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***A Child's Right for Protection
against all Forms of Violence –
Polish Legislation
and a Pedagogical Perspective***

SUMMARY

The article discusses the problem of a child's right to protection against all forms of violence. It presents a concept of pedagogical and legal analyses of the problem of violence towards a child. It discusses the normative concept for securing one of the fundamental childhood needs; the need to be safe. It analyses the provision of law, institutions and procedures within the scope of the protection and pursuit of children's rights to freedom from all forms of violence in the Polish law. Definitional dilemmas pertaining to the category of violence towards a child are subjected to analysis and the primary diagnostic prerequisites of this phenomenon are depicted. An main goal of the essay is to indicate the actual competencies and entitlements of teachers and pedagogues within the sphere of securing this right and tracing out the directions for change within the scope of its comprehensive execution.

→ **KEYWORDS** – CHILD, VIOLENCE, LAW, VIOLENCE TOWARDS CHILDREN

STRESZCZENIE

Prawo dziecka do ochrony przed wszelkimi formami przemocy – polskie rozwiązania prawne i perspektywa pedagogiczna

Artykuł ujmuje problematykę prawa dziecka do ochrony przed wszelkimi formami przemocy. Prezentuje koncepcje pedagogicznych i prawnych analiz problemu przemocy wobec dziecka. Omówiona została tu normatywna koncepcja zabezpieczenia jednej z podstawowych potrzeb dzieciństwa – potrzeby bezpieczeństwa – oraz podjęta została analiza stanu przepisów prawnych, instytucji i procedur w zakresie ochrony i dochodzenia prawa dziecka do wolności od wszelkich form przemocy w prawie polskim. Analizie poddano dylematy definicyjne kategorii przemocy wobec dziecka i ukazano podstawowe przesłanki diagnostyczne tego zjawiska. Ważnym celem prezentowanego tekstu jest wskazanie konkretnych kompetencji oraz uprawnień nauczycieli i pedagogów

w obszarze zabezpieczania tego prawa, a także wyznaczenie kierunków zmian w zakresie pełnej jego realizacji.

→ **KEYWORDS** – DZIECKO, PRZEMOC, PRAWO, PRZEMOC WOBEC DZIECKA

Violence towards... a child?

The problem of children being taken advantage of, treated badly or violently has been recognised for centuries. Since bygone times children have been seen as someone's property, which can be used for a specific purpose. The further back in time we take this thought, the lower the level of awareness the needs specific to childhood, and the lower the level of care for children and a higher rate of violent behaviours towards them. Here, a significant role is played by the Roman legal tradition and its reception in European legislation which grants almost unlimited power over children's lives to the father.¹ The absolute power to make decisions concerning the life and death of a child was abolished in Rome by Emperor Valentinian I in 365. He prohibited abandoning and killing children, however the father's right to discipline them remained. The significance of the Valentinian edict, despite often being omitted in the literature on the subject, is far-reaching. It can be analysed in the categories of the first legal position in history within the scope of the protection of children's rights.

The child's predicament over the centuries depended on the attitudes of adults which often spoke of a lack of understanding of the essence of childhood, the child's self and dignity. "As soon as a child could get by without the mother's, maid's or nanny's care, it entered into the world of adults and was no different than others."² Children lived together with adults and just as soon as they were able to, which occurred at around the age of seven,³ they stepped into the world of adults, sharing their work, games,

¹ Lat. *Pater familias* head of an agnatic family in ancient Rome. Only a male Roman citizen could fulfil that role, not subject to the paternal authority of a different *pater familias*. He was entitled to unlimited authority over all family members.

² P. Ariès, *Historia dzieciństwa. Dziecko i rodzina w dawnych czasach*, Gdańsk 1995, p. 125.

