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'We condemn abusing violence against women': The criminalization of domestic violence in Poland

„Potępiamy nadużywanie przemocy wobec kobiet". O kryminalizacji przemocy domowej w Polsce

Abstract: One can often hear Polish politicians saying there is no violence against women in Poland, since Polish men respect their women and women hold a strong position in Polish culture. The conviction rates for domestic abuse in Poland are indeed low, though the attrition rates are high. Every year, for approximately 75,000 registered cases of domestic violence, there are roughly 10,000 convictions. Most of the prison sentences are conditionally suspended. Protective orders or other punitive measures are seldom handed down. There is a visible reluctance on the part of the criminal justice system to punish and correct domestic abusers. One of the reasons is that domestic abuse provisions in the Polish Penal Code (Article 207 of the Polish Penal Code from 1997) criminalises a very different behaviour than is defined in the Counteracting Family Violence Act from 2005. Another, possibly even greater, reason is the culture of sentencing (both in general and of domestic abuse) within the Polish judiciary and the very strong conservatism of Polish decision-makers and society. The protection of family values by legislators and the judiciary is often enforced at the expense of the victims' right to life and to a life free from violence. This article discusses the Polish system for preventing domestic violence, which was set up in 2005 and the construction and jurisprudence of crime described in Article 207 of the Polish Penal Code. In particular, the question of culpability raises many problems when it comes to prosecution. First, we must compare Article 207 with the definition of 'family violence' specified in the Counteracting Family Violence Act and the Istanbul Convention. Then, I will explain how such an understanding and interpretation of Article 207 translates into the dynamics of sentencing and penal decision-making and the virtual ineffectiveness of both penal provisions (the lack of deterrent effect) and the system of counteracting family violence designed by lawmakers.

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Abstrakt: Powszechnie przyjmuje się, że art. 207 kodeksu karnego kryminalizujący znęcanie się nad najbliższymi osobami jest formą kryminalizacji przemocy domowej w polskim ustawodawstwie karnym. Jednak czy tak jest w istocie? Gdy Polska ratyfikowała konwencję stambulską (Konwencja Rady Europy ws. zwalczania przemocy domowej i przemocy wobec kobiet, CETS 210) w 2015 r. uznano, że nasze ustawodawstwo odnośnie do przemocy domowej spełnia wymogi konwencji, jeśli chodzi o zintegrowane, kompleksowe i skoordynowane ogólnokrajowe strategie obejmujące środki mające na celu zapobieganie wszelkim formom przemocy objętych zakresem konwencji. Pod względem ścigania aktów przemocy domowej uznano, że art. 207 jest wystarczającym instrumentem prawnokarnym, by zadośćuczynić wymogom konwencji. W artykule przedstawię polski system przeciwdziałania przemocy w rodzinie ustanowiony w ustawie z 2005 r. oraz zarysuję wzajemne relacje między systemem z ustawy o przeciwdziałaniu przemocy w rodzinie a regulacjami prawnokarnymi, a dokładnie to, czy zachowanie stypizowane w art. 207 k.k. pokrywa się z ustawową definicją przemocy w rodzinie. Te relacje bardzo wyraźnie obrazują liczby, które pokazują, że państwo polskie nie jest specjalnie responsywne na przemoc domową, a owa niska responsywność tylko po części wynika z niedoskonałych przepisów prawa, a w ogromnej części z pewnej inercji podmiotów stosujących prawo, archaicznej wykładni znamion omawianego przestępstwa i braku woli politycznej.

Słowa kluczowe: przemoc domowa, przemoc wobec kobiet, Polska, prawo karne, konwencja stambulska

Introduction

One often can hear in Poland politicians saying that there is no violence against women in Poland, since Polish men respect their women and women hold a strong position in Polish culture and within the family. The conviction rates for domestic abuse in Poland are indeed low, though the attrition rates are high. Every year, for approximately 75,000 registered cases of domestic violence (DV), there are roughly 10,000 convictions. Most of the prison sentences are conditionally suspended. Protective orders or other punitive measures are seldom handed down. There is a visible reluctance on the part of the criminal justice system to punish and correct domestic abusers.

When Poland ratified the Istanbul Convention (Council of Europe Convention on preventing and combating violence against women and domestic violence) in 2015, it was said that our domestic violence laws complied with the Convention's requirements. Poland was said to be in compliance with the obligations of the Istanbul Convention in terms of providing comprehensive and coordinated policies which encompass all relevant measures to prevent and combat all forms of violence covered under the scope of this Convention and which offer a holistic response to violence against women (VAW). The only legal modification that was made by the legislature was to introduce ex officio prosecution for rape, which previously had to be initiated upon a complaint filed by the victim.

Article 5.2 of the Convention provides an obligation to punish (criminalise) acts of violence covered by the Convention: 'Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish, and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.'

In terms of prosecuting DV, Poland was said to comply with the provisions of the Istanbul Convention, thanks to Article 207 of the Penal Code from 1997. So it was said, though the provision in question refers to behaviours that fall within what we call domestic abuse. This paper discusses the legal framework of DV provisions in Poland, presents numbers that show high attrition rates, and finally analyses the why the criminal justice system is nonresponsive towards domestic abuse.

