*, Vol. 2, M. Królikowski, R. Zawłocki (eds.), Warszawa 2011, p. 581.

context of counteracting domestic violence. However, the contents thereof correspond with the contents of bans and orders referred to in Article 39 section 2b and 2e of the Penal Code, which have already been discussed in the part of this paper devoted to the subject matter of penal measures which can be used by the courts against domestic violence perpetrators.

4.6.1. The obligation to refrain from alcohol abuse or using other intoxicants

In the literature it is justly underlined that this obligation was stipulated by the legislator very imprecisely, and thus it causes serious interpretative problems. These problems primarily result from using the phrase "abuse", which is a vague concept, and according to some doctrine representatives, "the evaluative nature thereof is too jarring".[68] It is difficult to evaluate when we deal with alcohol consumption and when alcohol abuse begins. As indicated by J. Skupiński and J. Mierzwińska-Lorencka, "Evaluation when alcohol consumption ends, and alcohol abuse begins is not only a biological evaluation but also moral, social and ethical evaluation. All of these factors are highly relevant and depend on the habits adopted in a given, larger or smaller community, and are also highly subjective."[69]

In the context of deliberations concerning the discussed probation obligation, one should pay particular attention to the Judgement of the Supreme Court of 6 November 1970, file no. V KRN 419/70, in which the Supreme Court underlined that obliging the perpetrator to refrain from alcohol abuse "(...) can be justified only when in a given case it has been determined that the perpetrator was abusing alcohol before committing the crime, or when the perpetrator has committed a crime while intoxicated as a result of alcohol abuse".

It is especially important, however, that pursuant to Article 72 par. 1 section 5 of the Penal Code the court cannot entirely forbid the perpetrator from consuming alcohol. The situation is different in the scope of other intoxicants, with regard to which the court has the competence to forbid the perpetrator from using them completely.[70] However, it is worth indicating that the com-

[68] J. Skupiński, J. Mierzwińska-Lorencka, *op. cit.*, p. 536.
[69] *Ibidem*.
[70] G. Łabuda, *op. cit.*, https://sip.lex.pl/#/commentary/587846668/644108/gie-zek-jacek-red-kodeks-karny-czesc-ogolna-komentarz?cm=URELATIONS (accessed on: 21.05.2023).

pletely prohibitive ban on using intoxicants other than alcohol is related to the prohibitive model of counteracting drug addiction adopted in our legal system.[71]

4.6.2. The obligation to undergo an addiction therapy or, in particular, psychotherapy or psychoeducation

Probation obligations enumerated in Article 72 par. 1 sections 6 and 6a of the Penal Code will be discussed in this part of the paper jointly, since as often indicated in the literature, the addiction therapy referred to in Article 72 par. 1 section 6 of the Penal Code is a type of therapy referred to in Article 72 par. 1 section 6a of the Penal Code, therefore, separating these probation obligations under different sections in Article 72 par. 1 of the Penal Code seems to be unnecessary.[72]

Undergoing a therapy means fulfilling the obligation to appear on set dates at a specific establishment (e.g., in the case of an addiction therapy at a detox treatment facility) and undergoing treatment of addiction to alcohol, intoxicants or another substance of a similar effect (in the case of an addiction therapy), pharmacological treatment (to diminish the sex drive), psychotherapy and psychoeducation (accompanying therapy) – used by the doctor (an addiction therapy), a psychiatrist, sexologist and a therapist (therapy) – which, in principle, is supposed to contribute to the improvement of the perpetrator's functioning in the society.[73]

Although, as has already been mentioned, imposing on the perpetrator obligations such as the obligation to undergo addiction therapy and an obligation to undergo, in particular, psychotherapy or psychoeducation requires consent of the convict, one should have in mind the contents of Article 71 par. 1 of the Act of 29 July 2005 on counteracting drug addiction, which stipulates that in the case of sentencing an addicted person for a crime related to the use of an intoxicant, psychoactive drug or a new psychoactive substance, to a custodial sentence, execution of which has been conditionally suspended, the court

---

[71] J. Skupiński, J. Mierzwińska-Lorencka, *op. cit*., p. 536.

[72] M. Budyn-Kulik, *op. cit*., https://sip.lex.pl/#/commentary/587736890/748518/mozga-wa-marek-red-kodeks-karny-komentarz-aktualizowany?cm=URELATIONS (accessed on: 21.05.2023).

[73] G. Łabuda, *op. cit*., https://sip.lex.pl/#/commentary/587846668/644108/gie-zek-jacek-red-kodeks-karny-czesc-ogolna-komentarz?cm=URELATIONS (accessed on: 21.05.2023).

obliges the convict to undergo treatment or rehabilitation in a treatment facility pursuant to the provisions on medical activity, and covers such a person with surveillance exercised by an appointed person, institution or association. In the situation indicated in the referred provision the court obligatorily, regardless of the convict's consent, obliges them to undergo a treatment or rehabilitation at a treatment facility, and covers them with surveillance executed by an appointed person, institution or association, which *de facto* means that Article 71 par. 1 of the Act on counteracting drug addiction constitutes *lex specialis* with regard to Article 74 par. 1 of the Penal Code.[74]

4.6.3. Obligation to participate in corrective-educational activities

In the context of probation obligations which can be imposed by the court on the domestic violence perpetrator, particular attention is paid in the literature to the participation in corrective-educational activities. It is argued that this measure is aimed at "helping the perpetrator to change their attitude to family members".[75] R.A. Stefański emphasises, among others, that the obligation to participate in corrective-educational programmes imposed on the perpetrator is focused on the perpetrator, since their participation in corrective-educational activities is supposed to contribute to changing their behaviour and understanding a completely different role they should play in a family".[76] The idea of corrective-educational activities applied with regard to domestic violence perpetrators stems from the conviction that due to the fact that violent behaviours in a family are learned and repeated from generation to generation, it is possible to correct such behaviours, which would be combined with education necessary for the perpetrator to realise that their behaviours towards a loved one are of a violent nature.[77]

---

[74] G. Łabuda, *op. cit.*, https://sip.lex.pl/#/commentary/587846668/644108/gie-zek-jacek-red-kodeks-karny-czesc-ogolna-komentarz?cm=URELATIONS (accessed on: 21.05.2023).

[75] R.A. Stefański, *Nowe środki probacyjne (New Probation Measures)*, "Prokuratura i Prawo" 2006, No. 4, p. 25.

[76] *Ibidem*.

[77] M. Lewoc, *Przeciwdziałanie przemocy w rodzinie – kompleksowy informator dla sędziów, prokuratorów i kuratorów sądowych (Counteracting Family Violence – Comprehensive Guide for Judges, Public Prosecutors and Court-Appointed Custodians)*, "Probacja" 2013, No. 4, p. 46.

Specific issues related to corrective-educational activities are stipulated in the Regulation of the Minister Rodziny i Polityki Społecznej (Minister of Family and Social Policy) of 20 June 2023 on corrective-educational programmes for people using domestic violence. This regulation specifies the standard for conducting corrective-educational programmes for people using domestic violence, and qualification requirements from people conducting corrective-educational programmes for people using domestic violence.

In compliance with par. 2 of the aforementioned regulation, the standard of conducting corrective-educational programmes for people using domestic violence includes: 1) changing beliefs of corrective-educational programmes' respondents concerning the use of domestic violence; 2) preventing the person using domestic violence from further use of violence; 3) developing the skills of self-control and coexistence, including more effective coping with emotions, including anger or a feeling of hurt in difficult situations; 4) decreasing by the programme participants the scale of behaviours based on strength and violence; 5) raising awareness concerning the phenomenon of domestic violence and consequences of using it; 6) extending the catalogue of behaviours of persons using domestic violence with behaviours alternative to hurtful behaviours in order to develop interpersonal relations based on an attitude consisting in respecting household members and partnership; 7) developing skills in the scope of child rearing without the use of domestic violence; 8) accepting by the person using domestic violence their responsibility for using violence; 9) obtaining information on the possibilities of undertaking therapeutic measures.

In par. 4 of the regulation it was stipulated that corrective-educational programmes for people using domestic violence are conducted in the form of individual or group meetings and, in particularly justified cases, they can be conducted with the use of means of electronic communication allowing remote communication. Pursuant to par. 3 of the aforementioned executive act, corrective-educational programmes for people using domestic violence can be participated in by people addicted to alcohol or other psychoactive substances after having completed an addiction psychotherapy programme.

Table No. 12. Probation obligations adjudicated against domestic violence perpetrators in 2015–2021

Year		2015	2016	2017	2018	2019	2020	2021
Refraining from staying in specific environments or places	**in total**	73	53	77	59	59	60	69
	women	4	4	8	3	7	6	5
	men	69	49	69	56	52	54	64
Refraining from contacting the injured or other persons	**in total**	506	514	554	533	438	460	614
	women	20	19	26	22	16	10	19
	men	486	495	528	511	422	450	595
Refraining from approaching the injured or other persons	**in total**	304	324	313	346	374	372	469
	women	12	7	11	8	16	8	12
	men	292	317	302	338	358	364	457
Leaving premises co-occupied with the injured person	**in total**	455	338	384	362	328	312	394
	women	8	6	14	7	10	4	8
	men	447	332	370	355	318	308	386
Participation in corrective--educational activities	**in total**	821	819	703	656	616	521	627
	women	37	42	40	43	51	42	67
	men	784	777	663	613	565	479	560

Source: own elaboration on the basis of data posted on the following websites: https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy--w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021.

Table No. 12 presents data concerning the frequency with which courts in 2015–2021 imposed probation obligations with regard to perpetrators against whom courts decided to use probation measures, i.e., a conditional discontinuance of criminal proceedings, a conditional suspension of execution of the penalty, or a conditional release from serving the rest of the penalty.

The probation obligation the most often imposed on perpetrators in the analysed time framework was the obligation to participate in corrective-educational activities. Second in terms of frequency of adjudication was the obligation to refrain from contacting the injured or other persons, third – the obligation to

leave premises co-occupied with the injured person – and fourth, the obligation to refrain from approaching the injured or other persons. The least frequently imposed probation obligation was the obligation to refrain from staying in particular environments or places.

Table No. 13. The frequency of adjudicating the obligation of participating in corrective-educational activities against domestic violence perpetrators sentenced to a custodial sentence with a conditional suspension of execution thereof in 2015–2021

Year	The number of perpetrators against whom the execution of a custodial sentence was conditionally suspended	The number of perpetrators against whom the obligation to participate in corrective--educational activities was adjudicated	Percent
2015	9,574	821	8.6
2016	6,158	819	13.3
2017	5,535	703	12.7
2018	5,374	656	12.2
2019	5,189	616	11.9
2020	4,345	521	12.0
2021	5,527	627	11.3

Source: own elaboration on the basis of data posted on the following websites: https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy--w-rodzinie---dane-statystyczne, https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021.

Data presented in Table No. 13 clearly proves that the frequency of adjudicating the obligation of participating in corrective-educational activities against domestic violence perpetrators sentenced to a custodial sentence with a conditional suspension of execution thereof is insignificant. It amounted to between 8.6% in 2015 and 13.3% in 2016. It means that courts adjudicate the obligation to participate in corrective-educational activities against only slightly over 1/10 of domestic violence perpetrators sentenced to a custodial sentence with a conditional suspension of execution thereof. Given the fact that the adjudicated probation obligation is focused on triggering change in the perpetrator's behaviour and, in consequence, preventing them from engaging in behaviours

meeting the attributes of domestic violence, it should be stated that it should be adjudicated by the courts much more frequently than it is currently the case.

5. Conclusion

To sum up, it should be once again indicated that the number of people affected by domestic violence in Poland, in 2015–2021 was around 200,000 and in the consecutive years stayed at a comparable level. The percentage share of sentences for using domestic violence in the general number of people accused of using domestic violence remained in the analysed timeframe at a relatively stable level – between 81.4% in 2021 and 83.3% in 2020. Furthermore, it should be also taken into consideration that in the cases concerning domestic violence, the probation measure in the form of a conditional discontinuance of criminal proceedings was quite often adjudicated by the courts (approx. 9%).

Statistical data presented in this chapter undoubtedly prove that the issue of domestic violence remains up-to-date and therefore, it is necessary to undertake relevant measures aimed at counteracting this phenomenon. Although domestic violence behaviours can meet the attributes of various prohibited acts, referred to in the Penal Code, the prohibited act occurring the most often in the context of domestic violence is abuse, i.e., the act referred to in Article 207 of the Penal Code. Sentences for acts meeting the attributes of abuse constitute approximately 3/4 of sentences for using domestic violence.

In the vast majority of cases, people affected by domestic violence are adults, whereas, women dominate decidedly among adults affected by domestic violence. However, a particular disconcertment is raised by the fact that a relatively large share of children was noted among domestic violence victims. Meanwhile, men dominate among people sentenced for using domestic violence. Their share in sentences remained at the level of approximately 95%.

Although domestic violence can take on various forms, regardless of the type of violence we deal with, the consequences thereof are always far-reaching and can be observed in many areas. Thus, it is necessary to undertake effective measures aimed at counteracting domestic violence. It requires proper reactions of various types of entities starting from the closest environment of the perpetrator

and the victim, through social assistance institutions and prosecuting authorities such as the Police or the public prosecutor's office, and ending with courts who are at the disposal of an entire range of criminal reaction instruments concerning the prohibited act committed by the perpetrator, meeting the attributes of domestic violence.

It should be emphasised that in cases concerning domestic violence, a special role is played by instruments that allow isolating the perpetrator from the injured person. They provide safety to the person affected by violence at the same time preventing the perpetrator from causing further suffering to the injured person. Measures at the disposal of the court that, on the one hand, constitute a reaction to the perpetrator's behaviour constituting domestic violence, and, on the other hand allow counteracting this type of violence and thus, are characterised with a prospective impact, can be divided into several categories such as: penalties, preventive measures, penal measures and probation obligations as well as modification of principles concerning adjudication of probation measures against domestic violence perpetrators.

The data presented in this chapter shows that the most frequently adjudicated penalty against family violence perpetrators in 2015–2021 was the custodial sentence, whereas, the custodial sentence with a conditional suspension of the execution thereof was much more often adjudicated than the absolute penalty. The second place among penalties the most often adjudicated against family violence perpetrators was held by the penalty of restricted liberty, whereas the penalty of a fine was the most rarely adjudicated.