³ *Ibidem*, p. 234.

happiness and troubles. A child was seen as a "little adult" who will soon attain their full usefulness in the life of a family. Children did not constitute any special social or age group, they rather endured in a peculiar – undefined state of waiting for adulthood. Looking at a child as a miniature adult allows for an easy description of it and its actions based on analogy to the functioning of an adult.⁴ The specific needs of a child were not noticed, and as such conditions for their fulfilment were not provided. "The civilisation of the Middle Ages forgot about the ancient paideia, but it was still lacking knowledge on modern education."⁵ The position of Richard Farson is worth mentioning, who formulates a thesis on "inventing a child"

the idea of childhood is a sixteenth century European invention. And as such prior to the first part of the Middle Ages the idea of childhood just did not exist. Most languages did not even have the word "child".⁶

Humanity began to discover the child and childhood in the 13th century⁷ and gradually delved into the mysteries of the thus far unknown, peculiar state of being. Together with this process the social attitude to the child and its needs and right was also transforming. A moral concept of childhood arose, which introduced entirely new categories in relation to a child. F. Coustel wrote in his 1687 *Rules for the education of children*:

Children must be loved and the aversion which they awaken in a reasonable man must be overcome. Children do not deserve a lot of respect, if one considers their outwardness, which is one weakness both on the body as well as the mind. But our feelings change, when we look into the future and when our actions are dictated by faith.⁸

⁴ J. Wilk, *Kim jest dziecko*, in: *W służbie dziecku*, ed. J. Wilk, t. I, Lublin 2003, p. 27.

⁵ P. Ariès, *Historia dzieciństwa*, op. cit., p. 234.

⁶ R. Farson, *O wynalezieniu dzieci*, in: *Edukacja i wyzwolenie*, ed. K. Blusz, Kraków 1992, p. 40.

⁷ Ibidem, p. 55.

⁸ Quote: F. Coustel, P. Ariès, *Historia dzieciństwa*, op. cit., p. 117.

This new take on the child primarily changes the social way of looking at childhood and sets out the way for humanity to fully discover and respect human rights during childhood. It is this new way of thinking about childhood, not only as an finite stage before adulthood, that led to an increase in social interest in the ill treatment of children.

The spiritual climate of the 17th century, the appearance and development of, *inter alia*, schooling, the establishment of the first college, all this meant that it was considered that a child, before becoming mature had to be given special care and protection. This care, in those times, assumed the framework of a special regime, a peculiar quarantine,⁹ which is to prepare a child to enter the adult world. However drawing attention to the virtue of protection and education for children, shall become that driving force, which will transform society in the direction of taking care of the needs of children.

The normative discovery of violence towards a child

Thus since the idea of who a child is, its psycho-physical specificity and needs was an unknown for such a long time one cannot speak in the modern reality of a normative concept of violence towards a child. Every attempt at naming and identifying this phenomenon, which has remained unnamed for centuries, lost its subject. Together with the social and scientific “discovery” of the child, its pedagogical and legal self, it became possible to undertake systematic reflection on the phenomenon of violence towards a child, which has been known for centuries. This process began in the 17th century, namely of a clear differentiation between the children and adult world particularly considering public life. It allowed the specific situation of a child to be noticed and the need for special protection to be pondered upon.

The problem of violence towards a child was only named and defined in the 1960s. Firstly, in medical categories and then in academic ones. In 1860 a court medical professor in Paris, Ambroise Tardieu, presented 32 cases of children beaten to death. In his description he described each medical diagnosis in detail as well as the children’s sociological and demographic situation,

⁹ Ibidem, p. 236.

however there was not even one mention, that the cause of death of the children was violence towards children despite all the injuries occurring whilst the children were under the care of their families.¹⁰ The positions assumed by medics were also important, *inter alia*, *Report of child violence* by Parriset and Caussade who were the first to identify the parents as the perpetrators of violence towards a child.¹¹ However, many years were needed for the problem of violence towards a child to become the subject of thorough scientific research. In 1953 the radiologist F. Silverman described using radiological characteristics of uncommon broken bones in young children so-called battered child syndrome.¹² In 1961 the American Paediatric Academy Conference was dedicated to this syndrome and in the following year this syndrome described in detail by F. Silverman, C.H. Kemp and B.F. Steele, officially entered medical literature as an illness and to medical literature within the scope of the prestigious medical journal "Journal of American Medical Association."¹³ This marked the start of a debate on the phenomenon of violence towards children in the family seen in medical, social as well as legal categories.