Perhaps the statement that only a small proportion of domestic abusers are convicted is not exceptionally insightful or illuminating, nor is it only a peculiarity of the Polish system. The interesting question is why this is so. It seems that one of the reasons is the construction of the basic legal provision designed to cover DV, i.e. Article 207.

In particular, the question of culpability raises many challenges when it comes to prosecution. Firstly, we must look up the interpretation of Article 207 and the definition of 'family violence' specified in the Counteracting Family Violence Act. Finally, one has to explain how the understanding and interpretation of Article 207 translates into the dynamics of sentencing and penal decision-making.

The paper is based on available data from two separate systems of reaction the so-called Blue Card data and criminal records. The difference between the two indicates a significant gap and raises doubts as to the adequacy of criminal responses, besides the more universal problem of the effectiveness of criminalising DV.

The quote in the title – by the government spokesperson in 2017, Beata Mazurek, commenting on the high-profile case of intimate partner violence by the local politician Rafał Piasecki – serves as a very accurate illustration of the solutions we have in Poland: 'I wish that in cases where there is an abuse of violence against women, the justice system worked efficiently' (TVN24 2017).

1. The criminalisation of domestic violence

Domestic violence, and intimate partner violence in particular, is a social phenomenon that affects a broad cross-section of the world's population. It is not merely a social, political, or public health problem, but a very violation of our human rights, protected by international law. When it comes to Europe, there have been several sentences from the European Court of Human Rights to hold Council of Europe member states accountable for not providing protection and criminal recourses for victims of domestic violence (e.g. Bevacqua and S. v. Bulgaria 71127/01 from

12 June 2008; Opuz v. Turkey 33401/02 from 9 June 2009; Eremia and others v. The Republic of Moldova 3564/11 from 28 May 2013). The state is thus internationally obliged to provide victims with protection and to punish perpetrators.

Currently in the Western world, no-one denies the urge to punish domestic violence. To the contrary, the problem is rather that some states rely excessively on criminal justice responses whilst overlooking the complexity of the problem and the issues of social justice (Goodmark 2018). Instead of solving the problem, it exacerbates it.

In the past few decades there has been a co-optation of the feminist agenda with the emergent political and penal paradigms of 'governing through crime' (Simon 2007), the neoliberal penal state (Wacquant 2009), or the late-modern 'cultures of control' (Garland 2001). It was visible not only in the United States, although the issue has so far been the most pronounced, perceived, and studied there. The feminist theorists have begun to explore how the feminist movement/agenda in the United States helped to facilitate the carceral state and how it was used to legitimise and justify the expansion of the crime control agenda and punitive policies of the contemporary state (Gottschalk 2006; Gruber 2007; Bumiller 2008; Bernstein 2012).

A trend of excessive reliance on the criminal justice system to eradicate VAW in the USA was coined 'carceral feminism' (Bernstein 2012) and in the Latino world 'punitive feminism' (*feminismo punitivo*, Larrauri 2007). It refers to a 'feminism' that calls for the criminalisation of the perpetrator and a harsher punitive response towards any acts of VAW. The underlying logic relies on increased policing, legal frameworks and state intervention, and harsher punishments as appropriate responses to prevent VAW while simultaneously overlooking other non-punitive social measures to prevent such violence.

Once the victims' rights movement and discourse emerged in the public sphere in the late 1970s, it quickly took over feminist concerns for protecting women from violence and used them to achieve its own goals. Such a deviation/diversion from the primary goals of the feminist movement and the feminist alliance with the penal function of the state – a joining of forces with the neoliberal project of social control (Bumiller 2008: 15) – has proved to be adverse to women themselves. The Violence Against Women Act (VAWA), enacted in 1994, solidified the understanding of VAW as a principally criminal matter and was applauded by conservative political forces as another powerful symbol of the war on crime (Gottschalk 2006: 152).

The 'zero tolerance' and tough-on-crime approach in cases of domestic abuse encompassed harsh measures that hardly improved women's safety, but instead make them more vulnerable and disempowered in their lives – shifting control over their lives from their abusive husbands to a paternalist state and criminalising their victimisation (Chesney-Lind 2006: 14). For example, in the USA, there is evidence that mandatory arrests, no-drop policies, and expanded definitions of

violence adopted by police departments have resulted in a greater risk for battered women to be arrested for domestic assault and the criminalisation of women who were merely defending themselves[1] (Chesney-Lind 2006: 16). Furthermore, these policies have increased the probability that state protection agencies will remove the children of abused women from their homes after reports of violence which they could not be protected from witnessing or becoming the victims of (Gottschalk 2006: 160). Additionally, abused women who live in public housing (abused by their non-resident partners) face eviction when reporting violence for exposure to violence of her neighbours (Simon 2007: 197).

Framing VAW as mainly a legal and law enforcement problem was useful in terms of deviating attention from the shrinking social functions of the state and its welfare resources which actually could better address the needs of abused women, and in a much less constraining way. The emphasis of DV criminalisation has come at the cost of deflecting focus from economic empowerment, education, and other non-punitive goals (Gruber 2007: 819). By embracing harsh criminalisation policies and resorting to the penal apparatus of the neoliberal paternalistic state without addressing any larger social issues or underlying conditions that are root causes of VAW (economic empowerment, education, or gender stereotypes), the state reinforces inequality rather than dismantling it, and so strays from the underlying values of the feminist movement – the equality and autonomy of women.