The restraining order requiring to stay away from specific people was the most often adjudicated among bans (and the order referred to in Article 39 section 2e of the Penal Code) imposed on domestic violence perpetrators, within penal measures, in the years 2015–2021. The second most frequently adjudicated was the no-contact order, whereas the third was the domestic violence protection order. The least frequently adjudicated was the ban on staying in specific environments or places.

Meanwhile, the probation obligation the most often imposed on perpetrators in the analysed time framework between 2015 and 2021 was the obligation to participate in corrective-educational activities. Second in terms of frequency of adjudication was the obligation to refrain from contacting the injured or other persons, third was the obligation to leave the premises co-occupied with the

injured person, and the fourth was the obligation to refrain from approaching the injured or other persons. The least frequently imposed probation obligation was the obligation to refrain from staying in particular environments or places.

The analysis of data presenting frequency of adjudicating penal measures (Table No. 11) and data presenting frequency of imposing on the perpetrator particular probation obligations (Table No. 12) leads to the conclusion that both penal measures and probation obligations are adjudicated decidedly less frequently than could have been the case. Perhaps, this state of affairs results from the wrong belief that the most adequate reaction to the crime committed by the perpetrator consists in adjudicating a penalty, combined with a false and unjustified assumption that the application of penal measures against perpetrators of prohibited acts is not likely to bring expected results.

Nevertheless, due to the characteristics of the phenomenon of domestic violence and the fact that violent behaviours in a family are often learned and repeated from generation to generation, it seems that with regard to perpetrators using domestic violence the necessity to achieve a result in the form of a change in their behaviour is brought to the forefront. There are no doubts that due to the characteristics of crimes meeting the attributes of domestic violence, not only can penalties, but also penal measures or probation obligations, have an actual impact on changing the perpetrator's behaviour, which is what usually domestic violence victims, who are often perpetrator's loved ones, care about the most. The fact of adjudicating a penalty is not necessarily able to result in a long-term change in the perpetrator's behaviour.

In order to eliminate or at least minimise the risk of re-offending by the perpetrator who has already been sentenced for using domestic violence, measures aimed at changing the attitude of the perpetrator should be primarily undertaken. For instance, corrective-educational activities are invaluable in this scope, since the perpetrator's participation in these activities can lead to the perpetrator's realisation that their behaviours constitute *de facto* domestic violence, and, in consequence, to changing such behaviours. Therefore, perhaps, it would be worth considering the possibility of obligatory adjudication, against domestic violence perpetrators, of the obligation of participating in corrective-educational activities, and only in particularly justified cases allow not adjudicating this measure by the courts. As shown by data presented in Table No. 13, currently, courts adjudicate the obligation to participate in corrective-educational activities against

only slightly over 1/10 of domestic violence perpetrators who are sentenced to a custodial sentence with a conditional suspension of execution thereof. Increasing the frequency of adjudicating this obligation seems to be most desirable.

Although binding provisions provide the courts adjudicating in penal cases with a wide range of possibilities in the scope of using mechanisms aimed at counteracting domestic violence – from preventive measures to penalties, penal measures and probation obligations, in practice, courts relatively rarely use these types of instruments; penal measures in particular are very rarely adjudicated. Furthermore, it should be indicated that although in Article 72 par. 1 of the Penal Code the legislator provided courts with the possibility of imposing on the perpetrators, against whom the conditional suspension of the execution of a penalty has been used, an array of probation obligations which can be imposed on perpetrators cumulatively and in addition, in various configurations, also these instruments are not often used by the courts, despite the fact that they are *de facto* aimed at the perpetrator's resocialisation by triggering in the perpetrator a socially active attitude, education and prevention of re-offending.

Thus, as has already been stated herein, in cases in which we deal with domestic violence, the problem of the perpetrator's alcohol addiction occurs very often. Furthermore, it seems that obliging the perpetrator to undergo addiction therapy as well as imposing on the perpetrator the obligation to refrain from alcohol abuse could bring measurable effects in the scope of individual-preventive treatment. In order to properly use this obligation against domestic violence perpetrators, it would be necessary to accurately verify by the courts whether a given perpetrator is addicted to alcohol or other intoxicants, and therefore if it is necessary for them to undergo addiction therapy. In such a case it would be indispensable to appoint an expert who would be able to determine whether a given perpetrator is addicted and, in consequence, it is necessary for them to undergo the relevant therapy. Of course, as has already been mentioned, imposing obligations such as the obligation to undergo addiction therapy and the obligation to undergo, in particular psychotherapy or psychoeducation, requires consent of the convict, however, one cannot exclude a situation, in which the domestic violence perpetrator addicted to alcohol or other intoxicants would not themselves decide to undergo such therapy, for instance due to the fact of not being aware of their addiction, while being made aware of this fact by properly qualified specialists could incline them to start the relevant therapy.

It should be clearly underlined that adjudicating penal measures or probation obligations should be preceded by an accurate analysis of a specific case in order to ensure that adjudicated measures or obligations fully allow achieving the result in the form of individual-preventive treatment of a given domestic violence perpetrator and, in consequence, lead to changing their behaviour so that it will not include domestic violence in the future. In order to achieve the above, particular cases of domestic violence cannot be treated routinely. An in-depth diagnosis of the situation is necessary each time, since every case of using domestic violence is different and requires individual treatment. It would ensure using by the courts mechanisms which, on the one hand, fully influence the perpetrator, thus properly shaping their attitude, and, on the other hand, provide the domestic violence victim with complete safety.

References

Judicial decisions

Judgement of the Supreme Court of 6 November 1970, file no. V KRN 419/70, OSNKW 1971/2/26.
Judgement of the Supreme Court of 7 July 2016, file no. V KK 194/16, Lex no. 2067794.
Judgement of the Supreme Administrative Court of 17 February 2017, file no. II OSK 1288/15, Lex no. 2342104.
Judgement of the Appellate Court in Katowice of 13 July 2017, file no. II AKa 222/17, Lex no. 2440653.
Judgement of the Supreme Court of 15 November 2017, file no. IV KK 382/17, Lex no. 2420340.
Judgement of the Appellate Court in Warsaw of 4 December 2017, file no. II AKa 348/17, Lex no. 2418163.
Judgement of the Appellate Court in Warsaw of 12 April 2019, file no. II AKa 478/18, Lex no. 2683095.
Judgement of the Supreme Court of 27 January 2020, file no. IV K 202/19, Lex no. 3220588.
Decision of the Supreme Court of 12 March 2020, file no. V KK 19/20, Lex no. 3009110.
Judgement of the Supreme Court of 27 May 2020, file no. V KK 564/19, Lex no. 3217343.
Judgement of the Appellate Court in Warsaw of 6 November 2020, file no. II AKa 410/19, Lex no. 3101540.

Judgement of the Supreme Court of 10 December 2020, file no. V KK 288/20, Lex no. 3093361.
Judgement of the Supreme Court of 17 December 2020, file no. I KK 170/20, Lex no. 3168903.
Judgement of the Appellate Court in Białystok of 29 June 2021, file no. II AKa 17/21, Lex no. 3240534.
Judgement of the Supreme Court of 26 January 2022, file no. IV KK 550/21, Lex no. 3391506.
Judgement of the Supreme Court of 25 February 2022, file no. IV KK 696/21, Lex no. 3405192.
Judgement of the Appellate Court in Gdańsk of 18 March 2022, file no. II AKa 382/21, Lex no. 3398669.
Judgement of the Supreme Court of 11 April 2022, file no. IV KK 377/21, OSNK 2022/4/14.

Literature

Budyn-Kulik M., [in:] *Kodeks karny. Komentarz aktualizowany*, M. Mozgawa (ed.), https://sip.lex.pl/#/commentary/587736890/748518/mozgawa-marek-red-kodeks-karny-komentarz-aktualizowany?cm=URELATIONS (accessed on: 4.05.2023).
Burdziej S., Branicka Z., Hofman D., *Wymiar sprawiedliwości wobec przemocy domowej. Raport z badań empirycznych*, Toruń 2022, p. 34;
Dudka K., [in:] *Kodeks postępowania karnego. Komentarz*, K. Dudka (ed.), Lex (accessed on 20.04.2023).
Eichstaedt K., [in:] *Kodeks postępowania karnego. Vol. 1. Komentarz*, D. Świecki (ed.), Warszawa 2022.
Helios J., Jedlecka W., *Współczesne oblicza przemocy. Zagadnienia wybrane*, Wrocław 2017, p. 34.
Hołyst B., *Kryminologia*, Warszawa 2009, pp. 28–29.
Jedlecka W., *Formy i rodzaje przemocy,* [in:] *Przemoc w prawie i polityce*, M. Sadowski, A. Spychalska, K. Sadowa (eds.), Wrocław 2017, p. 14, pp. 19–20, p. 22.
Kiziukiewicz P., *Problematyka zgodności z Konstytucją RP środka karnego obowiązku powstrzymania się od przebywania w określonych środowiskach lub miejscach, zakazu kontaktowania się z określonymi osobami lub zakazu opuszczania określonego miejsca pobytu bez zgody sądu par. 1*, "Palestra" 2009, No. 11–12, p. 19.
Kolarz B., Literski M., Sączek K., *Obowiązki probacyjne (istota, założenia, cele oraz stosowanie w praktyce sądowej)*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2018, No. 1, pp. 69–70;

Konarska-Wrzosek V., [in:] *Kodeks karny. Komentarz,* V. Konarska-Wrzosek (ed.), Lex (accessed on: 7.04.2023).

Kowalczuk A., *Stosowanie instytucji warunkowego umorzenia postępowania karnego wobec sprawców przemocy domowej*, "Prokurator" 2008, No. 2–3, p. 128.

Kozioł T., *Przestępstwo z użyciem przemocy jako przesłanka orzeczenia środka karnego z art. 41a § 1 Kodeksu karnego*, "Przegląd Sądowy" 2013, No. 11–12, p. 32.

Kuć M., *Indywidualizacja wykonywania kary pozbawienia wolności*, Lublin 2007, p. 60.

Kwieciński A., *Prawnokarne aspekty terapii skazanych uzależnionych od alkoholu*, "Ius Novum" 2014, No. 3, pp. 28–29.

Łabuda G., [in:] *Kodeks karny. Część ogólna. Komentarz*, Giezek J. (ed.), Lex (accessed on: 7.04.2023).

Lachowski J., [in:] *Kodeks karny. Część ogólna. Vol. 2*, M. Królikowski, R. Zawłocki (eds.), Warszawa 2011, p. 581.

Lewoc M., *Przeciwdziałanie przemocy w rodzinie – kompleksowy informator dla sędziów, prokuratorów i kuratorów sądowych*, "Probacja" 2013, No. 4, p. 46.

Lipiński K., [in:] *Kodeks karny. Część ogólna. Komentarz*, J. Giezek (ed.), Lex (accessed on: 7.04.2023).

Melezini M., Sakowicz A., *Środek karny w postaci obowiązku powstrzymania się od przebywania w określonych środowiskach lub miejscach, zakazu kontaktowania się z określonymi osobami lub zakazu opuszczania określonego miejsca pobytu bez zgody sądu (art. 39 pkt 2b k.k.)*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2008, No. 2, p. 208.

Mozgawa M., [in:] *Kodeks karny. Komentarz aktualizowany*, M. Mozgawa (ed.), Lex (accessed on: 7.04.2023).

Pudo T., *Środek karny w postaci zakazu opuszczania określonego miejsca pobytu bez zgody sądu – próba analizy*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2006, No. 2, pp. 79–80;

R.A. Stefański, *Nowe środki probacyjne*, "Prokuratura i Prawo" 2006, No. 4, p. 25.

Romańczuk-Grącka M., *Syndrom wyuczonej bezradności w kontekście przestępstwa znęcania się*, "Studia Prawnicze KUL" 2022, No. 3, p. 84.

Sienkiewicz Z., [in:] *Kodeks karny. Komentarz*, M. Filar (ed.), Warszawa 2008, p. 150.

Siwek M., *Wykonanie niektórych środków karnych*, "Prokuratura i Prawo" 2010, No. 11, p. 114.

Skupiński J., Mierzwińska-Lorencka J., [in:] *Kodeks karny. Komentarz*, R.A. Stefański (ed.), Warszawa 2017, p. 536.

Spurek S., *Izolacja sprawcy przemocy w rodzinie od ofiary*, "Prokuratura i Prawo" 2013, No. 7–8, p. 147.

Stefański R.A., [in:] *Kodeks karny. Komentarz*, R.A. Stefański (ed.), Warszawa 2017, pp. 363–364, p. 374, p. 376.

Stefański R.A., *Środek karny nakazu opuszczenia lokalu zajmowanego wspólnie z pokrzywdzonym*, "Prokuratura i Prawo" 2011, No. 2, p. 9.

Szeleszczuk D., *Środki karne w świetle nowelizacji Kodeksu karnego z dnia 20 lutego 2015 r.*, "Studia Prawnicze KUL" 2015, No. 4, pp. 80–81.
Szumski A., *Funkcja prewencyjna tymczasowego aresztowania*, "Prokuratura i Prawo" 2012, No. 7–8, p. 144, p. 145.
Szyrmer S., *Nowelizacja prawa karnego w świetle ustawy z dnia 27 lipca 2005 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego i ustawy – Kodeks karny wykonawczy (Dz.U. Nr 163, poz. 1363)*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2006, No. 1, p. 58.
Tarnowska D., *Pozaprocesowa funkcja środków zapobiegawczych*, "Prokuratura i Prawo" 2002, No. 11, p. 73, p. 78.
Żbikowska M., *Warunkowy dozór Policji*, "Prokuratura i Prawo" 2011, No. 7–8, pp. 25–26.
Ziółkowska A., [in:] *Kodeks karny. Komentarz*, V. Konarska-Wrzosek (ed.), Lex (accessed on: 7.04.2023).