Definitions of violence towards a child

Despite the scientific research on the phenomenon of violence towards children the concept is still variously and imprecisely interpreted. The World Health Organisation, defines violence towards a child as:

¹⁰ I. Pospiszyl, *Przemoc w rodzinie*, Warszawa 1994, p. 7.

¹¹ Cf. D. Girodet, *L'enfant maltraité*, *Collection médecine, enfance, adolescence*, Paris 1987, [quote] A. Margolis, *Zespół dziecka maltretowanego, diagnostyka medyczna*, Warszawa 1998, p. 3.

¹² Cf. F. Silverman, *Unrecognised trauma in infants. The battered child syndrome and the syndrome of Ambroise Tardieu*, "Radiology" 1972, no. 104, p. 337.

¹³ Cf. C.H. Kempe, F.N. Silverman, B.F. Steele, W. Droegemueller, H. Silver, *The battered child syndrome*, "Journal of American Medical Association" 1962, no. 181, p. 17; A. Margolis, *Zespół dziecka maltretowanego, diagnostyka medyczna*, op. cit., p. 3.

(...) every intentional and unintentional action by an adult, society or state, which is detrimental to the health, psychological or psychosocial development of a child.¹⁴

The wide-ranging scope of this definition should be emphasised. If one were to apply this definition literally to the pedagogical reality, then it might turn out that the life situation of most children in Poland would fulfil the prerequisites defined for victims of violence. For the needs of this work it is justified to attempt to make this concept more precise.

Within the scope of the literature on this subject three primary interpretation directions can be identified treating violence towards children:

- (...) every action or inaction of an entity, institution or society as a whole and every result of such action or inaction which deprives the equal rights and freedoms of children and/or disrupts their optimal development;¹⁵
- such actions, which regardless of the form in the end handicap the power of someone who is an object. And that is the goal of violence, making man passive;¹⁶
- action causing damage to the physical, psychological and social wellbeing of other people, causing pain, suffering, destruction leading to the loss of valued virtues;¹⁷
- intentional infringement of the power and any personal rights and property of an individual in a manner preventing its defence and causing psychological, physical, symbolic and material damage.¹⁸

A number of characteristic traits of the phenomenon draw attention in the above-mentioned definitions, which we call violence towards a child. The basic issue is the fact that violence towards a child constitutes.

¹⁴ M. Pietruszka, *Przemoc – wyzwanie dla świata. Światowy Raport WHO*, „Niebieska Linia” 6/23/2002, p. 7.

¹⁵ D.G. Gil, *Violence against children: Physical child abuse in the United States*, Cambridge 1973, fol: *Dziecko krzywdzone. Próba opisu zjawiska*, eds. E. Czyż, J. Szymańczak, Warszawa 1995, p. 10.

¹⁶ W. Sztander, *Na czym polega pomaganie ofiarom przemocy*, „Niebieska Linia” nr 5, Instytut Psychologii Zdrowia, Warszawa 1999, p. 18.

¹⁷ A. Frączek, *Czynności agresywne jako przedmiot studiów eksperymentalnej psychologii społecznej*, Wrocław 1979, p. 13.

¹⁸ J. Mellibruda, *Oblicza przemocy*, Warszawa 1993, p. 5-6.

