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CZY W POLSKIM PRAWIE KARNYM POTRZEBNA JEST REDEFINICJA ZGWAŁCENIA?

IS A REDEFINITION OF RAPE REQUIRED IN POLISH CRIMINAL LAW?

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Streszczenie
Artykuł dotyczy przestępstwa zgwałcenia stypizowanego w art. 197 k.k., a ściślej samej definicji tego zjawiska. Autorka dokonuje analizy regulacji penalizującej tego typu nadużycia seksualne obowiązujących zarówno na gruncie polskiego prawa karnego, jak również na gruncie prawa międzynarodowego, po to by w konsekwencji odnaleźć odpowiedź na pytanie, czy obecnie obowiązujące przepisy kodeksu karnego odpowiadają standardom konwencyjnym i w dostateczny sposób chronią ofiary przestępstw seksualnych, a także czy aktualna definicja zgwałcenia odpowiada teorii autonomii seksualnej, zgodnie z którą stosunek intymny bez dobowrownej, świadomej i wolnej od przymusu zgody to gwałt.

Słowa kluczowe: prawo karne, rozszerzona definicja zgwałcenia, zgwałcenie, dobowolna i świadoma zgoda, przemoc seksualna, paraliż wywołany gwałtem, toniczny bezruch.

Abstract
Te article concerns the crime of rape stipulated in art. 197 of the Criminal Code, or more precisely the definition of this phenomenon. Te author analyzes the regulations penalizing this type of sexual abuse, in force both under Polish criminal law and under international law, in order
to find the answer to the question whether the current provisions of the penal code comply with the convention standards and whether the definition of rape corresponds to the theory of sexual autonomy, according to which sex without voluntary, informed, and free of forced consent is rape.

Key words: criminal law, extended definition of rape, rape, only yes means yes approach, sexual violation, rape-induced paralysis, tonic immobility.

1. Introduction

Rape is definitely one of the most serious crimes as it strips the victim of their dignity and of their right to live free of pressures in terms of deciding about their own sexual life. The offence also entails traumatic experience\(^2\) and often leaves a mark on the victims for many years,\(^3\) resulting for instance in acute stress disorders leading to development of a post-traumatic stress disorder,\(^4\) which is also suffered by victims of war.

Unfortunately, as statistics show, the crime is very rarely met with an adequate reaction from law enforcement and the justice system.\(^5\) At this point we may refer to the statistics kept by Amnesty International. According to their measurements, every twentieth woman in Poland has been raped and at least one third has experienced unwanted sexual

\(^2\) I. Przybek-Czuchrowska, *Kobieca trauma w świetle badań struktury rodziny, pochodzenia i rodziny własnej*, “Nowiny Lekarskie” 2010, No. 1/79, p. 32.

\(^3\) M.J. Bliss, *Health and Mental Health Consequences from Sexual Trauma Victimizations*, in: *Handbook of Interpersonal Violence Across the Lifespan*, R. Geffner, J.W. White, L.K. Hamberger, A. Rosenbaum, V. Vaughan-Eden, I. Vieth, https://link.springer.com/referenceworkentry/10.1007/978-3-319-62122-7_278-1 (access: 18/03/2021).

\(^4\) According to J. Brągiel (see A. Brągiel, *Od histerii do pourazowego zespołu stresu – z historii badań nad przemocą. Rodzina w czasach szybkich przemian*, “Rocznik Socjologii Rodziny” XIII, 2001, p. 233): “A closer comparison of the rape syndrome with the symptoms of the shell shock revealed that the syndrome observed in victims of rape and domestic violence is the same as the disorders present in former soldiers; consequently the rape syndrome was classified as a post-traumatic stress disorder.”