Websites

http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/3639/$file/3639.pdf
https://www.gov.pl/web/rodzina/sprawozdania-z-realizacji-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie---dane-statystyczne
https://www.gov.pl/web/rodzina/sprawozdanie-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzinie-2021

ABOUT AUTHOR

Paulina Banaszak-Grzechowiak – adjunct at the Criminal Law and Process Section, the Institute of Justice in Warsaw, and assistant professor at the Department of Penal Law, the Faculty of Law and Administration of the University of Opole. She is the author of scientific articles on penal law and co-author of the monograph *Zabójstwa kwalifikowane w kodeksie karnym z 1997 r. Naukowa i sądowa wykładnia znamion kwalifikujących* (*"Qualified homicides in the 1997 Penal Code. Scientific and judicial interpretation of the qualifying elements"*). She participated in numerous research projects in the scope of substantive penal law and criminal proceedings. Her scientific interests include substantive penal law with a particular consideration of subject matters concerning the science of crime.
ORCID: 0000-0002-7367-0860

dr hab. Konrad Burdziak
UNIVERSITY OF SZCZECIN, INSTITUTE OF JUSTICE

Counteracting domestic violence in the criminal perspective of the public prosecutor's practice

1. Introduction

Domestic violence can be understood (and defined) in many ways. It suffices to indicate that before 22 June 2023 the Polish legislator understood domestic violence as a single or repeated intended action or omission infringing the rights or personal goods of family members, in particular, exposing these persons to a threat of losing life or health, violating their dignity, bodily inviolability, freedom, including sexual freedom, causing damages to their physical or mental health, as well as suffering and moral damages of persons affected by domestic violence (Article 2 par. 2 of the Act on Counteracting Domestic Violence[1]), and since 22 June 2023 it has been understood as: "*a single or repeated, intended action or omission with the use of physical, mental or economic advantage, infringing the rights or personal goods of a person experiencing domestic violence, in particular: a) exposing this person to a threat of losing life, health or property, b) violating their dignity, bodily inviolability, freedom, including sexual freedom, c) causing damages to their physical or mental health resulting in suffering or moral damages, d) limiting or depriving this person from access to funds or the possibility to take*

[1] The Act of 29 July 2005 on Counteracting Family Violence (Journal of Laws of 2021, item 1249, as amended).

up employment, or gain financial independence, e) significantly violating privacy of such a person or causing a feeling of threat, humiliation or torment, including actions undertaken through the agency of means of electronic communication" (Article 2 par. 1 subpar. 1 of the Act on Counteracting Domestic Violence[2]). Whereas, according to the Council of Europe, domestic violence should be understood as all acts of physical, sexual, psychological or economic violence occurring in a family or a household, between former or current spouses or partners, regardless whether or not a perpetrator and a victim cohabit or used to cohabit (Article 3 letter b of the Istanbul Convention[3]).

The aforementioned definitions have obvious differences. It can be easily perceived that: 1) Polish definitions emphasise the subject matter of the aspect of the offence regarding the perpetrator, whereas the definition proposed in the Istanbul Convention does not take into consideration this subject matter at all; 2) the newer Polish definition underlines the necessity of the perpetrator to have a physical, mental or economic advantage over the injured person and using such an advantage, whereas in the definition proposed in the Istanbul Convention all acts of physical, sexual, psychological or economic violence are mentioned; 3) Polish definitions require a specific result (infringement of the law or personal interest of a specific person), whereas in the Istanbul Convention this subject matter has not been taken into consideration at all. The above differences have a significant impact on the possibility of considering a given behaviour as a symptom of domestic violence; the definition proposed in the Istanbul Convention is in this regard a definition with a broader scope in comparison to Polish definitions, which – due to the additional conditions stipulated by the legislator – should be considered relatively narrow (albeit more precise).

However, regardless of the manner of understanding or defining domestic violence, it remains clear that this is an undesirable phenomenon of a complex nature that requires undertaking comprehensive preventive and remedial measures by various cooperating institutions.[4] With regard to the necessity of

[2] The Act of 29 July 2005 on counteracting Domestic Violence (Journal of Laws of 2021, item 1249, as amended).

[3] Council of Europe Convention on preventing and combating violence against women and domestic violence drawn up in Istanbul on 11 May 2011 (Journal of Laws of 2015, item 961, as amended), hereinafter also referred to as Istanbul Convention.

[4] See: M. Notko, M. Husso, S. Piippo, M. Fagerlund and J. Houtsonen, *Intervening in domestic violence: interprofessional collaboration among social and health care professionals*

undertaking comprehensive measures aimed at counteracting domestic violence, it suffices to indicate that according to the Centers of Disease Control and Prevention,[5] some preventive measures could and should take on the form of the following strategies: 1) teaching the skills required for safe and healthy relationships; 2) engaging influential adults and peers; 3) impeding development paths leading to intimate partner violence; 4) creating protective environments; 5) reinforcing economic support for families; or 6) supporting victims in order to increase safety and diminish damages (see: Table No. 1).[6]

Table No. 1. Preventive measures for counteracting family violence

Strategy	Method
Teaching the skills required for safe and healthy relationships	Socio-emotional education programmes for youth
	Healthy relationship programmes for couples
Engaging influential adults and peers	Men and boys as allies in prevention
	Empowerment and education of third parties
	Family programmes
Impeding development paths leading to intimate partner violence	Domestic visits during early childhood
	Enriching preschool offer with the engagement of a family
	Programmes teaching parenting skills and family relations
	Therapy for children, youth and families at risk

and the police, "Journal of Interprofessional Care" 2022, Vol. 36, No. 1, pp. 15–23, DOI: 10.1080/13561820.2021.1876645.

[5] Centers for Disease Control and Prevention is a national public health agency in the United States of America. It is a federal agency reporting to the Department of Health and Human Services, with its registered office in Atlanta, Georgia (See more: Centers for Disease Control and Prevention, *About CDC*, https://www.cdc.gov/about/index.html, accessed on: 20.07.2023).

[6] See: Centers for Disease Control and Prevention, *Intimate Partner Violence: Prevention Strategies*, https://www.cdc.gov/violenceprevention/intimatepartnerviolence/prevention.html (accessed on: 20.07.2023).

Creating protective environments	Improvement of the school atmosphere and safety
	Improvement of the organisational policy and atmosphere at work
	Modification of the physical and social nature of the neighbourhood
Reinforcing economic support for families	Reinforcement of household financial safety
	Reinforcement of the work-family support
Supporting victims in order to increase safety and diminish damages	Victim-focused services
	Housing programmes
	First aid and civil law protection
	Patient-oriented approach

Source: Centers of Disease Control and Prevention, Intimate Partner Violence: Prevention Strategies, https://www.cdc.gov/violenceprevention/intimatepartnerviolence/prevention.html (accessed on: 20.07.2023).

Among preventive and remedial measures for counteracting domestic violence, also measures undertaken by public prosecutors should have and do have, at least in Poland, a place. In fact, it is not surprising at all. After all, behaviours of domestic violence perpetrators often simultaneously show attributes of particular types of acts prohibited under penalty, stipulated in the Polish criminal legislation. Whereas, pursuant to Article 2 of the Acton the Public Prosecutor's Office:[7] "*The prosecutor's office performs tasks in the scope of prosecuting acts and upholds the rule of law*." The above means that adherence to the law, in particular the adherence to criminal legitimised norms, should be (and let us hope – is) public prosecutor's main concern. The aforementioned duties of the public prosecutor's office are obviously implemented as a result of performing a series of tasks enumerated in Article 3 of the Acton the Public Prosecutor's Office, not all of which concern the broadly understood fight against crime, preventing and combating it. However, tasks of a nature other than preventing crime are in the minority. It is justly indicated in the literature that: "*The subject matter*

[7] The Act of 28 January 2016 – Law on the Public Prosecutor's Office (Journal of Laws of 2022, item 1247, as amended).

of fighting against crime is only exceeded to a specific degree by public prosecutor's participation in civil proceedings and undertaking measures provided for under the law in proceedings in cases on offences and in administrative proceedings, as well as in other types of proceedings."[8] Furthermore, public prosecutors have the broadest competences in the scope of counteracting crime. Therefore, the subject matter of counteracting domestic violence in the scope of activity of public prosecutors should be examined primarily from the point of view of their rights and duties in the scope of counteracting (especially combating) infringement of criminal legitimised norms.[9] This study has been based on this perspective, while we will primarily focus on *de lege ferenda* postulates which, if entered into force, will bring an improvement in the scope of effectiveness of public prosecutors counteracting domestic violence.

2. The aim of the paper and research method

As indicated above, the aim of this paper is to analyse the subject matter of counteracting domestic violence from the criminal perspective of public prosecutor's practice. However, it should be underlined that the study does not focus on discussing the current legal status and citing contents of particular provisions. An attempt at taking a step further has been made and current legal and factual solutions have been filtered in terms of the possibility of modifying them in

[8] A. Kiełtyka, W. Kotowski, A. Ważny, *Komentarz do art. 3 p.o.p.*, [in:] *Prawo o prokuraturze. Komentarz*, A. Kiełtyka, W. Kotowski, A. Ważny, Warszawa 2021, https://sip.lex.pl/#/commentary/587740247/648631/kieltyka-andrzej-kotowski-wojciech-wazny-andrzej--prawo-o-prokuraturze-komentarz-wyd-ii?cm=URELATIONS (accessed on: 20.07.2023).

[9] According to data from the National Prosecutor's Office: "*In 2021 prosecutors brought against 15,067 people with regard to the alleged crime of domestic violence: 14,853 indictments, 657 motions specified in Article 335 par. 1 of the Code of Criminal Procedure, 625 motions pursuant to Article 335 par.2 of the Code of Criminal Procedure and 320 motions for conditional discontinuance of proceedings with regard to perpetrators of crimes classified as domestic violence.*" Ministerstwo Rodziny i Polityki Społecznej, *Sprawozdanie z realizacji Krajowego Programu Przeciwdziałania Przemocy w Rodzinie w roku 2021 za okres od dnia 1 stycznia do dnia 31 grudnia 2021 r.* (Ministry of Family and Social Policy, *Report on the Implementation of the National Programme for Counteracting Domestic Violence in 2021 for the Period between 1 January and 31 December 2021*), https://www.gov.pl/attachment/e804fa59-704b-46bc-9359-cff4f7a9a165 (accessed on: 20.07.2023).

a manner ensuring more effective prevention of domestic violence by public prosecutors. Thus, the paper has been given as innovative as possible and – at the same time – conclusive character. Reports, albeit certainly valuable, cannot have a significant impact on the practice of the law, and thus are not the most desirable.

A general research method used herein is the contextual method due to two circumstances. Namely: 1) it allows multilateral presentation of the studied phenomena; and 2) it aims at defining all important contexts: genetic, historical, functional, logical, axiological and others.[10]

A detailed research method used in the study is (primarily) the dogmatic-legal method. Therefore, the subject matter of counteracting domestic violence from the point of view of public prosecutor activity was studied through the agency of as comprehensive and multilateral an analysis as possible of the normative material referring to all discussed issues including, in particular the following legal acts:[11] 1) Act of 29 July 2005 on Counteracting Family Violence (Journal of Laws of 2021, item 1249, as amended); 2) Council of Europe Convention on preventing and combating violence against women and domestic violence drawn up in Istanbul on 11 May 2011 (Journal of Laws of 2015, item 961, as amended); 3) the Act of 28 January 2016 – Law on the Public Prosecutor's Office (Journal of Laws of 2022, item 1247, as amended); 4) Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws of 2022, item 1375, as amended); 5) Act of 6 June 1997 – the Penal Code (Journal of Laws of 2022, item 1138, as amended). This analysis was conducted with the use of M. Zieliński's derivative conception of the interpretation of the law.[12]

[10] See: R. Tokarczyk, *Komparatystyka prawnicza*, Warszawa 2008, p. 74.

[11] Legal acts listed in order, in which the author refers to them in the main text.

[12] See more on this conception and its advantages in: M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2012; M. Zieliński, *Derywacyjna koncepcja wykładni jako koncepcja zintegrowana*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2006, No. 3, p. 93 and next.

3. Legal analysis with a particular consideration of *de lege ferenda* postulates

As has already been mentioned in the introduction, this paper primarily focuses on *de lege ferenda* postulates which can bring measurable benefits in the scope of the public prosecutor's practice of counteracting domestic violence and, in consequence, contribute to reinforcing the protection of individuals from infringement of their legally protected interests, in particular life and health (not only physical, but also mental).

Deliberations have been divided into three parts concerning, respectively: 1) the basis for undertaking measures by public prosecutors in the scope of counteracting domestic violence; 2) sources of information constituting grounds for undertaking measures by public prosecutors in the scope of counteracting domestic violence; and 3) the manner of undertaking measures by public prosecutors in the scope of counteracting domestic violence.

3.1. The basis for undertaking measures by public prosecutors in the scope of counteracting domestic violence

The basis for undertaking measures by public prosecutors in the scope of counteracting domestic violence is a justified suspicion of committing a crime in any way related to the aforementioned phenomenon (see: Article 303 of the Code of Criminal Procedure[13]). In the case of such a suspicion, the public prosecutor issues a decision on starting the investigation (see: Article 305 of the Code of Criminal Procedure) or a decision on starting the inquiry (see: Article 325e of the Code of Criminal Procedure) and conducts these proceedings or supervises them in the scope in which it is not conducted by such a public prosecutor himself (see: Article 326 of the Code of Criminal Procedure).

In the case of domestic violence, a justified suspicion of committing a crime is usually related to the perpetrator matching the definition of the type (and in substance – types) of an act prohibited under penalty specified in Article 207

[13] The Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws of 2022, item 1375, as amended).

par. 1 of the Penal Code,[14] pursuant to which: "*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, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.*" As we can see, we deal with a crime (and in substance with crimes), which can be committed only deliberately (according to many, only with a direct intent[15]) by causing physical or mental suffering of another person[16] as a result of repeated actions not necessarily of the same type (although, as an exception, it can even be a single event close in time and place, characterised with proper intensity[17]).

There are relatively a lot of preparatory proceedings conducted in the context of the indicated crime. As shown by the Police data for 2021: 1) the number of proceedings initiated in the context of Article 207 of the Penal Code amounted to 28,835; 2) the number of proceedings ended with a refusal to initiate proceedings amounted to 13,982; 3) the number of proceedings ended by drawing up an indictment amounted to 14,050; while 4) the number of proceedings ended by discontinuation amounted to 16,233.[18] Furthermore, P. Ostaszewski states: "*The number of preparatory proceedings concerning crimes under Article 207 of the Penal Code (abuse) and the number of crimes under this Article stated by the Police was not subject in the analysed period* [i.e., in the years 2011–2021 – annotation by K.B.] *to analogous changes (...) – excluding a small drop in 2015 (related to the introduced and then withdrawn reform of the criminal proceedings to a contradictory model), these numbers basically remain at the same level. It would mean that the improvement of the general situation related to the decreasing spreading of domestic violence in Poland does not concern the gravest symptoms thereof that lead to criminal proceedings concerning the crime of abuse – the number thereof*

[14] The Act of 6 June 1997 – the Penal Code (Journal of Laws of 2022, item 1138, as amended).