- action or inaction. Violence may pertain to actual actions injuring a child, but also to failure to perform actions desirable for the child's correct functioning and development, such as not showing them respect and love (emotional violence) or inadequate clothing or feeding, failure to treat a child (neglect).¹⁹
- intentionality. This means that violence is an intended, or rather non-random action undertaken towards a child with the intention of achieving a certain goal. This trait of violence is best expressed by the term non-accidental, which is difficult to render exactly in Polish. However, what is most significant is the non-accidental character of a child's injuries which occur in domestic violence.
- inequality of strength, in a violence relationship one of the parties dominates over the other. This domination may refer to physical strength, social, legal or economic position. For a child each of these prerequisites is usually true. A child, due to its psycho-physical characteristics is the weaker party in relations with adults.
- infringement of personal rights and property of the victim of violence. The perpetrator, in taking advantage of their domination infringes a child's basic rights such as the right to bodily inviolability, dignity, respect, as well as the right to health or education,
- the victim's suffering and pain. In infringing the above rights the perpetrator of violence causes pain and bodily or psychological harm to the child, putting the child's health and life at risk.

Violent actions usually fulfil the above criteria. Domestic violence towards a child defined in such a manner can assume various forms. In the literature on the subject four forms of violence are defined:²⁰

- physical violence
- emotional violence
- sexual abuse
- neglect.

¹⁹ Cf. *inter alia* R.E. Helfer, *The developmental basis of child abuse and neglect*, Chicago 1987.

²⁰ Cf. *inter alia* D.M. Houghton, *Working with children*, London 1995, p. 116-120.

A detailed discussion of these lies beyond the scope of this work, however they have been mentioned and marked to complete this matter.

The legal context of the phenomenon of violence towards a child

The fact that the phenomenon of violence towards a child over the years also became a legal category is also significant for the issues under discussion. This phenomenon, for ages legally indifferent, becomes the subject of a legislative process shaping the position of a child within the family, society and state.

It should be emphasised that the Polish legislator has not introduced a legal definition of violence towards a child. A normative definition of domestic violence (and thus also the category which we are analysing, violence towards a child treated as a member of the family) states, pursuant to Article 2 of the Domestic Violence Prevention Act, that by domestic violence one should understand

a one off or repeated intentional action or inaction infringing personal rights or property of persons referred to in point 1, and in particular exposing these persons to the risk of a loss of life, health, infringing their dignity, bodily inviolability, freedom including sexual freedom, causing damage to their physical or psychological health as well as causing moral suffering and harm in persons effected by violence.²¹

It should be noted that in this definition the legislator includes the traits characteristic to the phenomenon of violence listed and discussed above, and as such it is action or inaction, infringement of the victims rights or property, the risk of a loss of life or health, causing pain and suffering. The element of one off or repeatability of the acts of violence and their intentionality supplements the definitions.

In interpreting Article 2 of the Prevention of Domestic Violence Act it should be emphasised that for the phenomenon of violence to appear and be sanctioned a one off conscious action or

²¹ Prevention of Domestic Violence Act dated 29 July 2005 "Journal of Laws" 2005, no. 180, item 1493.

inaction infringing a family member's personal rights or property, exposing them to serious damage and causing pain and harm is sufficient. This is very significant from the perspective of a diagnostic criteria, as the phenomenon of violence does not have to be a series of repeated actions causing pain and suffering, but can be of a one off character or even incidental. Also in these cases, when the behaviour or omission fulfils the prerequisites of Article 2 of the Domestic Violence Prevention Act, violence should be diagnosed.