On the other hand, this inclusion of a feminist agenda in a penal and crime control framework also might be seen as policymakers' symbolic recognition of the importance of the problem. In times of late (Giddens 1990) or liquid (Bauman 2000) modernity, when we are witnessing the decline of the power of the traditional sovereign state, criminal law has become the last powerful tool by which the state can assert its power. Globalisation and neo-liberal policies increased the exclusion and hardship of specific social groups, thus creating new problems of order and new fears and anxieties (Garland 2001: 153). The criminalisation of social problems, in situations when social policies and resources are no longer available (and certainly not as effective or spectacular) to address the social conditions that produced them, has become the easiest way to demonstrate the state's power (or efficacy of politicians) and its concern for the well-being and safety of its citizens.

Addressing VAW as a mainly criminal matter is yet another example of 'governing through crime'. This in fact means making crime (criminal law, crime control field, and popular crime narratives) available outside its original, limited subject domains and making it a powerful tool with which to interpret and frame all forms of social action as a problem of governance (Simon 2007: 17). When something is

[1] For example, because of dual arrest policies, which refers to situations where police officers cannot identify the primary aggressor, and detains both parties. Law enforcement agencies developed an expansive definition of DV that fails to distinguish between aggressive/instigating violence and self-defensive/retaliatory violence (Chesney-Lind 2006: 16).

framed as a problem of governance, the suggestion is that it is possible to regulate or solve by political and immediate measures.

This trend – an alliance, or rather appropriation, of the feminist agenda by 'tough-on-crime' politicians – however, was not observed in Poland. Despite the Polish politicians' readiness to resort to criminal law for any social problem in the last two decades (Grzyb 2017), they never brought DV into play in such a way. The system of prevention beginning in 2005 does not resort to criminal law, although many effective remedies are in fact only available to the victims when they decide to start criminal proceedings.

2. Preventing domestic violence in Poland

Since 2005, when the Sejm adopted the Counteracting Family Violence Act, there has been a dual track for reacting to domestic violence. The system for counteracting family violence (Polish lawmakers adopted the term 'family violence') which was enacted in the bill is run by the public administration and the criminal justice track. These two tracks do not actually overlap, though the key role in both cases is assigned to the police.

The Counteracting Family Violence Act of 29 July 2005 established a system of comprehensive measures and obligations of the public institutions (at both the central and local levels) to protect victims of domestic violence.

Article 2.2 of this law defines 'family violence' as a single or recurring wilful action or negligence which infringes upon the personal rights or well-being of the persons listed in Point 1 (i.e. a family member – a close relative or other person sharing the residence or household), in particular, exposing them to the risk of losing life or health, compromising their dignity, physical integrity, or freedom – including sexual freedom – causing harm to their physical or mental health, and causing pain and moral suffering in those who are subjected to violence.

Given the definition of DV enacted by Article 3(b) of the Istanbul Convention,[2] the Polish provision omits economic abuse and also overlooks the problem of violence between former intimate partners who do not live together or do not share households.

[2] Article 3 of the Istanbul Convention defines VAW and DV as follows:

- 'violence against women' is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological, or economic harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life
- 'domestic violence' shall mean all acts of physical, sexual, psychological, or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.

The lawmakers adopted a gender-neutral approach, which is to say there is not a single reference throughout the whole document to the fact that women are more likely to suffer from DV and that men are more likely to perpetrate it. The Act uses the neutral term 'victim'.

Under the provisions of the Act, a person suffering from DV is entitled to several forms of assistance (Art. 3): medical, psychological, legal, social, professional, and family counselling; crisis intervention and support; protection from further harm by preventing the abusers from using a home occupied jointly with other family members and prohibiting contact with a victim via restraining orders to stay away from them; safe shelter in a specialised support centre for victims of DV; medical examination to identify the causes and types of injuries resulting from DV and to issue a medical certificate in that respect; assistance in finding a place to live for people who experience DV and do not have legal title to the premises occupied with the perpetrator. The perpetrators instead shall be subjected to measured aimed at preventing contact with the victims and at corrective and educational measures (Art. 4).

In general, the Act is in line with the standards set by the Istanbul Convention; therefore, when Poland signed and ratified the Convention in 2015, no changes were made.

A key procedure in response to family violence enacted in 2005 is the 'Blue Card' procedure (Article 9d). A Blue Card is a form of intervention within the family where DV occurs. It is a procedure that provides assistance to a family affected by violence, both those suffering and those inflicting violence. The approach adopted by the lawmakers and in the Blue Card procedure identifies DV not only as a legal problem, but also a health, psychological, and social problem.

The procedure takes a comprehensive and coordinated approach. It is run by an interdisciplinary council at the municipality level, composed of representatives from 1) social welfare, 2) municipality committees for solving alcohol problems, 3) the police, 4) education institutions, 5) healthcare institutions, and 6) non-governmental organisations (Article 9a).

The Blue Card system was initially introduced in 1998 to regulate police intervention and interaction with families experiencing DV. The questionnaire was printed on blue paper, hence the name of the procedure. Originally, in the mid-90s it was intended to detect alcohol-related DV, provide some assistance to affected families, and monitor the family situation.

Until 2010 such procedures were initiated by the police. After a 2010 amendment to the Act, the procedure can be initiated by a social worker, healthcare professional, or other public functionary, although almost 80% of all Blue Card cases are still initiated by the police (MRPiPS 2019: 173).