[15] See: A. Muszyńska, *Komentarz do art. 207 k.k.*, [in:] *Kodeks karny. Część szczególna. Komentarz,* (ed.) J. Giezek, Warszawa 2021, thesis 27, https://sip.lex.pl/#/commentary/587881133/678573/giezek-jacek-red-kodeks-karny-czesc-szczegolna-komentarz?pit=2023-06-16&cm=URELATIONS (accessed on: 20.07.2023).

[16] See: *ibidem*, thesis 11 and 12.

[17] See: *ibidem*, thesis 14.

[18] See: Ministerstwo Rodziny i Polityki Społecznej, *Sprawozdanie z realizacji Krajowego Programu Przeciwdziałania Przemocy w Rodzinie w roku 2021 za okres od dnia 1 stycznia do dnia 31 grudnia 2021 r.*, https://www.gov.pl/attachment/e804fa59-704b-46bc-9359-cff4f7a9a165 (accessed on: 20.07.2023).

is clearly not dropping."[19] The above qualification (qualification pursuant to Article 207 of the Penal Code) does not, in fact, include all behaviours that can be a form of domestic violence. Domestic violence can have many faces. As indicated by Women Against Abuse,[20] the most frequent symptoms of domestic violence include: 1) physical violence (including hitting, slapping, punching, kicking, burning, chocking, destroying personal property, refusing to provide healthcare and/or controlling medicines, forcing partner to abuse substances); 2) emotional violence (including name-calling, insulting, blaming partner for everything, extreme jealousy, intimidation, shaming, humiliation, isolation, stalking); 3) sexual violence (including forcing partner to have sex with other people, pursuing a sexual activity when the victim in not fully aware or is afraid to refuse, physically harming partner during sex, forcing partner to have sex without protection); 4) technological violence (including hacking partner's email and personal accounts, using tracking devices on the partner's mobile phone to monitor their location, phone calls and messages, monitoring interactions on social media, demanding to learn partner's passwords); 5) financial violence (including causing physical harm or injuries, which would prevent a given person from going to work, harassing partner at their workplace, controlling financial assets and effectively forcing partner to collect a benefit, destroying partner's credit capacity).[21]

The majority of the aforementioned behaviours are behaviours prohibited under penalty on the basis of the valid Penal Code. Cases of infringing bodily inviolability can be qualified pursuant to Article 217 par. 1 of the Penal Code; cases of causing bodily harm can be qualified pursuant to Article 157 or

[19] P. Ostaszewski, *Przemoc domowa w świetle danych statystycznych procedury "Niebieskiej Karty"*, p. 13, https://iws.gov.pl/wp-content/uploads/2022/11/IWS_Ostaszewski-P._Przemoc-domowa-w-switle-danych statystycznych-procedury-_Niebieskiej-Karty_.pdf (accessed on: 20.07.2023).

[20] Women Against Abuse is a non-profit agency, which is one of the largest agencies dealing with domestic violence in the United States of America. The organisation's mission is to provide high quality, compassionate and non-judgemental services, supporting self-respect and independence of people experiencing violence from their partner, as well as fighting for ending domestic violence through advocacy and education of the society. See: https://www.womenagainstabuse.org/about-us/our-mission-and-services (accessed on: 20.07.2023).

[21] See: Women Against Abuse, *Types of abuse*, https://www.womenagainstabuse.org/education-resources/learn-about-abuse/types-of-domestic-violence (accessed on: 20.07.2023).

Article 156 of the Penal Code; name-calling or offending can be qualified pursuant to Article 216 par. 1 of the Penal Code; intimidation can be qualified pursuant to Article 190 par. 1 of the Penal Code; stalking can be qualified pursuant to Article 190a par. 1 of the Penal Code; cases of sexual abuse can be qualified pursuant to relevant regulations of Chapter XXV of the Penal Code; hacking email in order to read mails can be qualified pursuant to Article 267 par. 1 of the Penal Code, etc. The indicated regulations should be recognised as sufficient from the point of view of the necessity to counteract particular and corresponding symptoms of domestic violence by the penal law.

However, regulations concerning the criminal protection against cases of potential financial (economic) domestic violence should be recognised as insufficient. The currently binding Penal Code does not provide regulations sufficiently and unequivocally referring to, e.g., a malicious limitation of one of spouses' access to family budget or preventing the spouse from taking on gainful employment. In this scope, the regulation of Article 207 par. 1 of the Penal Code should be changed and given the following wording: "Whoever physically, mentally or economically mistreats a person close to them, or another person being in a permanent or temporary state of dependence to the perpetrator, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years." Of course, one could agree with J. Kluza who claims that: "*Pursuant to Article 207 of the Penal Code there are no doubts that behaviours described among the attributes of the planned Article 115 par. 25 of the Penal Code* [i.e., behaviours aimed at making a close person or a person staying in common household dependant, forcing such a person to perform certain acts, or to humiliate such a person by limiting the access to, as well as the possibility to use or administer their financial or property assets, or financial or property assets of common household, or by limiting such a person's possibility to acquire financial or property assets – annotation by K.B.] *fall within the category of mental violence referred to in this provision. It is, in fact, such a broad term that it includes not only elements of the perpetrator's physical impact on the other person aimed at causing harm; also, the construction of abuse requires occurrence of specific relations between the perpetrator and the victim.*"[22] However, while one should agree with the aforementioned author that mental violence can be treated

[22] J. Kluza, *Przestępstwo przemocy ekonomicznej*, "Prokuratura i Prawo" 2019, No. 9, p. 110.

in literature and judicial decisions in a broad manner and does also include economic violence, one cannot forget about the principal manner in which the penal law influences the society, that is, the motivational impact through the agency of a criminal legitimised norm,[23] which is not and shall not be duly implemented in the context of financial domestic violence on the grounds of the valid legal status, and potential interpretative doubts, which can occur in the case of a lack of specification that mental violence also includes economic violence. In the context of the latter, it is worth citing one of the results of the empirical research conducted by Court Watch Polska,[24] according to which: "*Construction of Article 207 of the Penal Code results in the fact that, in practice, bodies which conduct criminal proceedings often omit forms of violence other than physical and mental abuse, or enumerate other modes of perpetrator's operation perfunctorily. In consequence, jurisprudence especially omits economic violence, symptoms of which are often indicated by victims in their very first testimonies.*"[25]

Therefore, perhaps the new wording of Article 207 par. 1 of the Penal Code would not give the public prosecutors an additional instrument to counteract domestic violence, but it would certainly remove their potential doubts whether economic violence can be prosecuted with the use of this regulation.

Regardless of the above, it should be also noticed that the aforementioned legal regulations other than Article 207 of the Penal Code, constituting a potential basis for reaction to various symptoms of domestic violence might not be connected by public prosecutors with the said phenomenon, although they can constitute an important factor suggesting occurrence thereof. Thus, it is

[23] See: K. Burdziak, *Osoba niepoczytalna a prawnokarna norma sankcjonowana*, Warszawa 2021, p. 33 and next.

[24] Foundation Court Watch Polska is a non-profit organisation operating in the territory of the Republic of Poland which has the following aims, among others: 1. activity to the benefit of the implementation of principles of a democratic state of law; 2. educational and scientific activity in the scope of law, law and order, and justice; 3. activity to the benefit of improvement of the quality of law and justice institutions (See: Statute of the Foundation CWP, https://courtwatch.pl/wp-content/uploads/2010/10/FCWP_statut1.pdf, accessed on: 20.07.2023).

[25] S. Burdziej, Z. Branicka, D. Hofman, *Wymiar sprawiedliwości wobec przemocy domowej. Raport z badań empirycznych*, Toruń 2022, p. 70, https://courtwatch.pl/wp-content/uploads/2022/03/RAPORT_wymiar_spr_wobec_przemocy_domowej.pdf (accessed on: 20.07.2023).

important to sensitise public prosecutors to the above circumstance and to potential factors of the risk of the discussed phenomenon.[26]

Furthermore, it could be also considered to introduce to the Penal Code a solution analogous to Article 248 of the Penal Code of Kosovo, according to which: "*1. Whoever commits physical, psychological or economic violence or mistreatment with the intent to violate the dignity of another person within a domestic relationship*[27] *shall be punished by fine and imprisonment of up to three (3) years. 2. When any act in the Criminal Code is committed within a domestic relationship, it will be considered an aggravating circumstance. 3. Every member of the family who exerts physical, psychological, sexual or economic violence or mistreatment against another member of his/her family, shall be punished by a fine and imprisonment of up to three (3) years. 3.1. 'Domestic relationship' for the purpose of this provision is in accordance with the definition in Article 113 of this Code. 3.2. Domestic violence, physical, psychological, sexual or economic violence, for purposes of this Code shall be the same as defined in provision of Article 2 sub-paragraph 1.2. of the Law No. 03/L-182 Law on Protection against Domestic Violence.*"[28]

A possible Polish regulation could take on the following wording:

"*Article 207 § 1. Whoever uses physical, mental, sexual or economic violence or abuses another person while remaining with the latter in a relationship specified in Article 2 par. 1 subpar. 2 of the Act of 29 July 2005 on Counteracting Domestic Violence (Journal of Laws of 2021, item 1249, as amended) or in other permanent*

[26] See: e.g., A. Herbert, J. Heron, C. Barter *et al*., *Risk factors for intimate partner violence and abuse among adolescents and young adults: findings from a UK population-based cohort*, "Wellcome Open Res" 2021, 5(176), DOI: 10.12688/wellcomeopenres.16106.3.

[27] Whereas, "domestic relationship" is understood as "*the relationship between: 25.1. who are engaged or were engaged or are married or were married or are in extra marital union or were in extra marital union or are cohabiting in a common household or were cohabiting in a common household; 25.2. who use a common house and who are related by blood, marriage, adoption, in-law or are in a guardian relationship, including parents, grandparents, children, grandchildren, siblings, aunts, uncles, nieces, nephews, cousins; or 25.3. who are the parents of a common child*" (Article 113 of the Penal Code of Kosovo, https://md.rks-gov.net/desk/inc/media/A5713395-507E-4538-BED6-2FA2510F3FCD.pdf, accessed on: 20.07.2023).

[28] The aforementioned regulation was introduced to the Penal Code of Kosovo with support of a regional programme to the benefit of ending violence against women in West Balkans and Turkey, "Implementing Norms, Changing Minds", funded by the European Union (See: UN Women, *Recognizing domestic violence as a criminal offence, a big step towards justice for women in Kosovo*, https://eca.unwomen.org/en/news/stories/2020/6/recognizing-domestic-violence-as-a-criminal-offence-a-big-step-towards-justice-for-women-in-kosovo, accessed on: 20.07.2023).

or temporary dependence relationship, shall be liable to deprivation of freedom for a term of between 3 and 5 years. § 1a. Whoever commits the act specified in par. 1 towards a person unable to take proper care of themselves due to their age, mental or physical condition, shall be liable to deprivation of freedom for a term of between 6 months and 8 years. § 2. If the act specified in par. 1 or 1a is combined with the use of extraordinary cruelty, the perpetrator shall be liable to deprivation of freedom for a term of between 1 and 10 years. § 3. If the act specified in paras. 1–2 results in a suicidal attempt of the victim, the perpetrator shall be liable to deprivation of freedom for a term of between 2 and 12 years."

Introduction of this type of regulation to the Penal Code would unequivocally prohibit domestic violence at a crucial level from the point of view of the Polish penal law, thus treating it as broadly as possible[29] and, in consequence, properly securing the legal interest in the form of family's interest. Simultaneously, this type of regulation would constitute an unequivocal suggestion for public prosecutors that occurrence of physical, mental or economic violence requires examining whether it does not constitute a symptom of a broader phenomenon that is domestic violence and thus, whether manners and measures of proceedings relevant for the nature of this phenomenon should be applied.

Together with the possible introduction of a new regulation, it should be also considered to amend Article 240 par. 1 of the Penal Code and supplement the catalogue of prohibited acts stipulated in the said provision with a crime (or in principle – crimes) of domestic violence, of which the authority appointed to prosecute crimes should be immediately notified. It would constitute an important, albeit, of course, only an additional, step in the direction of breaking the taboo of domestic violence.

Of course, one could consider as sufficient in this scope the solution provided for in Article 12 of the Act on Counteracting Domestic Violence, according to which: 1) people, who with regard to the performance of their service or professional duties suspect commitment of a prosecuted crime with the use of domestic violence,[30] are obliged to immediately notify the Police or the public

[29] Attributes of basic types could be implemented in any form of an intent (direct and conceivable), at the same time without the necessity to have any effect (in the external or internal world of the other person).

[30] Regardless of the above, it is suggested to introduce a change in the contents of Article 12 par. 1 of the Act on Counteracting Domestic Violence. The phrase "crime with the

prosecutor; and 2) people who witness family violence[31] should notify the Police, the public prosecutor or another entity acting to the benefit of counteracting family violence. However, it should be underlined that the obligation put on citizens under Article 12 par. 2 of the Act on Counteracting Domestic Violence is of an exclusively social (not legal) nature, and fulfilment thereof cannot cause any consequences, whereas the obligation of a legal nature was put under Article 12 par. 1 of the Act on Counteracting Domestic Violence only on a limited group of people and concerns exclusively crimes (only crimes prosecuted *ex officio*). Indicated regulations are, therefore, incomparably weaker in the scope of the motivational impact on citizens in comparison with the potential new obligation that would result from Article 240 par. 1 of the Penal Code.