In the normative context, the aspect of act intentionality or omission mentioned in the definition is also important. In side-stepping the widely discussed category in criminal law of a prohibited act²², it should be ascertained in general that pursuant to Article 9 of the Criminal Code §1 and 2

a prohibited act is perpetrated intentionally, if the perpetrator intends to perpetrate it, that is want to commit it or foreseeing the possibility of committing it, accepts it. A prohibited act is perpetrated unintentionally, if the perpetrator with no intention of committing it, still commits it as a result of failure to pay due care required in given circumstances, despite the possibility of the committal of such act being foreseen or being able to foresee.²³

Thus the action or omission of an entity will bear the hallmarks of violence towards a child if it is perpetrated with the intention of infringing the personal rights or property of a child causing pain and suffering and also moral suffering. Such an interpretation is also evident in the Supreme Court case law.²⁴ The pedagogical category of intentionality may also be analysed in this context assigned to violent acts, understood in the non random / non-accidental aspect. In this context it is possible to ascertain that violence towards a child constitutes such actions or inactions, which do not occur as a result of an accident, and are the result of intentional actions. In this context one should concur with the thesis of K. Kamińska that

²² Cf. The Criminal Code. Main part Commentary Article 1-116, pub. 4, ed. A. Zoll, Warszawa 2012.

²³ Act of 6 June 1996, The Criminal Code, "Journal of Laws" 1996, no. 88, item 553 as amended.

²⁴ See The Supreme Court Resolution of 9 June 1976 (VI KZP 13/75), OSNKW 1976, no. 78, item 86, as well as the justification to the ruling of 27 February 2002 (II KKN 17/00), OSNKW 2002, no. 7-8, item 55.

parents intentionally injure and harm their children regardless of whether they do this consciously, to educate, an act intending to pay the child back for bad behaviour, or if they act impulsively – it is important that they know what they are doing.²⁵

Violence towards a child – social and legal consequences

The provisions of Polish law pertaining to the prohibition of the use of violence towards a child are guaranteed by the highest constitutional standard. Article 40 of the Constitution of the Republic of Poland states that “No one shall be subject to torture, cruel, inhuman or degrading treatment and punishment. The use of bodily punishment is prohibited.”²⁶ The Convention of children’s rights ratified by Poland in Article 3 obligates the State-Party to undertake

actions to ensure protection and care for a child to such a degree as it is necessary for its wellbeing, taking into consideration the rights and obligations of its parents, legal guardians or other persons legally responsible for it, and all necessary legislative and administrative steps shall be undertaken to that end.²⁷

Articles 19 and 36 of the Convention supplement the problem of protecting a child against bad treatment. Article 19 states directly the obligation of the State-Party to protect a child against all forms of physical or psychological violence, harm or neglect, bad treatment, sexual abuse and exploitation. Whereas Article 36 supplements the concept of child protection stating that “States-Parties shall protect t a child against all other forms of exploitation, in any aspect infringing the wellbeing of a child.”²⁸

In 2010 Polish legislators introduced changes to the quoted Domestic Violence Prevention Act and some other Acts and in the Family and Care Code a new Article 61¹ appeared stating that

²⁵ K. Kamińska, *Dobro dziecka w dyskursie państwo – rodzina, inaczej o przemocy domowej*, Kraków 2010, p. 71.

²⁶ Article 40 of the Constitution of the Republic of Poland dated 2 April 1997, “Journal of Laws” 1997, no. 78, item 483.

²⁷ Convention the rights of a child, “Journal of Laws” 1991, no. 120, item 526.

²⁸ Ibidem, art. 36.

“persons executing parental authority and caring or looking after a minor are forbidden to use bodily punishments.”²⁹ Detailed provisions of the Criminal Code sanction behaviours incompatible with the above rule of law. Of particular importance here is Article 217 of the Criminal Code referring to striking a person and Article 207 referring to the crime of torment.³⁰

Despite such a broad protection for a child against violence the problem of the use of corporal punishment towards children is still met with overwhelming social acceptance. The authors of the report by the Children's Rights Spokesman “Children the victims of domestic violence” show that the indicators pertaining to the social approval for the use of the so-called slaps is 69%.³¹ Thus still more than half of Poles approve of and support the use of corporal punishment in the educational process. Research carried out by Ewalina Wiszczun similarly shows a large frequency of the use of physical punishment in the educational process. 60% of the teenagers subject to research admitted that in their families severe physical punishment is used, which result in injuries, bruises, wounds or broken bones. 95% of teenagers consider such behaviour to be degrading for the child and may lead to permanent emotional problems for children and stands as a testament to the fact that parents are not good educators. Only, and as many as, one is six of the respondents considers physical punishment as a normal educational method.³² Such high indicators of acceptance of the use of bodily punishment with respect to children still remains, despite the critique of violent educational methods which has been going on for a number of years on the basis of pedagogical and psychological teachings.