The Blue Card procedures shall be initiated by means of filling in the Blue Card form in the event of a suspicion of domestic violence arising in the course of performing professional tasks, or as a result of notification by a family member or

a witness to domestic violence (Art. 9d.4). To open a case, the consent of the victim is not required (Art. 9d.1).

The Blue Card form is comprised of forms entitled A, B, C, and D. Form A is the report of the police intervention itself or of the professional initiating the procedure. It is done in the presence of the victim. Form B is a useful piece of information for the victim, describing the violence, her rights, and the places she can seek help. Form C is completed at the meeting of an interdisciplinary team (or working group) in the presence of the suspected victim, acting as a kind of diagnosis of the situation and a personalised assistance plan tailored to the individual victim. Form D, finally, is also filled in by the professionals during the meeting, in the presence of the suspected perpetrator of the violence. During the course of the case and the realisation of the assistance plan, the family is monitored and assisted by the police officers and/or social workers. The procedure is deemed complete when the interdisciplinary team decides the plan has been executed and that further actions are unwarranted or the problem has been solved.

Besides the Blue Card procedure, the Counteracting Family Violence Act imposes obligations on both local authorities – the development and implementation of a programme for preventing DV (Art. 6) – and the central administration – developing a National Programme for the Prevention of Domestic Violence (Art. 8) – as well as providing infrastructure for the victims (e.g. support centres) and developing corrective and educational measures for perpetrators (Art. 6.4).

The Act also provides specific measures in cases of violence, i.e. eviction orders issued by a civil court on the demand of the victim (Art. 11a). Social workers also have the right to remove a child from a family in the event of a direct risk to the child's life or health due to domestic violence (Art. 12a). When a perpetrator of violence is on parole or probation for committing acts of violence or threats against family members, the probation officer also has the right to file a motion to execute the penalty of imprisonment or to revoke the parole (Art. 12d).

Finally, in the event a professional suspects an offence of injuries or domestic abuse in the course of performing their duties, the professional shall report it as a crime to the police, or a police officer shall initiate criminal proceedings (Art. 12). It needs to be emphasised that opening a Blue Card case, even by a police officer, does not at all equate to pressing criminal charges against the perpetrator. The provisions of Article 12, the Act, and the system for preventing domestic violence do not have recourse at any time to the criminal justice system.

3. Prosecuting domestic violence in Poland

The second track of addressing domestic violence is to start criminal proceedings. When a person experiences domestic abuse, apart from opening a Blue Card case, they may press charges against the perpetrator.

In the Polish Penal Code of 1997, Article 207 criminalises offences of maltreatment of family members or vulnerable persons, which is described as 'domestic violence crime'. Otherwise, a victim may press charges for some other offences: injury (Art. 157), punishable threats (Art. 191), or rape (Art. 197); however, Article 207 is deemed to be the basic type for behaviour which falls under DV, and it represents the majority of convictions (which is elaborated on later).

Starting criminal proceedings and reaching a conviction – apart from the penalty – provides the judge with several options regarding the perpetrators of domestic abuse which aim to protect the victim. Along with a conviction, the court may (although it is not mandatory) issue

- a restraining and barring order
  - prohibiting the guilty party from contacting certain individuals,
  - prohibiting them from approaching certain individuals, or
  - prohibiting them from leaving a specific area without the court's permission [Art. 39.2b], or
- an eviction order – the order to vacate the premises which the guilty party shares with the victim [Art. 39.2e].

An eviction order may be issued by the prosecutor before a conviction. The police, however, have no right to issue an eviction or restraining order in emergency situations, during police intervention.

Furthermore, when conditionally suspending the enforcement of the penalty imposed, the court may impose an obligation:

5) to abstain from abusing alcohol or from using other stupefacient substances
6) to submit to treatment (e.g. for alcoholism) or to therapeutic activities
6a) to participate in correctional/educational activities (therapy for domestic abusers)
7) to refrain from associating with specific social groups or visiting specific locations
7a) to refrain from contacting the harmed party or from approaching them [Art. 72]

At first glance, it seems that Polish criminal law does adequately address the problem of domestic violence. The Penal Code does criminalise the conduct of domestic abuse or other forms of violence against family members. The sentencing rules and existing measures (i.e. barring and protection orders) do not aim to merely punish the perpetrators, but also to protect the victims.

However, all of these measures or obligations that often proved to be efficient deterrents rather than 'just deserts' in terms of stopping and preventing further abuse are seldom imposed and only used in criminal proceedings, even if some of them can be issued before the sentencing phase. That is to say, they are not available for victims who have had a Blue Card procedure initiated but who have not pressed charges.

Only in April 2020 the Polish house of parliament passed a law providing immediate restraining and eviction orders for the perpetrators of domestic abuse issued by police officers upon intervention (up to 14 days) (Ministry of Justice 2020). The law is expected to come into force in 2020.

Moreover, in fact, a provision in Polish Penal Code regarding domestic abuse (Article 207 of the Polish Penal Code from 1997) criminalises a very different behaviour than is defined in the Counteracting Family Violence Act of 2005. The numbers on DV and attrition rates clearly demonstrate the discrepancy.