3.2. Sources of information constituting grounds for undertaking measures by public prosecutors in the scope of counteracting domestic violence

Domestic violence is a phenomenon, occurrence of which is usually known only to a narrow group of people (perpetrators, victims, possibly random witnesses, e.g., neighbours), who will not want to or will not be able to disclose to any third parties, especially prosecution agencies, information of the fact that the discussed phenomenon has occurred. Obtaining by the public prosecutor the

use of domestic violence" unnecessarily limits the scope of the obligation imposed on the society members only to crimes (and does not include, e.g., offences); moreover, it unnecessarily complicates the interpretation process; nevertheless, it is not known what a crime with the use of domestic violence is, and what does the use of domestic violence mean (domestic violence is, in fact, a certain behaviour showing the attributes of an act prohibited under penalty). It would be much more transparent to give Article 12 par. 1 of the Act on Counteracting Domestic Violence the following wording: "*People, who due to the performance of their official or professional duties suspect commitment of an act prohibited under penalty, which constitutes an element of domestic violence, immediately notify the Police or the public prosecutor.*"

[31] Regardless of the above, it is suggested to introduce a change in the contents of Article 12 par. 2 of the Act on Counteracting Domestic Violence in order to adjust the aforementioned regulation to terminological changes introduced to the Act. The new wording of Article 12 par. 2 of the Act on Counteracting Domestic Violence could be as follows: "*People who witness domestic violence should notify the Police, public prosecutor or other entity acting to the benefit of counteracting domestic violence.*"

information concerning occurrence of a prohibited act related to domestic violence will therefore be extremely difficult, to say the least, and will be primarily limited to the situation when the victim themselves decides to overcome their fear and reveal the tragedy they are experiencing. As results from the research conducted by Court Watch Polska: "*People experiencing violence in the majority of cases have to seek help themselves. They rarely receive it from people from their environment or relevant institutions. If the case started with the Police intervention, an official note constituting a written confirmation of conducted activities usually indicated that the victim was called to the Police station to give a testimony. Case files often included testimonies ending with the following phrase: «I [first name and surname] submit a motion for prosecuting and punishing X [first name and surname] for using mental violence against me »or« I [first name and surname] am afraid of them and fear that they will finally hurt me. I demand prosecuting and punishing [first name and surname] for abusing me». Only after such an official notification submitted by the victim, including the motion for prosecution, and not after the fact of learning about the suspicion of committing a crime at the moment of intervention, the proceedings in the case were initiated.*"[32]

The aforementioned status can of course – at least in a certain scope – change at the moment of fully using the possibilities stipulated in the Act on Counteracting Domestic Violence, providing for the participation (or a possibility of participation) of public prosecutors in interdisciplinary teams (and diagnostic-auxiliary groups),[33] whose tasks include: 1) diagnosing the issue of domestic violence at the local level; 2) initiating preventive, educational and information measures aimed at counteracting domestic violence and entrusting performance thereof to relevant entities; 3) initiating measures with regard to people experiencing domestic violence and people using domestic violence; 4) drawing up

[32] S. Burdziej, Z. Branicka, D. Hofman, *op. cit.*, p. 42.

[33] In the context of cooperation between public prosecutors and other entities, it is also worth noticing the Database of people supervising or coordinating in Voivodeship Offices, District Courts, Penitentiary Units, Voivodeship Police Offices, Appellate Prosecutor's Offices and Local Education Authorities the work of services performing tasks in the scope of counteracting domestic violence, centres providing assistance to people experiencing domestic violence, specialist counselling facilities and lodging facilities, which has been developed for a few years (See: Ministry of Family and Social Policy, *Report on the Implementation of the National Programme for Counteracting Domestic Violence in 2021 for the Period between1 January and 31 December 2021*, https://www.gov.pl/attachment/e804fa59-704b-46bc-9359-cff4f7a9a165, accessed on: 20.07.2023).

a project of a municipal programme on counteracting domestic violence and protection of people experiencing domestic violence; or 5) distributing information on institutions, people and possibilities of providing assistance in the local environment (Article 9b par. 2 of the Act on Counteracting Domestic Violence), as well as obligations stipulated in the aforementioned Article 12 of the Act on Counteracting Domestic Violence.[34]

Nevertheless, it should be underlined that there are perhaps (unfortunately) underappreciated sources of obtaining by the public prosecutor information on the potential occurrence of domestic violence, sources which may prove to be extremely effective in the scope of detecting the discussed phenomenon – namely, proceedings in cases of juveniles conducted on the basis of regulations of the Act on the Support and Rehabilitation of Juveniles[35] in which the public prosecutor participates as the party. We will focus on this subject matter in this part of the study, hoping that the changes proposed below in the scope of public prosecutor practice will significantly contribute to increasing effectiveness of the public prosecutor's office in counteracting domestic violence.

Let us start with recalling that pursuant to the Act on the Support and Rehabilitation of Juveniles, proceedings are conducted for two reasons: due to the juvenile's commitment of a punishable act (an act prohibited as a crime, fiscal crime, offence or tax offence), or due to the juvenile's behaviour that might suggest their demoralisation (see: Article 2 of the Act on the Support and Rehabilitation of Juveniles). In the context of the latter, it should be indicated that the legislator stipulates in the Act a catalogue of their exemplary forms, including commitment of a prohibited act, violating rules of social coexistence, avoiding school or education obligation, abusing alcohol, intoxicants, psychoactive drugs, precursors thereof, substitutes or new psychoactive drugs, or prostitution (Article 4 of the Act on the Support and Rehabilitation of Juveniles).

All of the aforementioned behaviours in which young people or very young people (aged between 10 and 18 years old) engage in, can suggest that the

[34] On Polish solutions in the legal-comparative context see: P. Kruszyński, K. Wlaźlak, *Przeciwdziałanie przemocy w rodzinie na tle porównawczym*, "Prokuratura i Prawo" 2017, No. 5, pp. 37–55.

[35] The Act of 9 June 2022 on the Support and Rehabilitation of Juveniles (Journal of Laws, item 1700, as amended), hereinafter referred to as: the Act on juvenile support and resocialisation.

perpetrator's personality has been developing improperly, and thus it is necessary to provide them with assistance and protection (support), and perhaps also resocialisation. From the point of view of the good of the juvenile, assurance and protection of which is the supreme directive of proceeding in their case (see: Article 3 of the Act on the Support and Rehabilitation of Juveniles), it is, however, necessary not only to determine, in the course of the proceedings conducted pursuant to the Act on the Support and Rehabilitation of Juveniles, their potential demoralisation and the extent thereof, but also, or perhaps, primarily, reasons for this demoralisation, since only then it will be possible to act effectively and not only "mitigate symptoms".[36] Demoralisation can be caused by endogenous factors (attributable to the juvenile themselves), or exogenous factors (attributable to the juvenile's environment, e.g., family or school). Whereas, exogenous factors related to the juvenile's family can include domestic violence used against them or their family members, violence which has an immense impact on the psyche and behaviour of a young person. In the literature it is indicated, for instance, that older children show potential indicators of domestic violence that include: blaming themselves, depression, self-harm, suicidal thoughts, abusing substances, risky behaviours, criminal behaviours, weak social networks, demotivation to education, and eating disorders. Girls more often show such symptoms as: withdrawal, fear, and depression, whereas boys exhibit violence against peers and/or antisocial behaviours.[37]

As can be seen, improper behaviour of a juvenile, for example, in the form of a punishable act, can result from experiencing domestic violence. Therefore, public prosecutor engagement in the juvenile's case can contribute to establishing the truth; truth – it should be underlined – not only regarding a specific behaviour of the juvenile, but also concerning reasons for such a behaviour. Only

[36] The reasons for demoralisation should also be determined in the course of the proceedings conducted pursuant to Article 10 par. 2 of the Penal Code. It should be, in fact, emphasised that while on the grounds of the penal law it is important to administer justice (from the point of view of the injured, society and perpetrator), Article 53 of the Penal Code explicitly stipulates that it is equally important to influence the convicted in individual-preventative terms; the latter will not be possible without comprehensive recognition of the reason for committing an act prohibited under penalty.

[37] See: M. Lloyd, *Domestic Violence and Education: Examining the Impact of Domestic Violence on Young Children, Children, and Young People and the Potential Role of Schools*, "Frontiers in Psychology" 2018, Vol. 9, art. ID 2094, DOI: 10.3389/fpsyg.2018.02094, p. 4.

in the case of determining actual reasons for the juvenile's demoralisation or commitment of a punishable act will it be possible to undertake relevant preventive measures (counteracting such phenomena), including using proper reaction measures towards the juvenile or their parents, stipulated in the Act on the Support and Rehabilitation of Juveniles. Thus, public prosecutor participation in the proceedings regarding the juvenile's case should not only be a possibility, but an obligation, and public prosecutor engagement in the proceedings should not be a fiction,[38] but a fact.

Therefore, it is suggested to give Article 69 par. 2 of the Act on the Support and Rehabilitation of Juveniles the following wording: "Parties to the trial, the barrister of a juvenile, the victim and plenipotentiaries are notified of the date of the trial. Their failure to appear before the court does not hinder examination of the case, unless the family court decides otherwise. In cases referred to in Article 38 par. 1 and 2, the defender's participation in the trial is obligatory. Public prosecutor participation in the trial is obligatory." It is also suggested to include in the Regulation of the Minister of Justice of 7 April 2016 on the rules and regulations of the internal office hours of common prosecution organisational units (Journal of Laws of 2023, item 1115, as amended) provision of par. 364a of the following wording:

"*1. In the course of proceedings in the juvenile's case conducted on the basis of regulations of the Act of 9 June 2022 on the Support and Rehabilitation of Juveniles (Journal of Laws, item 1700, as amended) the public prosecutor strives to determine whether the juvenile committed a punishable act or shows symptoms of demoralisation, and to support the court in making a decision of applying specific reaction measures against the juvenile to their benefit and taking into account social interest. 2. In the course of proceedings referred to in par. 1, the public prosecutor strives to determine the reasons for committing a punishable act by the juvenile or reasons for their demoralisation. 3. In the case of stating factors justifying suspicion that juvenile's behaviour results from experienced domestic violence, the public prosecutor*

[38] As stated by P. Górecki: "*The hitherto jurisprudence indicated little activity of the public prosecutor in proceedings concerning juveniles*" (P. Górecki, *Komentarz do art. 35 u.w.r.*, [in:] *Wspieranie i resocjalizacja nieletnich. Komentarz*, (ed.) V. Konarska-Wrzosek, Warszawa 2023, thesis 7, https://sip.lex.pl/#/commentary/587927164/724604/konarska-wrzosek-violetta-red-wspieranie-i-resocjalizacja-nieletnich-komentarz?cm=URELATIONS (accessed on: 20.07.2023)).

considers the possibility of applying measures stipulated in the Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws of 2022, item 1375, as amended) or the Act of 25 February 1964 – the Code of Family and Guardianship (Journal of Laws of 2020, item 1359, as amended)."[39]

The above regulations can contribute to higher activity of public prosecutors in proceedings concerning juveniles' cases and, in consequence, to detecting a larger number of domestic violence cases.

3.3. The manner of undertaking measures by public prosecutors in the scope of counteracting domestic violence

The manner in which public prosecutors act within conducted criminal proceedings concerning various prohibited acts, which are symptoms of domestic violence, should take into consideration the characteristics of this type of crimes, which, on the one hand, obviously require striving to detect the perpetrator and bring them to justice, and, on the other hand, they require proper treatment of victims in order to, for instance, prevent their secondary victimisation. Important and legitimate directives in this scope result from guidelines issued by the Minister Sprawiedliwości (Minister of Justice) concerning the rules of procedure of common prosecution organisational units in the scope of counteracting family violence.[40] According to the guidelines, the public prosecutor conducting or supervising a case related to the issue of family violence is obliged to, among others, inform the victim of all forms of assistance provided to people suffering family violence, available within municipal, county and voivodeship programmes of counteracting family violence. Moreover, they inform about the activity of other assistance facilities for victims, which are closest to the victim's place of residence, and indicate the scope of activities of such facilities and forms

[39] This regulation should not be included in Section V. Participation of a public prosecutor in judicial proceedings in criminal cases, due to the fact that proceedings in juvenile cases conducted on the grounds of the Act on the Support and Rehabilitation of Juveniles are not of a criminal nature and are not related to juvenile liability (especially criminal).

[40] Guidelines of the Public Prosecutor General of 22.02.2016 concerning the code of conduct of general organisational units of the prosecutor's office in the scope of counteracting domestic violence, http://szczecin.pr.gov.pl/wp-content/uploads/2016/03/wytyczne_2016.pdf (accessed on: 20.07.2023).

of assistance provided by them, and notifies of the activity of non-governmental organisations in a given area, providing assistance to victims of family violence.

Nevertheless, the aforementioned guidelines primarily concern hard competences (relevant knowledge in the scope of penal law and criminal trial, relevant professional experience) and performance of particular activities by public prosecutors in a strictly defined manner, guaranteeing from the formal point of view the best execution of domestic violence victim's freedoms and rights; they do not, however, concern – although they should – other important issues including, in particular, the necessity of public prosecutors conducting criminal proceedings related to domestic violence to have hard competences in the scope of psychology, pedagogy and criminology (especially regarding indicators of the occurrence of domestic violence) and sociology, as well as soft competences with a particular consideration of empathy. The latter (the issue of empathy) seems to be the *sine qua non* condition of the proper manner of proceeding with people suffering domestic violence.

Empathy is a reaction to the other person's situation (temporary mental state triggered by the other person's situation) and a permanent feature (the ability to empathise with another's situation). In adults, empathy is of a non-uniform nature and can mean: "*First of all, emotional accord and compassion for an oppressed person or even feeling the same emotions as the other person. (...) The empathic reaction is immediate and automatic (as in new-borns), therefore it does not require any reflections and decisions. Secondly, empathising with another person can mean more thought-over acceptance of their point of view and considering the case from another person's perspective. It requires certain skills and ability to «exclude» one's own perspective, that is, it is a developmentally posterior reaction. Thirdly, empathy means experiencing own suffering in response to seeing another person who is oppressed*."[41]

This empathising with another person, the ability to accept their point of view and look at the case from their perspective is required in public prosecutor work in the scope of counteracting domestic violence. However, in actuality it is often not the case (unfortunately!), and empathy is not something that

[41] B. Wojciszke, *Psychologia społeczna*, Warszawa 2020, p. 230. On empathy also see, e.g.: A. Nowogrodzka, *Zdolność do rozpoznawania emocji i odczuwania empatii u osób popełniających przestępstwa,* "Profilaktyka Społeczna i Resocjalizacja" 2014, No. 23, pp. 7–17.

characterises every person. As indicated by S. Baron-Cohen, empathy constitutes a certain continuum (from a low to high level), in which every person holds a specific place. Depending on how much empathy we have, we hold a place that is closer to one or the other end of a spectrum.[42] The aforementioned author and his team prepared a scale called Empathy Quotient (EQ), which allows distinguishing people that have difficulty with empathy from people who do not have such difficulty. On the basis of results of the use thereof, Baron-Cohen also came to the conclusion that we can differentiate seven potential settings of the "empathy mechanism", from 0 to 6.[43] And thus: 0) "*A person at the 0 level has no empathy whatsoever. (...) Some people at the 0 level become able to commit crimes, among others: murder, assault with the use of violence, torture and rape. Fortunately, not all people at this level commit cruel acts – some do experience serious difficulties in relations with others, but they do not want to hurt others*;"[44] 1) "*At level 1 a person is still able to hurt others, but, to a certain extent, is also able to contemplate what they have done and feel remorse. The problem is, they cannot stop themselves. Clearly, empathy does not constitute a sufficient restraint for them that would prevent improper behaviours*;"[45] 2) "*At level 2 a person still experiences serious difficulties with empathy, but they are to a sufficient extent aware of what the other person would feel in order to refrain from physical aggression. They can shout at others and hurt them with words without any inhibitions, but they have sufficient empathy to be aware that they have done something bad when the other person feels hurt. However, usually they need a clear communication from the other person or from a third party to realise that they have gone too far*."[46] Of course, the higher the number, the higher the level of empathy until at level 6 it reaches the highest level, and people characterised with this level of empathy "*constantly focus of feelings of others, take care of their well-being and make effort to provide them*

[42] See: S. Baron-Cohen, *Teoria zła. O empatii i genezie okrucieństwa*, Sopot 2014, p. 34 (e-book); The summary of findings presented in the book can be found in: M. Banasik, *Od dewiacji do poszanowania prawa, czyli uwagi na tle braku empatii w ujęciu Simona Barona-Cohena*, https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/50163/banasik_od_dewiacji_do_poszanowania_prawa_czyli_uwagi_na_tle_braku_empatii_2014.pdf?sequence=1&isAllowed=y (accessed on: 20.07.2023).