²⁹ Family and Care Code of 25 February 1964, “Journal of Law” 1964, no. 9, item 59.

³⁰ The Criminal Code, of 6 June 1997, “Journal of Laws” 1997, no. 88, item 553 as amended.

³¹ E. Jarosz, A. Nowak, *Dzieci ofiary przemocy w rodzinie. Raport Rzecznika Praw Dziecka. Funkcjonowanie znowelizowanej ustawy o przeciwdziałaniu przemocy w rodzinie*, Warszawa 2012, p. 10.

³² During 2000-2001 E. Wiszczun conducted research amongst 120 18 and 19 year old pupils of vocational schools and an economics college in Zabrze, see E. Wiszczun, *Rozwój przejawów patologii społecznej jako konsekwencja przemocy w rodzinie*, [in:] *Pokolenie wygranych? Ciąg dalszy badań nad sytuacją dzieci i młodzieży w procesie transformacji*, ed. J. Sztumski, Katowice 2006, p. 214-223.

In the literature on the subject the ineffectiveness of physical punishment as an educational means is emphasised.³³

Peroration

Concluding the discussion on the violence towards a child phenomenon in the pedagogical and legal aspect a question should be posed pertaining to what happens to an adult, that they are able to, in certain conditions, take intentional actions or fail to perform necessary acts, which results in harm, physical and moral damage to a child, causes them pain and suffering? What lies at the basis of such a decision to act violently towards a child?

An analysis of the literature on the subject does not provide one single depiction of the sources for violence towards children. The WHO states that

there is no single factor explaining why one person and not another behaves in a violent manner or why one community will be torn apart by violence whilst the neighbouring community will live in peace. Violence is an extremely complex phenomenon, which takes root through the interaction of many factors – biological, social, cultural, economic and political.³⁴

Asking for the sources of violence is, in essence, asking for the accumulation of the so called “risk factors,” or such environmental, situational, factual, personal, psychological and legal circumstances the occurrence of which may cause violence towards a child to occur. The literature on the subject points to three groups of these factors: internal to the child, parent or the family system.³⁵

The normative context for the protection of children’s rights to freedom against all forms of violence has been clearly delineated by the Polish legislator in the Constitution of the Republic of Poland, as well as many other acts and implementing measures.

³³ An exception here may be the publications by J. Dobson, *Zasady nie są dla tchórzy*, Warszawa 1998, or the very same *Dzieci i wychowanie*, Warszawa 2000.

³⁴ <www.who.int> (access: 05.01.2014).

³⁵ Cf. E. Jarosz, *Ochrona dzieci przed krzywdzeniem. Perspektywa globalna i lokalna*, Katowice 2009.

They define the particular competencies and obligations of all citizens, and in particular persons holding social functions significant in terms of prevention of violence. In the context of violence prevention, the role of institutions and organisations appointed to perform the broadly understood prevention of violence towards a child is extremely important, namely schools, social workers, health service and the police. It is the manner of the execution of duties, competency (understood to be knowledge, skills and attitudes) of the staff of these institutions which may constitute an environmental factor protecting the child's right to freedom from all forms of violence, or be the factor increasing the risk of violence occurring.³⁶

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³⁶ A. Widera-Wysoczańska, *Mechanizmy przemocy w rodzinie. Z pokolenia na pokolenie*, Warszawa 2010, p. 146-147.

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