4. Domestic violence figures in Poland

Because DV has a very high proportion of unreported cases, victimisation surveys can be a reliable source of information on its prevalence. The rates obtained in surveys may differ, but presenting these numbers is a good starting point for discussing the official number of reported cases.

4.1. Victimisation surveys

The first Polish victimisation survey on VAW was conducted by Beata Gruszczyńska (2007: 58–63) in the framework of the International Violence Against Women Survey (IVAWS). The survey was carried out in 2004 among a sample of 2,000 women aged 18–70. The results revealed that 34.6% of women had experienced physical or sexual violence in their lifetime, out of which 15.6% were victimised by their partner. Physical violence was experienced by 18.1% of respondents, 15.1% of which was from their partner. Within the 12 months prior to the survey, 5.1% of respondents had experienced physical violence, and 1.6% sexual violence.

Slightly different, though comparable, rates were reported in the 'Violence against women: An EU-wide survey', published by the Fundamental Rights Agency in 2014. The survey was conducted on a European sample of 42,000 women (over 15 years of age) from EU28 countries – approx. 1,500 women from each country – and covered a wide range of abuse: physical abuse, sexual abuse, psychological violence, stalking, and sexual harassment. The study found that 13% of women had experienced physical or sexual violence from a partner since the age of 15 (4% within the previous 12 months), 11% from a non-partner, and 19% overall from

a partner or non-partner. 37% of women reported having been subjected to psychological violence (FRA 2014).

The third survey worth mentioning is the study commissioned in 2014 by the Polish Ministry of Family, Labour, and Social Policy, which is in charge of coordinating the system for preventing domestic violence. It was carried out on a sample of 3,000 men and women who were asked about physical, psychological, sexual, and economic violence. According to that study, 26.8% of women and 22.3% of men had experienced violence within their lifetime. Of the respondents, 16.8% had experienced physical violence, 20.3% psychological violence, and 2.7% sexual violence. In a very similar study commissioned by the Ministry of Family, Labour, and Social Policy in 2010, 39.4% of women reported experiencing violence during their lifetime (Miedzik and Godlewska-Szurkowa 2014: 68).

4.2. Blue Card statistics

Another source of information are the Blue Card statistics published annually by the Ministry of Family, Labour, and Social Policy. Thanks to an amendment of the Counteracting Family Violence Act made in 2010, comparable statistics have been collected since 2012. One can tell there is quite a stable trend. Each year, between 90,000 and 100,000 Blue Card cases are started. One-fifth (18.4% in 2014) of them are reports on subsequent incidents, and four-fifths (81.6% in 2014) are new cases.[3] Based on police records, 92% of the perpetrators are men and 70% of the victims are women (a further 15% are children).

The efficiency of Blue Card procedures is rather low. Every year, there are approximately 70,000 Blue Cards are finalised, 70% of them because the violence has stopped or there are reasonable grounds to believe it has stopped, and 30% because there is no reason to take further action. In 2016, the Supreme Audit Office (Polish constitutional agency) published a report on assistance and services for victims of DV and an evaluation of the Blue Card procedure. The report revealed that in only 2.6% of the cases studied did the violence stop; in 13% of cases a completed procedure had been reopened (NIK 2016: 11). Nonetheless, 61% of people receiving assistance said their situation had somehow improved or they were feeling better, and only 1.5% were feeling worse.

[3] While interpreting Blue Card statistics, one must bear in mind a few reservations. The statistics are collected on the basis of completed forms A, C, and D. The numbers presented here refer to A forms, which technically initiate the procedure. Firstly, if the interdisciplinary team in its work discovers that the suspect was not the perpetrator, this fact is not reflected in the statistics. Secondly, a procedure in one year can pertain to one family in different configurations. It may happen that one person is simultaneously a victim and a perpetrator (e.g. they may suffer violence from their partner and inflict violence on their child). Thirdly, there is sometimes the problem of mutual accusations – a wife opens a Blue Card case against her husband, and vice versa. All of these issues require caution from researchers whilst interpreting Blue Card statistics.

Table 1. The Blue Card procedure

	2012	2013	2014	2015	2016	2017	2018
Number of Blue Card forms	63,820	73,119	99,093	99,749	97,224	98,307	93,311
Number of Blue Card forms filled in by the police	51,236	61,047	77,808	75,495	73,531	75,662	73,153
Number of perpetrators (only police Blue Card records)	51,531	61,450	78,489	74,155	74,155	76,206	73,654
Number of victims			105,332	97,501	91,789	92,529	88,133
Percentage of female victims			69.1	71.15	72.9	73.47	73.8

Source: Ministry of Family, Labour, and Social Policy [MRPiPS] (2015; 2019).

The Blue Card statistics suggest that each year there are at least 60,000–70,000 recorded cases of Article 207 offences or related crimes. This is not the case, though. These numbers are in stark contrast with the criminal justice statistics.

4.3. Criminal Justice Statistics

It is still virtually impossible to count all convictions related to DV, since the courts are not obliged to mention in their sentences that an offence was committed in the context of DV, which would subsequently be a ticked box in the statistics. Since 2011, it has been possible to extract from judicial statistics figures on crimes committed against an immediate family member, e.g. injuries, threats, or rape, but that joint qualification is still not mandatory for judges in the sentencing phase or during statistical reporting. Nevertheless, there is a growing tendency among the judiciary to indicate such cases in their sentences.