[43] See: S. Baron-Cohen, *op. cit.*, pp. 38–40.

[44] *Ibidem*, pp. 40–41.

[45] *Ibidem*, p. 41.

[46] *Ibidem*, p. 41.

with support."[47] People with the highest (or at least a high) score on the "scale of empathy" should deal with the subject matter of domestic violence. Only such a high level of empathy combined with knowledge and experience in the scope of law, psychology, etc., will guarantee that activities of public prosecutors conducted on the basis of relevant statutory regulations will be activities that ensure providing victims with proper assistance, and not only activities that formally ensure achievements of the objectives of the criminal proceedings.[48]

In view of the aforementioned, public prosecutors dealing with the issue of domestic violence must be not only people with extensive knowledge and experience in the scope of law, but also people who possess the relevant personality traits and who are well and duly trained across a wide range of disciplines. Additionally, these should be people specialising in this subject matter (in the best case scenario dealing only with this issue), subject to preliminary and periodic training in psychology, sociology, criminology, etc., and at the same time capable of selecting a team of people, specialists in particular fields (psychologists, psychiatrists, etc.), who could, at any time, provide them with support in the scope of measures undertaken with regard to counteracting domestic violence. According to the National Domestic Violence Prosecution – Best Practices Guide: "*victims should (...) receive comprehensive wraparound support services to help alleviate their psychological, social, and financial fears. A multidisciplinary approach may help ensure that a victim is treated respectfully, compassionately, and with dignity. A multidisciplinary approach may also help secure defendant accountability and community safety. Multidisciplinary collaboration should be prosecutor-led and*

[47] *Ibidem*, p. 43, The above findings concerning empathy were previously presented in the monograph: B. Wach, K. Burdziak, *Eutanazja w psychiatrii. Aspekty bioetyczne i prawne,* Gorzów Wielkopolski 2022, pp. 138–139.

[48] Perhaps, all prospective candidates for public prosecutors should be required to show certain steering features during recruitment for prosecutor's training: 1) significant individual personality traits in the scope of intellectual functions (processability and reproducibility); and 2) proper traits in the area of interpersonal relations, with a particular consideration of susceptibility (which should be small or average) and – and this is the most interesting at this point – tolerance, which should fall within the range of average and high. High tolerance favours, among others, interpersonal skills, patience, peaceful relations with others and good cooperation with them, making compromises and empathy (See: J. Wilsz, *Właściwości sterownicze osób wykonujących zawody prawnicze pożądane ze względu na efektywne funkcjonowanie zawodowe*, http://www.jolantawilsz.pl/attachment/id/48, accessed on: 20.07.2023).

should include, but not be limited to, law enforcement, judges and court staff, medical and mental health communities, victim and witness services within and outside the prosecutor's office, domestic violence survivors, clergy, probation and parole, corrections, civil attorneys, and child welfare services."[49] However, the author of the study does not mean teams understood as interdisciplinary teams or diagnostic-auxiliary groups referred to in the Act on counteracting domestic violence, but teams that should have a less formal nature and operate *ad hoc* in the context of particular cases related to the subject matter of family violence, and be combined in the person of a public prosecutor and their good relations with particular specialists. A quick, flexible and interdisciplinary reaction of such teams to a given case of an act prohibited under penalty, constituting an element of domestic violence, can bring a much greater benefit to the domestic violence victim than actions of formalised groups based on relevant rules and regulations, and procedures.

Having the aforementioned considerations in mind, it is suggested to at least introduce the following regulations:

1. Regulation of the Minister Sprawiedliwości (Minister of Justice) of 7 April 2016 – Rules of internal procedure of common organisational units of the Prosecutor's Office:

> "*§ 29. (...) 2. Branches in the district prosecutor's office can be established, competences of which include: 1) conducting and supervising cases concerning medical mistakes resulting in a grave injury to a human body; 2) conducting and supervising cases concerning crimes committed with the use of the Internet and advanced technologies, and IT systems (cybercrime): a) of a complex factual status or b) if the value of the damaged caused by the crime exceeds the amount referred to in Article 115 par. 5 of the Penal Code; 3) conducting and supervising cases concerning crimes with regard to which there is a suspicion that they constitute an element of domestic violence.*"

[49] National District Attorneys Association. Women Prosecutors Section, *National Domestic Violence Prosecution – Best Practices Guide*, 2017, pp. 35–36, https://ndaa.org/wp-content/uploads/WPS-Best-Practice-Guide_Domestic-Violence-Jan.-2021-REVISED.pdf (accessed on: 20.07.2023).

> "*§ 59. (...) 6. While assigning activities, the qualifications, abilities and professional experience of particular public prosecutors should be taken into account, and the principle of even distribution of workload should be adhered to. Public prosecutors, who are responsible for conducting and supervising cases concerning crimes, with regard to which there is a suspicion that they constitute an element of domestic violence, must have knowledge and competences in the scope of psychology, pedagogy and criminology, as well as proper personality traits allowing them to effectively conduct this type of cases with respect for the victim's dignity.*"

2. The Act of 28 January 2016 – Law on the Public Prosecutor's Office:

> "*Article 98. The public prosecutor is obliged to constantly improve their professional qualifications, including participation in training and other forms of professional improvement. Public prosecutors responsible for conducting and supervising cases concerning crimes, with regard to which there is a suspicion that they constitute an element of domestic violence, are obliged to improve their knowledge and competences also in the scope of psychology, pedagogy and criminology.*"

Of course, one could consider the above-mentioned changes, that refer to "training" for prosecutors to be unnecessary; after all, as indicated in the justification to the Bill of 9 March 2023 on the amendment of the Act on Counteracting Domestic Violence and certain other acts (Journal of Laws, item 535):[50] "*The hitherto wording of Article 6 par. 6 subpar. 4 is supplemented with obligatory training for members of the interdisciplinary team and diagnostic-auxiliary groups. From the drafter's point of view it is important for members of the interdisciplinary team, who have not yet participated in the works thereof, to have a possibility of acquiring or supplementing knowledge in the scope of counteracting domestic violence. The aim of the aforementioned regulation is to improve competences of services, which will significantly influence the quality and effectiveness of undertaken*

[50] Uzasadnienie do projektu ustawy o zmianie ustawy o przeciwdziałaniu przemocy w rodzinie oraz niektórych innych ustaw (*Justification to the Bill on the Amendment of the Act on Counteracting Domestic Violence and Certain Other Acts*), https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=2799 (accessed on: 20.07.2023).

measures."[51] However, it should be underlined, first of all, that public prosecutors only "can" be, but do not "have" to be, included in interdisciplinary teams, and, in principle, are included in diagnostic-auxiliary groups only exceptionally (see: Article 9a of the Act on Counteracting Domestic Violence). Secondly, pursuant to Article 9a par. 5a of the Act on Counteracting Domestic Violence: "*Members of the interdisciplinary team, within 12 months as of the day of their appointment to the interdisciplinary team, undergo obligatory training referred to in Article 6 par. 6 subpar. 4*;" the above means that the prosecutor, even when he is finally included in the interdisciplinary team, will be able to function in such a team without proper training for almost a year, which is a solution difficult to accept.

In the context of the proposition to separate a specialised group of public prosecutors responsible for conducting and supervising cases on crimes about which there is a suspicion that they constitute an element of domestic violence, it should be also considered introducing the requirement that they cooperate with the interdisciplinary teams and diagnostic-auxiliary groups referred to in the Act on counteracting domestic violence. Therefore, it is proposed to give Article 9a par. 3 of the Act on counteracting domestic violence the following wording: "An interdisciplinary team should include representatives of: 1) welfare organisational units; 2) a municipal commission for solving alcohol problems; 3) the Police; 3a) the Public Prosecutor's Office, that is, territorially competent public prosecutors responsible for conducting and supervising cases on crimes, with regard to which there is a suspicion that they constitute an element of domestic violence; 4) education; 5) health care; 6) non-governmental organisations."[52] Also Article 9a par. 11c of the Act on Counteracting Domestic Violence should be amended; the suggested new wording of the indicated regulation could have the following wording: "A diagnostic-auxiliary group can also include: 1) an

[51] Of course, it should also be remembered that the subject matter of domestic violence is an element of the prosecutor's training (See: Ministerstwo Rodziny i Polityki Społecznej, *Sprawozdanie z realizacji Krajowego Programu Przeciwdziałania Przemocy w Rodzinie w roku 2021 za okres od dnia 1 stycznia do dnia 31 grudnia 2021 r.*, https://www.gov.pl/attachment/e804fa59-704b-46bc-9359-cff4f7a9a165, accessed on: 20.07.2023).

[52] In the case of introducing the amendment suggested above, the contents of Article 9a par. 5 of the Act on Counteracting Domestic Violence should also be modified. Then, the aforementioned regulations should be given the following wording: "The composition of the interdisciplinary team can also include representatives of entities other than those specified in par. 3–4, acting to the benefit of counteracting domestic violence."

employee of a specialist social support centre for people experiencing domestic violence; 2) a family assistant; 3) a teacher-tutor or a teacher aware of the domestic situation of the juvenile; 4) people practising a medical profession, including a doctor, nurse, midwife or paramedic; 5) a representative of the municipal commission for solving alcohol problems; 6) a territorially competent public prosecutor responsible for conducting and supervising cases on crimes, with regard to which there is a suspicion that they constitute an element of domestic violence."

4. Potential limitations in the scope of the possibility of introducing proposed legal changes

Proposed solutions *de lege ferenda,* in the scope in which they concern introduction of new legal regulations or modification of hitherto regulations, do not in principle cause any far-fetched problems related to their potential implementation. One exception is a proposition that public prosecutors dealing with the subject matter of domestic violence should be people specialising in this subject matter (in the best case scenario dealing only with this issue), subject to preliminary and periodical training in psychology, sociology, criminology, etc., and at the same time capable of selecting a team of people, specialists in particular fields (psychologists, psychiatrists, etc.), who could, at any time, provide them with support in the scope of measures undertaken with regard to counteracting domestic violence. In the context of the aforementioned proposition, the following problems can occur: 1) personal problems including, in particular: a) staff shortages resulting from the insufficient number of public prosecutors and the necessity to supplement these shortages; b) shortages of soft and hard competences of current public prosecutors; as well as c) shortages of available specialists in psychology or psychiatry; 2) financial problems including, in particular: a) the necessity of incurring high costs of training of current and future public prosecutors dealing with the subject matter of domestic violence; and b) the necessity of incurring costs of cooperation with numerous specialists, among others, in psychology or psychiatry.

However, incurring the aforementioned costs seems to be necessary and, at the end of the day, profitable (especially from the point of view of those affected by domestic violence).

5. The possibility of using algorithms in counteracting domestic violence

Regardless of the aforementioned legal changes, it should be also considered to equip public prosecutors with an instrument (or instruments) facilitating recognition whether in a given case they deal with domestic violence, and if yes, the gravity of related potential threats in a given case. An instrument – let us emphasise – making it easier for public prosecutors to make an assessment, increasing objectivism of the assessment, but not replacing public prosecutors in the process.[53]

The aforementioned instrument would have to be, on the one hand, simple to use, and, on the other hand, effective and adequate. It would have to take into consideration all necessary indicators and be devised in a manner limiting the number of false-positive and negative results to a minimum, and, at the same time, it would have to show results in an understandable manner allowing verification by entities using the instrument and individuals against whom this instrument has been applied. It would have to be an instrument as resilient as possible to potential mistakes and prejudices (for example related to the nationality, sex or race) of people entering data, and, at the same time, to analogous mistakes and prejudices of entities creating the algorithm. It would have

[53] These types of instruments could, for instance, make it easier for public prosecutors to make decisions regarding the application of the measure stipulated in Article 275a par. 1 of the Code of Criminal Procedure. In compliance with this regulation: "By way of a preventive measure the person accused of a crime committed with the use of violence to the detriment of a cohabiting person can be ordered to periodically leave the premises co-occupied with the injured person, if there is a justified fear that the accused will re-commit the crime with the use of violence against such a person, especially if the accused has threatened to commit such a crime." Currently, public prosecutors are not at a disposal of instruments allowing them to conduct an objective evaluation, whether or not "a justified fear" is present. Introduction of the discussed instruments could change it.

to be an instrument subject to ongoing evaluation by independent specialists, and data concerning this instrument would have to be publicly available and transparent in order to allow entities, against whom the instrument has been applied, to defend their rights.

The aforementioned instrument could have a form of a software, something reminiscent of an electronic, structured assessment system (questionnaire) including proper questions describing a given person or relevant risk factors. Questions included in the questionnaire should be closed, with yes/no answers or answers in the form of scales, although, obviously, there could also occur issues requiring a descriptive assessment. Data entered into the system would be introduced to the mathematical algorithm, developed as a result of research and based on statistical data, and would lead to a specific result suggesting, for instance, lower or higher, or perhaps determined in percentage, risk of domestic violence.[54]

The discussed instrument would not be – let us emphasise – nothing new. This type of instruments are used in many places including, in particular the United States of America, but also in Europe, for instance in Great Britain or Estonia in the procedure of conditional release from serving the full custodial sentence (but not only in this procedure), and the application results are promising (although, of course, these instruments are not perfect, and results thereof can be questioned). However, introduction thereof in Poland would not be simple. It would require not only making a decision in this scope, but also undertaking further measures in the form of a transfer of a policy (transferring to Poland an instrument used abroad upon prior introduction or relevant adaptations), or developing our own instrument upon prior long-lasting and expensive research.[55] Therefore, it is not a solution that could be introduced quickly; however, it could certainly contribute to objectivising and increasing the effectiveness of measures of particular services, of course on the condition of introducing proper security against any negative consequences of using algorithms (that could result from defects of instruments based on algorithms or misguided use thereof). One should agree with M. Bland that: "*Algorithms are*

[54] See: K. Burdziak, E. Rüütel, *Prognoza kryminologiczna. Porównanie rozwiązań estońskich i polskich*, Lublin 2022, pp. 58–61.

[55] Broadly on this topic: *ibidem*, p. 124.

already operating in law enforcement and show promise in improving the capability of police forces to predict future serious domestic abuse before it occurs. At face value this is an exciting development, particularly given the current context. However, there is the potential to cause waste, de-skill professionals and focus interventions inappropriately. While all of these issues are arguably present in the status quo, there is little to be gained from swapping one set of ills for another. Instead, there is a need to construct a meaningful framework of regulation and control, which enforces the principles set out in Oswald et al. and establishes a set of minimum standards for the development and inclusion of specialist capabilities, transparency, accountability and evaluation."[56]

Moreover, public prosecutors' use of instruments from the group of "structured professional judgement", such as for example SARA (Spousal Assault Risk Assessment) or B-SAFER (Brief Spousal Assault Form for the Evaluation of Risk) should be considered. As indicated by P.R. Kropp and S.D. Hart, in the case of this type of instruments, the assessor has to conduct assessment in compliance with the guidelines which reflect the current theoretical, professional and empirical knowledge on violence, and ensure a minimal set of risk factors,[57] which should be taken into consideration in each case, and at the same time include recommendations concerning collecting information (e.g., using many sources and many methods), giving opinions and implementing strategies of preventing violence. On the one hand, this approach is more structured than the one usually applied, also in Poland, the clinical approach (based on the professional recognition of a given entity and usually justified by

[56] M. Bland, *Algorithms Can Predict Domestic Abuse, But Should We Let Them?*, p. 152, https://www.researchgate.net/publication/343026304_Algorithms_Can_Predict_Domestic_Abuse_But_Should_We_Let_Them (accessed on: 20.07.2023).

[57] As indicated by U. Nowakowska: "Risk factors which are usually included in questionnaires are the following: history, violence escalation, generally aggressive behaviour, violating decisions issued by the public prosecutor or court, threats of committing a murder or causing a grave bodily injury, threats of using or using a weapon, suffocation, controlling partner's behaviours, extreme jealousy, harassment, alcohol abuse, drugs abuse, mental disorders of the perpetrator (including depression), threats of committing a suicide, separation/divorce, case on contacts with children, sharing a flat with a stepson/stepdaughter, violence against a pregnant partner. They have been confirmed in empirical research." (U. Nowakowska, *Ocena ryzyka w sprawach o przemoc w rodzinie,* [in:] *Jak skutecznie chronić ofiary przemocy w rodzinie*, (ed.) L. Mazowiecka, Warszawa 2013, https://sip.lex.pl/#/monograph/369283799/62?keyword=lidia%20mazowiecka&tocHit=1&cm=SREST (accessed on: 20.07.2023).

qualifications and experience of the specialists who conduct the assessment), whereas, on the other hand, it is more flexible in comparison with instruments based on algorithms, since the step of combining risk factors is not performed algorithmically.[58] However, the introduction of this type of tools, similarly as tools based on algorithms, would require, apart from a simple political decision, relevant additional measures, including, for example, transfer of policy.

6. Conclusion

Several new legal solutions have been proposed herein, introduction of which, in the author's opinion, can improve the effectiveness of the Public Prosecutor's Office in counteracting domestic violence.

The proposed solutions concern three groups of subject matters: 1) the basis for undertaking measures by public prosecutors in the scope of counteracting domestic violence; 2) sources of information constituting grounds for undertaking measures by public prosecutors in the scope of counteracting domestic violence; and 3) the manner of undertaking measures by public prosecutors in the scope of counteracting domestic violence.

However, regardless whether the proposed solutions will be taken into consideration by the legislator or not, it should be remembered that they do not constitute a remedy for all problems related to counteracting domestic violence. In fact, counteracting domestic violence effectively requires comprehensive, interdisciplinary and multiagency solutions within which public prosecutors will constitute only one of the cogs in a larger machine.

[58] See: P.R. Kropp, S.D. Hart, *The Development of the Brief Spousal Assault Form for the Evaluation of Risk (B-SAFER): A Tool for Criminal Justice Professionals*, pp. 4–5, https://canada.justice.gc.ca/eng/rp-pr/fl-lf/famil/rr05_fv1-rr05_vf1/rr05_fv1.pdf (accessed on: 20.07.2023).

References

Sources of the law (in order of reference in the text)

The Act of 29 July 2005 on Counteracting Domestic Violence (Journal of Laws of 2021, item 1249, as amended).
Council of Europe Convention on preventing and combating violence against women and domestic violence drawn up in Istanbul on 11 May 2011 (Journal of Laws of 2015, item 961, as amended).
The Act of 28 January 2016 – Law on the Public Prosecutor's Office (Journal of Laws of 2022, item 1247, as amended).
The Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws of 2022, item 1375, as amended). Act of 6 June 1997 – Penal Code (Journal of Laws of 2022, item 1138, as amended).
Penal Code of Kosovo, https://md.rks-gov.net/desk/inc/media/A5713395-507E-4538-BED6-2FA2510F3FCD.pdf, accessed on: 20.07.2023).
The Act of 9 June 2022 on the Support and Rehabilitation of Juveniles (Journal of Laws item 1700, as amended).

Other

Banasik M., *Od dewiacji do poszanowania prawa, czyli uwagi na tle braku empatii w ujęciu Simona Barona-Cohena*, https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/50163/banasik_od_dewiacji_do_poszanowania_prawa_czyli_uwagi_na_tle_braku_empatii_2014.pdf?sequence=1&isAllowed=y, s. 5–21 (accessed on: 20.07.2023).
Bland M., *Algorithms Can Predict Domestic Abuse, But Should We Let Them?*, https://www.researchgate.net/publication/343026304_Algorithms_Can_Predict_Domestic_Abuse_But_Should_We_Let_Them (accessed on: 20.07.2023).
Burdziej S., Branicka Z., Hofman D., *Wymiar sprawiedliwości wobec przemocy domowej. Raport z badań empirycznych*, Toruń 2022, https://courtwatch.pl/wp-content/uploads/2022/03/RAPORT_wymiar_spr_wobec_przemocy_domowej.pdf (accessed on: 20.07.2023).
Centers of Disease Control and Prevention, *About CDC*, https://www.cdc.gov/about/index.html (accessed on: 20.07.2023).
Centers of Disease Control and Prevention, *Intimate Partner Violence: Prevention Strategies*, https://www.cdc.gov/violenceprevention/intimatepartnerviolence/prevention.html (accessed on: 20.07.2023).
Guidelines of the Public Prosecutor General of 22.02.2016 concerning the code of conduct of general organisational units of the prosecutor's office in the scope of

counteracting domestic violence, http://szczecin.pr.gov.pl/wp-content/uploads/2016/03/wytyczne_2016.pdf (accessed on: 20.07.2023).

Justification to the Bill on the Amendment of the Act on Counteracting Domestic Violence and Certain Other Acts, https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=2799 (accessed on: 20.07.2023).

Kropp P.R., Hart S.D., *The Development of the Brief Spousal Assault Form for the Evaluation of Risk (B-SAFER): A Tool for Criminal Justice Professionals*, https://canada.justice.gc.ca/eng/rp-pr/fl-lf/famil/rr05_fv1-rr05_vf1/rr05_fv1.pdf (accessed on: 20.07.2023).

Ministry of Family and Social Policy, *Report on the Implementation of the National Programme for Counteracting Domestic Violence in 2021 for the Period between 1 January and 31 December 2021*, https://www.gov.pl/attachment/e804fa59-704b-46bc-9359-cff4f7a9a165 (accessed on: 20.07.2023).

National District Attorneys Association. Women Prosecutors Section, *National Domestic Violence Prosecution – Best Practices Guide*, 2017, https://ndaa.org/wp-content/uploads/WPS-Best-Practice-Guide_Domestic-Violence-Jan.-2021-REVISED.pdf (accessed on: 20.07.2023).

Ostaszewski P., *Przemoc domowa w świetle danych statystycznych procedury "Niebieskiej Karty"*, https://iws.gov.pl/wp-content/uploads/2022/11/IWS_Ostaszewski-P._Przemoc-domowa-w-switle-danych-statystycznych-procedury-_Niebieskiej-Karty_.pdf (accessed on: 20.07.2023).

Statute of the Foundation CWP, https://courtwatch.pl/wp-content/uploads/2010/10/FCWP_statut1.pdf (accessed on: 20.07.2023).

UN Women, *Recognizing domestic violence as a criminal offence, a big step towards justice for women in Kosovo*, https://eca.unwomen.org/en/news/stories/2020/6/recognizing-domestic-violence-as-a-criminal-offence-a-big-step-towards-justice-for-women-in-kosovo (accessed on: 20.07.2023).

Wilsz J., *Właściwości sterownicze osób wykonujących zawody prawnicze pożądane ze względu na efektywne funkcjonowanie zawodowe*, http://www.jolantawilsz.pl/attachment/id/48 (accessed on: 20.07.2023).

Women Against Abuse, *Types of abuse*, https://www.womenagainstabuse.org/education-resources/learn-about-abuse/types-of-domestic-violence (accessed on: 20.07.2023).

https://md.rks-gov.net/desk/inc/media/A5713395-507E-4538-BED6-2FA2510F3FCD.pdf (accessed on: 20.07.2023).

https://www.womenagainstabuse.org/about-us/our-mission-and-services (accessed on: 20.07.2023).

Literature

Baron-Cohen S., *Teoria zła. O empatii i genezie okrucieństwa*, Sopot 2014.

Burdziak K., *Osoba niepoczytalna a prawnokarna norma sankcjonowana*, Warszawa 2021.

Burdziak K., Rüütel E., *Prognoza kryminologiczna. Porównanie rozwiązań estońskich i polskich*, Lublin 2022.

Górecki P., *Komentarz do art. 35 u.w.r.*, [in:] *Wspieranie i resocjalizacja nieletnich. Komentarz*, (ed.) V. Konarska-Wrzosek, Warsaw 2023, https://sip.lex.pl/#/commentary/587927164/724604/konarska-wrzosek-violetta-red-wspieranie-i-resocjalizacja--nieletnich-komentarz?cm=URELATIONS (accessed on: 20.07.2023).

Herbert A., Heron J., Barter C. *et al.*, *Risk factors for intimate partner violence and abuse among adolescents and young adults: findings from a UK population-based cohort*, "Wellcome Open Res" 2021, 5(176), DOI: 10.12688/wellcomeopenres.16106.3.

Kiełtyka A., Kotowski W., Ważny A., *Komentarz do art. 3 p.o.p.*, [in:] *Prawo o prokuraturze. Komentarz*, A. Kiełtyka, W. Kotowski, A. Ważny, LEX/el. 2021.

Kluza J., *Przestępstwo przemocy ekonomicznej*, "Prokuratura i Prawo" 2019, No. 9.

Kruszyński P., Wlaźlak K., *Przeciwdziałanie przemocy w rodzinie na tle porównawczym*, "Prokuratura i Prawo" 2017, No. 5.

Lloyd M.*, Domestic Violence and Education: Examining the Impact of Domestic Violence on Young Children, Children, and Young People and the Potential Role of Schools*, "Frontiers in Psychology" 2018, 9(2094), DOI: 10.3389/fpsyg.2018.02094.

Muszyńska A., *Komentarz do art. 207 k.k.*, [in:] *Kodeks karny. Część szczególna. Komentarz*, J. Giezek, (ed.), Warszawa 2021, https://sip.lex.pl/#/commentary/587881133/678573/giezek-jacek-red-kodeks-karny-czesc-szczegolna-komentarz?pit=2023-06-16&cm=URELATIONS (accessed on: 20.07.2023).

Notko M., Husso M., Piippo S., Fagerlund M., Houtsonen J., *Intervening in domestic violence: interprofessional collaboration among social and health care professionals and the police*, "Journal of Interprofessional Care" 2022, 36(1), pp. 15–23, DOI: 10.1080/13561820.2021.1876645.

Nowakowska U., *Ocena ryzyka w sprawach o przemoc w rodzinie*, [in:] *Jak skutecznie chronić ofiary przemocy w rodzinie*, (ed.) L. Mazowiecka, Warszawa 2013, https://sip.lex.pl/#/monograph/369283799/62?keyword=lidia%20mazowiecka&tocHit=1&cm=SREST (accessed on: 20.07.2023).

Nowogrodzka A., *Zdolność do rozpoznawania emocji i odczuwania empatii u osób popełniających przestępstwa*, "Profilaktyka Społeczna i Resocjalizacja" 2014, No. 23.

Tokarczyk R., *Komparatystyka prawnicza*, Warszawa 2008.

Wach B., Burdziak K., *Eutanazja w psychiatrii. Aspekty bioetyczne i prawne*, Gorzów Wielkopolski 2022.

Wojciszke B., *Psychologia społeczna*, Warszawa 2020.

Zieliński M., *Derywacyjna koncepcja wykładni jako koncepcja zintegrowana*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2006, No. 3.

Zieliński M., *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2012.