Moreover, it is important to emphasise that not every conviction from Article 207 §1 was related to DV. Article 207 protects family members and vulnerable persons from maltreatment; thus, the victim may be a student maltreated by a professor or an employee harassed by a superior, though these are a tiny proportion of all cases. To illustrate the breakdown, in 2018 70.3% of all convictions for crimes related to DV were for Article 207 §1 (Lewoc 2019), and among all convictions for Article 207 §1, 88.6% (in the final judgement, 84% in the first instance) were for maltreatment of a family member.

Thus, despite the fact that Article 207 of the Penal Code does not include all recorded cases that can be considered DV, it still remains the basic penal provision for addressing DV. Therefore, Article 207 figures remain the most accurate

portrayal of criminal justice. In particular, §1 (and since 2016, §1a as well) of Article 207 covers the vast majority of cases tried in relation to domestic abuse.

Table 2. Numbers of reported and recorded crimes (police records) and judicial statistics on adjudications (first instance) and final convictions (second instance)

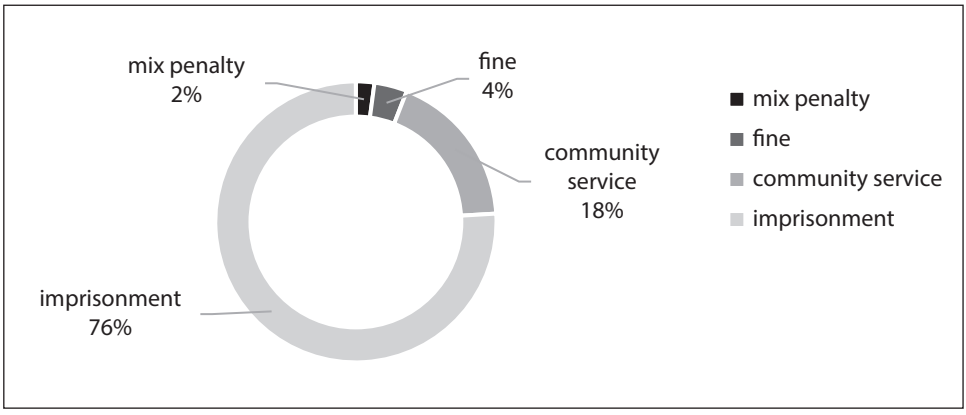
Article 207 §1, Penal Code	2010	2011	2012	2013	2014	2015	2016	2017	2018
Reported crimes	30,534	29,958	29,193	29,879	30,901	27,642	26,633	28,608	28,014
Recorded crimes	18,759	18,832	17,785	17,513	17,523	14,191	15,513	15,730	14,797
Adjudications (first instance)	16,239	13,588	11,937	14,132	15,001	14,400	12,846	13,252	13,422
Convictions (final judgments)	13,484	13,153	12,318	11,593	11,282	10,533	10,572	9,755	10,450

Source: Ministry of Justice, Bureau of Statistics.

Out of 10,450 convicted individuals in 2018 (final judgements) for Art. 207 §1:

- 221 were sentenced to mixed penalties,
- 397 were given a fine,
- 1,895 were sentenced to community service, and
- 7,937 were sentenced to imprisonment.

Figure 1. Penalties for Article 207 § 1



Source: Ministry of Justice, Bureau of Statistics.

Table 3. Length of prison sentence

Imprisonment	**Total: 7,937**	**100%**
3–12 months	7,415	93.4%
1–2 years	460	5.8%
2–5 years	62	0.8%

Source: Ministry of Justice, Bureau of Statistics.

The offence of maltreatment of an immediate family member is punishable by between 3 months and 5 years of imprisonment. Most of the prison sentences are for the mandatory minimum sentence, up to one year (93.4%). Furthermore, 67% (5,319) of all prison sentences are conditionally suspended. That is to say that only 2,618 perpetrators were sentenced to prison for DV.

Table 4. Attrition in domestic violence cases in Poland, 2018

Number of Blue Card forms ('Form A') (MRPiPS, 2019)	93,311
Number of perpetrators (Blue Cards)	73,654
Number of victims (Blue Cards)	88,133
Article 207 §1 – proceedings initiated (police)	28,014
Article 207 §1 – crimes recorded (police)	14,797
Article 207 §1 – perpetrators identified (police)	14,756
Article 207 §1 – adjudications (first instance)	13,422
Article 207 §1 – convictions (final judgements)	10,450
Article 207 §1 – prison sentences	7,937
Article 207 §1 – prison sentences executed (not suspended)	2,618
Article 207 §1 – adjudicated measures (first instance):	
• restraining order (prohibition from contacting someone)	2,495
• restraining order (prohibition from approaching someone)	3,100
• eviction order	839
• therapy for the perpetrators	952

Source: Lewoc 2019.

Table 4 shows that the attrition rates are quite high. For 73,654 people suspected of inflicting violence and recorded in a Blue Card case (MRPiPS 2019: 76), only 2,618 were sentenced to imprisonment without suspension, that is, 3.3% (10.8% are sentenced to imprisonment in general). It is clear that most of the DV

cases do not reach the criminal justice system. Furthermore, only a few previously convicted perpetrators are issued protection orders or subjected to any kind of treatment.

5. A problem with Article 207 of the Polish Penal Code

5.1. Legal framework

The origin of the provision can be traced to the first Polish Penal Code from 1932. Lawmakers at that time proscribed in Article 246 abuse of dependent minors (that is to say, those under guardianship) and vulnerable individuals. Other family members, i.e. partners or healthy adult relations, were not protected. The equivalent of that provision in the succeeding Penal Code of 1969 – Article 184 – expanded the scope of protected individuals and broadened the category to include all minors and adult dependent family members and vulnerable people, regardless their dependency. This was due to the merging of this article with another provision, Article 23 from the Combatting Alcoholism Act of 1959, which criminalised the abuse of family members by someone under the influence of alcohol. The current Article 207 is a virtual copy of its legal predecessor from 1969 (Jodłowski and Szewczyk 2017).

Since the offence of maltreating a family member emerged in the Polish legal order in the context of addressing the consequences of alcohol abuse (not as a result of feminist activism), the problem of domestic abuse was framed primarily as being alcohol-abuse-related (Sienkiewicz 1985) and specific to the lower classes in society. That approach permeated the jurisprudence, and until the last few years public debate and political responses, as well.

Article 207 of the Penal Code is placed in Chapter XXVI 'Crimes against family and guardianship', that is to say, the primary legal interest protected is the integrity and proper functioning of the family (Jodłowski and Szewczyk 2017: 857). The in fact means that the proper goal to achieve through criminal justice intervention is to uphold the integrity of the family unit. Some scholars add that the secondary legal interest protected is the individual's interests, i.e. the life, health, and physical and moral integrity of family members (Muszyńska 2014). However, these are only secondary.

The provision of Article 207 states:

[*Physical and mental maltreatment of an immediate family member or a dependant person*]

§1 Whoever physically or mentally maltreats an immediate family member or another person being in permanent or temporary relation of dependence to the perpetrator, is subject to the penalty of deprivation of liberty for between 3 months and 5 years.

§1a Whoever physically or mentally maltreats a person who is helpless, due to this person's age or mental or physical condition, is subject to the penalty of deprivation of liberty for between 6 months and 8 years.
§2 If the act referred to in §1 is coupled with the use of particular cruelty, the perpetrator is subject to the penalty of deprivation of liberty for between 1 year and 10 years.
§3 If the consequence of an act referred to in §1 or §2 is the harmed party's attempt on his own life, the perpetrator is subject to the penalty of deprivation of liberty for between 2 years and 12 years.

At first glance, it seems that physical and mental maltreatment does not encompass exactly the same as the definition of 'family violence' from Article 2.2 of the Counteracting Family Violence Act. However, to understand the relationship between Polish domestic violence law and penal provisions – whether they correspond and are a coherent whole – it is necessary to have a look at the dogmatic construction and jurisprudence on Article 207.

5.2. Jurisprudence and application

The scholarship and jurisprudence regarding Article 207 emphasise four constitutive elements that could cause a behaviour to be considered a crime of maltreating a family member. These elements dramatically limit the application.

The first element refers to *mens rea*, an **intention**. In Polish criminal legal theory, the scholarship distinguishes direct intention, i.e. the perpetrator intends to commit the act, he/she wants to commit it, and oblique intention, where the perpetrator foresees the possibility of committing the act and accepts it (Article 9 §1 of the Penal Code). The intention encompasses the goal of the actor, which in case of mistreating someone is to inflict physical or moral suffering, to harm someone.

The jurisprudence is predominantly of the opinion that the actor acts with the direct intention to cause harm (Marek 2010; Mozgawa 2018: 650; see e.g. IV KKN 312/99 and V KKN 580/97), that is to say, his/her goal was to cause suffering and pain. When it comes to physical harm, it is not difficult to prove, since the victim has a medical certificate – the obviousness of the harm beyond question. When it comes to psychological harm, however, it may be difficult to demonstrate, as it is more intangible than physical injury. Moreover, it gets even more complicated, given that the point of reference is not the perspective and feelings of the victim, but an 'objective judgement' – the feelings of a reasonable citizen (Jodłowski and Szewczyk 2017, section 17), that is to say, an individual judge.

As an aside, one can ask, what are the criteria of the 'harm'? Who decides what is enough harm to fulfil the conditions of Art. 207? This question is particularly relevant when it comes to psychological harm. According to the jurisprudence an objective assessment shall be applied, not the subjective feeling of the harmed person (that is to say, a rational, properly socialised adult, a model citizen).

This makes it almost virtually impossible to get a conviction for pure psychological abuse (with no accompanying physical abuse), especially in the context of gender-based violence. According to the conception of coercive control, these are the most harmful abuses that women suffer from their intimate partners (Stark 2007).

Furthermore, when it comes to domestic abuse, the main goal of the perpetrator is often not to inflict pain, to make the victim suffer, but merely to have control in the relationship, to dominate, to subordinate the victim. The perpetrator does not necessarily care whether the victim suffers or not, and this depends very much on the victim's individual capacities (Pospiszyl 1998). Since the intention must cover the consequence of the act – the physical or psychological suffering – it becomes difficult to prove mistreatment in court when there are no severe physical injuries. Mental states and feelings can be very subjective and gendered. Some behaviours which are devastating for some people can be seen as harmless and inconsequential by others.