ABOUT AUTHOR

Konrad Burdziak – habilitated Doctor at Law, certified Suicidologist. Senior employee of scientific-research institutions (University of Szczecin; Institute of Justice). Dr Burdziak underwent a 3-month scientific internship at the University in Tallinn, Estonia, and a 2-week query in Great Britain. The author or co-author of several dozen scientific publications (including 8 scientific monographs) and over 30 papers at all-Polish and international scientific conferences. Dr Burdziak participates in Polish and international research projects (among others: Polish-Hungarian Research Platform and the project: Algorithms used in the field of criminal sciences funded by Visegrad Grants). He is a member of the International Association of Penal Law, expert at the Centre for Advanced Research on Integrity, Rights and Inclusion of the Child (Estonia), expert-consultant during meetings of the European Institute for Gender Equality. He cooperates with specialists from Poland and abroad.
ORCID: 0000-0002-0696-1174

Summary

The analysis of counteracting domestic violence conducted by the authors in their respective chapters of this study leads to the conclusion that, in the juridical scope, a comprehensive prevention of domestic violence requires simultaneous reference to many areas of law. On the one hand, it results from the complex and complicated nature of this negative phenomenon and, on the other hand, from the significant dispersion of norms referring to counteracting domestic violence. Coordination of the application of all legal instruments provided for in many areas of law should contribute to improving effectiveness of this prevention. Therefore, amendments of the law should be focused on coordination from the perspective of not only a given area of law, but also the entire legal system. Undoubtedly, regulations of the Act on Counteracting Domestic Violence as the Act aimed at explicite regulating this subject matter do not have a comprehensive character. Although it is difficult to expect that this Act will have such a character, it would be advisable to modify it so that, together with other normative acts and in compliance with propositions presented by the authors of the study, it intensifies counteracting domestic violence.

The starting point for the proposed direction of changes should be axiology and human rights which constitute common grounds for the entire Polish legal order. Axiology and human rights not only determine the framework of law, but should also have an impact on its interpretation in the process of the application

of law. Domestic violence is less and less socially accepted. In consequence, legal regulations not only do not provide for acceptance of this type of phenomenon, but are also aimed at effective prevention thereof. The conducted analysis shows that norms regulating counteracting domestic violence result from and should result from constitutional axiology, as well as universal and regional international acts. Norms that allow counteracting domestic violence directly or indirectly can be found in the basic law itself. Other normative acts should be compliant with norms of higher order. Reference to entities applying the law in the constitutional catalogue of basic ideas, values and principles of the law is crucial for the entire legal system which should allow more comprehensive execution of rights of people experiencing domestic violence. It is essential to identify a human as a subject of the law and include actual recognition of their dignity. Routine measures undertaken by public entities can often constitute a certain threat in this scope. International standards concerning counteracting domestic violence require, among others, preventing abuse, developing relevant mechanisms of reacting to actual threat, as well as providing domestic violence victims with comprehensive assistance. Therefore, counteracting domestic violence should take place at all stages of this phenomenon. Thus, constitutional axiology and human rights referring to counteracting domestic violence should be taken into account in relevant norms of the Polish legal order referring to counteracting domestic violence. In this scope it is worth mentioning, in particular, penal law which, along with family and administrative law, was for a long period of time the only area of the law obliged to prevent domestic violence.

Penal law continues to play an important role in the scope of counteracting domestic violence. However, it turns out that applying only penal law is not sufficiently effective in the scope of this prevention – which was already underlined in the justification to the bill on counteracting domestic violence. However, in the context of domestic violence penal law still seems to be indispensable. It is difficult to imagine counteracting domestic violence effectively without any penal sanctions within a given legal order. Substantive penal law requires analysis and amendment of certain norms. The analysis conducted in the scope of counteracting domestic violence primarily leads to the conclusion that the definition of domestic violence included in the Act on Counteracting Domestic Violence is not concurrent with the concept of violence understood in penal law terms. Furthermore, the analysis conducted herein also shows inadequateness of

this definition with regard to specifying a group of individuals using domestic violence in accordance with this Act. Through the agency of many norms the substantive penal law is aimed at counteracting domestic violence, although these norms require relevant changes, among others, extending criminal liability against perpetrators using economic violence. Penal law provides judicial authorities with a wide range of penal measures that have a significant potential and effective impact both in the retributive and preventive field. Nevertheless, a relevant modification thereof in compliance with the propositions included herein should allow a higher level of effectiveness in the scope of counteracting domestic violence. Unfortunately, these measures are often not used within application of the law.

The aforementioned broad range of measures constitutes, among others, an element of the prosecutor's practice in the scope of counteracting domestic violence. The public prosecutor's office is obliged not only to prosecute domestic violence perpetrators committing crimes, but also to prevent domestic violence, and to do so not only within criminal proceedings. Penal Code regulations were assessed in the study as generally sufficient from the perspective of the prosecutor's practice and the necessity to counteract particular, corresponding symptoms of domestic violence by penal law. In the procedural aspect, it is postulated to amend provisions in the direction of an obligatory participation of a public prosecutor in other proceedings and not only in criminal ones. Furthermore, training for public prosecutors, especially the ones who are members of interdisciplinary teams, as well as appointment of a specialised group of public prosecutors responsible for conducting and supervising cases on crimes with regard to which there is a suspicion that they constitute an element of domestic violence, and introduction of the participation requirement of thus specialised public prosecutor in the work of interdisciplinary teams and diagnostic-auxiliary groups, should also be of importance. Moreover, using relevant algorithms in counteracting domestic violence, which could contribute to objectivising and increasing effectiveness of measures, could also be helpful in prosecutor's practice. It is worth adding that modern technologies, including so-called Artificial Intelligence, can have an auxiliary character in the prosecutor's practice. Application of this type of auxiliary instruments can contribute to accelerating the proceedings, which, from the point of view of people experiencing domestic violence, is often of crucial importance.

Counteracting domestic violence also occurs in court practice, since courts are at a disposition of a broad range of various types of instruments and mechanisms which can counteract the phenomenon of domestic violence. Courts have at their disposal the broadest scope of measures that can be applied against perpetrators of domestic violence. The conducted analysis of judicial decisions of courts adjudicating in penal cases shows that the number of people convicted for domestic violence has, unfortunately, been stable for several years, and undertaken measures aimed at counteracting this phenomenon do not bring expected results. The number of people affected by domestic violence in Poland, in 2015–2021 amounted to approx. 200,000 a year. The most frequently occurring act prohibited in the context of domestic violence is the act referred to in Article 207 of the Penal Code, and sentences for this act constitute approximately 3/4ths of convictions for using domestic violence, i.e., approx. 10,000 convicted people a year. In 2015–2021 the most frequently adjudicated penalty against domestic violence perpetrators was a custodial penalty with a conditional suspension of execution thereof. In this period of time, within penal measures, courts the most frequently adjudicated a restraining order, a no-contact order and a domestic violence protection order, whereas a ban on staying in specific environments or places was the least frequently adjudicated. Furthermore, the conducted analysis shows that penal measures or probation obligations can result in a change of behaviour of a person using violence to a larger extent than a penalty. There is a disproportion between the number of adjudicated penalties and the number of adjudicated penal measures or probation obligations. In practice, courts relatively rarely use these types of instruments against perpetrators. Especially the perpetrator's obligation to undergo addiction therapy, as well as obliging the perpetrator to refrain from alcohol abuse, could bring measurable effects in the scope of individual-preventive treatment. Application of these instruments should be preceded with an in-depth analysis of a specific case. It is worth adding here that parties to the proceedings should not be passive and can propose courts to apply in a given case specific instruments properly justifying such propositions, for instance by referring to the statistical effectiveness of using a given measure.

Counteracting domestic violence is also an obligation included in family law despite the fact that there is no reference *expressis verbis* to domestic violence in the Family and Guardianship Code. Such prevention can be, however,

deduced from the application of general principles (e.g., the principle of child welfare), general bans (e.g., the ban on using corporal punishment), or specific solutions (e.g., restrictions of keeping in touch with the child). Moreover, the Act on counteracting domestic violence allows taking a child away from a family. Due to its current construction, this measure requires specification in formal and organisational aspects. Furthermore, it should also be emphasised that in the proceedings before guardianship courts in cases on parental authority, the long-lasting hearing of evidence can, in domestic violence cases, result in a threat to the child's sense of security. At the same time, it is worth adding that measures protecting children from adults' violence definitely prevail with regard to measures referring to violence between adults.

The requirement of counteracting domestic violence also refers to administrative law in which, as results from the conducted analysis, a particular dispersion of administrative grounds in the scope of this prevention can be observed, which hinders reconstruction of the system of these norms and thus, joint application thereof. The Act on counteracting domestic violence, due to the adopted method of regulating social relationships, can be recognised as the Act in the scope of substantive and systemic administrative law. In the scope of administrative law, it should be noticed that the axiological structure justifying counteracting domestic violence is extremely wide. In consequence, it is possible that conflicts between values occur, and resolution thereof constitutes a challenge for public administration bodies operating in the sphere of counteracting domestic violence. Moreover, this analysis shows that assessment of the legal nature of activities undertaken by bodies implementing tasks in the scope of counteracting domestic violence from the perspective of theories of legal forms of administration activities is, in many cases, hindered. Apart from several unequivocal authorisations to issue implementing regulations and exceptionally provided for in the Act on welfare only legal grounds for administrative decisions, all other jurisdiction provisions require more advanced interpretative measures in order to determine the legal nature of a given administrative activity. It should be noticed that thus obtained results of the interpretation can be questioned as non-exclusive. Moreover, it should be underlined that within counteracting domestic violence the legislator broadly uses the legal construction of administration ties, which deserves complete approval due to the necessity of an interdisciplinary approach to the analysed social phenomenon requiring cooperation

of many specialised entities, simultaneously providing the state, acting through the agency of governmental administration bodies directly representing the state, with relevant possibilities of influencing the accuracy of implementation of domestic violence prevention tasks by territorial self-governments and non-public entities.

Nonetheless, activities of public and non-public entities should not be isolated from each other. The conducted analysis shows that counteracting domestic violence within the framework of cooperation of public and non-public entities is already established in the Polish legal order. It is worth indicating in the historical aspect that the hitherto norms allowed the aforementioned prevention first *implicite,* and then also *explicite* within the rule of cooperation, which is formulated in various ways. Currently, cooperation of public and non-public entities within counteracting domestic violence results *implicite* or *explicite* from norms at a constitutional, international, community and statutory level. The catalogue of public and non-public entities that can cooperate in the scope of domestic violence is wide. There are decidedly more entities in terms of a type criterion that can be found on the non-public side, which can prevent domestic violence within public benefit activities or charity and care activities. The catalogue of public and non-public entities that can cooperate within counteracting domestic violence does not exclusively end in the Act on counteracting domestic violence and is supplemented with other norms of a statutory, international and constitutional level. In subjective terms, various cooperation configurations are possible, i.e., bilateral or multilateral. The objective scope of cooperation between public and non-public entities is broad and there are many potential areas of cooperation in the scope of counteracting domestic violence. In the scope of the object of cooperation, non-public entities are more flexible, since modification of an internal document is required to change the scope of their activities. Whereas, public entities do not have this flexibility due to the principle of legality. In the formal aspect, cooperation usually consists in public entities financing implementation of the tasks in the scope of counteracting domestic violence by non-public entities on the basis of an agreement or granting a relevant subsidy. The hitherto binding norms in the scope of counteracting domestic violence in the context of cooperation between public and non-public entities require specification and supplementation despite their complexity (and, at the same time, unnecessary dispersion). Primarily, it is worth enumerating in the

Act on counteracting domestic violence the principles of this cooperation and the catalogue of example forms of cooperation in the scope of counteracting domestic violence.

Inclusion of the principle of cooperation in the Act on counteracting domestic violence should not, however, be treated as public structures admitting their ineffectiveness in combating domestic violence, but as a realistic approach to the phenomenon. It should be assumed that the higher level of this cooperation, the lower the phenomenon of domestic violence will be.

Therefore, counteracting domestic violence requires a proper dynamics of legislative amendments proposed herein, in particular, due to the changing forms of domestic violence and social changes. These amendments should not, however, only concern particular law areas without any analysis of other norms concerning counteracting domestic violence. Otherwise, an unnecessary repetition of legal solutions, e.g., in the scope of leaving the co-occupied premises by the person using domestic violence and the person affected by this violence, can occur. Such a duplication of solutions can cause a lack of a relevant reaction to domestic violence. Unification of the concept of domestic violence so that it has proper application in penal, civil and administrative law is of great importance. Autonomous understanding of violence within particular areas of law does not contribute to the proper coordination of activities and use of penal measures.

Law referring to counteracting domestic violence must be not only properly stipulated but also applied. Proper factual knowledge and experience of people performing functions in public entities in the scope of counteracting domestic violence should be of a particular significance. Then, activities of these people should be coordinated in compliance with adopted procedures while paying special attention to communication and exchange of information between them, for instance regulating the issues of personal data protection or professional secrets protection. Nevertheless, the autonomy of particular proceedings, among others, criminal, civil and administrative, and a frequent lack of mutual relations between them, can constitute a problem. It is worth considering the introduction of relevant norms regulating simultaneous proceedings in the scope of counteracting domestic violence. Activity of non-public entities acting within the framework of adopted standards can prove to be helpful in these proceedings. Moreover, it is worth underlining the necessity to specify norms, which confirm

the possibility of cooperation of public and non-public entities in the scope of counteracting domestic violence within the framework of particular procedures.

Various types of scientific studies as well as guides addressed to people affected by violence, with a particular consideration of pleading templates, can be helpful in the intensification of domestic violence prevention. It is also worth considering the introduction of official templates in the form of a set of relevant forms to fill in, included in relevant executive acts.

The dispersion of norms concerning counteracting domestic violence presented herein also encourages reflection on a relevant amendment of the law aimed at *ex officio* appointment of an obligatory plenipotentiary for people affected by domestic violence and, respectively, a barrister for the perpetrator at the court stage, as well as the pre-court stage. Parties could also have the possibility to resign from the assistance of such lawyers. Such a solution seems to be necessary for many reasons. First of all, such a lawyer would specialise in cases on domestic violence in the context of many proceedings and growing professional experience. Such a person could provide comprehensive legal assistance instead of focusing on one type of proceedings. Moreover, such a lawyer, as a trustworthy person, could even at the pre-court stage encourage a possible extra-judicial manner of solving a conflict on the basis of circumstances of a given case. Swift provision of legal assistance to parties to the proceedings is also of great importance. At the same time, a proper balance should be kept between parties to this phenomenon within the framework of counteracting domestic violence, not forgetting the right to defence. It is worth indicating that in cases on abuse in 2015–2021, in approx. 2% of them (approx. 300 people a year) the accused persons were acquitted. It should be added that although there are currently many possibilities of receiving free legal assistance, the disadvantage of this type of assistance is its fragmented character. Conducting many proceedings due to the current dispersion of particular measures for counteracting domestic violence requires adopting a proper strategy of action and dynamics of undertaken activities.

Finally, it can be concluded that although currently the elimination of domestic violence seems illusive, a proper coordination of activities at the level of concurrent norms included in various areas of law should allow decreasing the scale of this phenomenon.