The second element refers to a **relationship of power or a preponderance of force** between the perpetrator and the victim. The victim has to be dependent in relation to the perpetrator (materially, personally, emotionally, or contractually). The perpetrator mistreats the victim by using their power over them (Jodłowski and Szewczyk 2017, p. 32; III KK 262/6). The victim cannot resist, or only to some extent. This does not encompass mutual malicious teasing between spouses or ex-spouses. The mutual violence or conflict between family members when there is no preponderance of force of one over another do not fall under the scope of Article 207. Even if it sounds logical, this in fact leads to widespread confusion among the judiciary. The occurrence of violence is commonly confused with conflict (Wrona 2017).

The third and fourth elements relate to the nature of the violent behaviour – its **severity** and **frequency**. Not every maltreatment can be qualified as an offence under Article 207. To meet the standards of Article 207 it must be severe (more than usual) and repeated, i.e. extended over time and incidents, not just a single act, but a series of behaviours. As an exception, it can be one incident, but a particularly cruel and violent one. The Court of Appeals in Gdańsk stated in a judgement from 2 April 2013 (II Aka 399/12):

> Inflicting moral and psychological suffering on a victim in order to debase, humiliate, or tease her, no matter the motivation, shall not be 'maltreating someone' in the meaning of Article 207 §1, since it is not 'severe' and 'beyond measure', so by its intensity go beyond a usual violation of physical integrity, insulting, humiliation, or others kinds of defamation.

The conduct of the perpetrator must be intense, excessively painful, i.e. beyond measure, and the purpose foreseen in every single activity. Its intensity must go beyond the limits of 'usual' breaches of someone's personal integrity/inviolability,

insults, debasement, and so forth (Supreme Court judgement, 6 August 1996, WR 102/96).

Thus, Article 207 of the Penal Code is interpreted in a very restrictive way. It criminalises only severe and malicious forms of DV. Article 207 covers only DV which is 'beyond measure', as though abuse within whatever 'measure' is referred to is, from a criminal law standpoint, acceptable. This is precisely why Article 207 does not include all behaviours or situations deemed as 'family violence' under Article 2.2 of the Counteracting Family Violence Act (Wrona 2011; Lewoc 2019).

It is worth noting that is has recently become possible to get a conviction for a different crime, e.g. homicide (Article 148 of the Penal Code), an injury (Article 157), a lethal injury (Article 156), or a punishable threat (Article 190) in the cumulative qualification (i.e. Art. 148 in conjunction with Art. 2.2 of the Counteracting Family Violence Act) with DV.

This trend is new for the Polish justice system, discretionary and introduced mainly for statistical purposes. The data are available from 2012, yet few courts use that cumulative qualification, so one cannot exactly ascertain an accurate proportion of all convictions for a certain crime.

The basic penal provision referring to DV is still Article 207 §1. Since the provision embraces only a small proportion of all reported DV cases, it means that the protection measures, granted only when there is a conviction, are available only for very few victims of domestic abuse. In practical terms, this means that most victims of DV are denied sufficient legal protection. Moreover, without going into a discussion of the effectiveness and deterring effect of the punishment, in the Polish legal order only a court during sentencing and in the case of conditional suspension may oblige the defendant to undergo therapy for domestic abusers, which means that most domestic abusers go unpunished and there is no option to force them to change their behaviour.

Conclusion

The Polish legal system does address DV, but it does not criminalise it, or it criminalises it in an extremely limited way. The definition of family violence provided in Article 2.2 of the Counteracting Family Violence Act covers all forms of inflicting and using violence against a family member. In turn, Article 207 §1 of the Polish Penal Code covers only 'abusive' violence, which is to say, limited to severe and premeditated forms of DV. Its application in the penal decision-making process strengthens this gap. Article 207 and its legal interpretation covers only a tiny proportion of all DV cases reported to the state agencies each year.

DV is practically not a crime under Polish law, in the practice of the Polish justice system.

Besides the penalties adjudicated for offences of Article 207, penal measures aimed at preventing or deterring further DV may sometimes be more efficient than a mere penalty, but they are only applied in cases of conviction under Article 207. Given that protection orders aimed at preventing or deterring further violence can only be adjudicated during the sentencing phase, very few DV victims are entitled to these orders, and fewer in fact receive them.

One of the reasons for this situation may be the culture of sentencing within the Polish judiciary (both in general and regarding DV cases) and the strong conservatism of Polish society and decision-makers. Given the primary legal interest protected by the provisions of Article 207 of the Penal Code, it turns out that the protection of family values by law-makers and the judiciary is often enforced at the expense of the victims' right to a life free from violence.

The policy-makers in Poland by and large have not acknowledged that DV is a deep social problem and that the state apparatus should condemn it (Grzyb 2019). Following the political transformation after 1989, the Polish welfare system and all of society underwent neoliberal reforms that did not leave or develop public resources to solve that multifaceted problem in an integrated way. The problem arises, however, when there is an actual decriminalisation of DV inscribed within a system of prevention.

Needless to say, the criminal justice response alone has not solved the very complex and deeply rooted problem of DV, though a factual criminalisation of the issue seems indispensable nowadays to convey the symbolic message that some behaviour is harmful and intolerable and that society wants to eradicate it. It seems, then, that without framing domestic abuse as a crime, and without effectively prosecuting and punishing the perpetrators, eradicating the problem would be even harder to achieve.

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