\(^5\) MP’s bill amending the Polish Penal Code, No. 1091, IX Term of the Parliament, http://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-429-2021/$file/9-020-429-2021.pdf (access: 25/03/2021).
advances. Only 10% of them have reported to this to law enforcement.\textsuperscript{6} This means that only every tenth victim reports the violation. Other problematic issues, in addition to the problem of low reporting of sexual assaults, include the high percentage of situations where the authorities refuse to open a case and the alarming scale of dropping already opened cases. According to an analysis by the Foundation for Equality and Emancipation STER, 5,525 cases contrary to Article 197 of the Polish Penal Code were registered in public prosecution offices all across Poland in the period from 27 January 2014 to 30 June 2015,\textsuperscript{7} while pre-trial proceedings were initiated in only 4,172 cases (which is less than 76%). Moreover, 771 decisions of public prosecutors were issued refusing to launch pre-trial proceedings (14%), 386 cases were dropped under Article 308 of the Polish Criminal Procedure Code (7%), while 2,561 cases were dropped just after the pre-trial proceedings were initiated (61%). According to the STER Foundation, “if we add up the refusals to open a case and the dropped cases, it turns out that 67% of cases end in the public prosecution office and never reach the court [...]. In the ten district prosecution offices, the total percentage of refusals to launch pre-trial proceedings and dropped cases, including cases dropped before even being opened, is over 90 percent of all cases.”\textsuperscript{8} This data shows that only 1 out of 100 rapists is put on trial.

Another problem is the leniency of the justice system for sexual offenders, reflected in relatively light sentences and a high number of suspended sentences. At this point we should present the data gathered by the \textit{European Sourcebook of Crime and Criminal Justice Statistics}. The research shows that “only 13.2\% of rape convicts receive long sentences in Poland, of 5 to 10 years in prison, while the European average is 25.4 (32 in the Czech Republic, 33.7 in Hungary, 24.6 in Germany and 31.9 in

\textsuperscript{6} Amnesty International, \textit{Konieczna jest zmiana definicji gwałtu w Polsce}, https://amnesty.org.pl/amnesty-international-konieczna-jest-zmiana-definicji-gwałtu-w-polsce/ (access: 18/03/2021).

\textsuperscript{7} Polish Penal Code of 6 June 1997 (Journal of Laws of 2020, item 1444; hereinafter the “Penal Code”).

\textsuperscript{8} M. Grabowska, A. Grzybek, \textit{Przełamać Tabu. Raport o przemocy seksualnej}, Fundacja na rzecz Równości i Emancypacji STER, Warsaw 2016, p. 154, http://www.fundacjaster.org.pl/upload/Raport-STERu-do-netu.pdf (access: 17/03/2021).
France).” 9 This means that Polish courts show statistically double leniency towards rapists when compared to courts in other European countries.10 Consequently, victims have no trust in the state and in the law it creates, they do not believe that the offender will be put on trial and convicted. They are also afraid of experiencing secondary victimisation and as a result they rarely decide to report being raped to law enforcement. To prevent this, the state should first of all improve the standards of handling rape victims and create a law that would provide maximum protection to victims of sexual abuse, which occurs in various relations and forms. In view of the foregoing, there are voices in the public debate 11 that the Polish legal order requires redefining rape to make it encompass any situations where sexual intercourse takes place without affirmative – informed, free, autonomous and voluntary – consent. Supporters of such a legislative change believe that this would improve the legal situation of victims and is consistent with convention-based requirements. In contrast, opponents of the amendment claim that the wording of Article 197 of the Polish Penal Code fully protects crime victims as it is and the change would be a legal redundancy.12

The objective of this article is to analyse the current and postulated legal background regarding rape and to explore convention-based standards related to this issue in order to find the answer to the question of whether Polish law requires legal redefinition of rape.

9 M.F. Aebi, G. Akdeniz, G. Barclay, C. Campistol, S. Caneppele, B. Gruszczyska, S. Harrendorf, M. Heiskanen, V. Hysi, J. M. Jehle, A. Jokinen, A. Kensey, i in., European Sourcebook of Crime and Criminal Justice Statistics 2014, Helsinki 2014, s. 227, https://wp.unil.ch/europeansourcebook/files/2018/03/Sourcebook2014_2nd_revised_printing_edition_20180308.pdf (access: 18/03/2021).
10 Ibidem.
11 The need for redefinition of rape in the Polish legal order has been mentioned on numerous occasions by the Polish Ombudsman, by women’s organisations, such as the Fundacja Feminoteka foundation, the Centrum Praw Kobiet foundation, by the Foundation for Equality and Emancipation STER and by NGOs such as Amnesty International.
12 Reply to interpretation no. 19896 on the problems regarding implementation of the Convention on preventing and combating violence against women and domestic violence dated 17 April 2018, http://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xhtml?key=64E7E609 (access: 18/03/2021).
2. Rape against the current legal background

Rape is criminalised in Article 197 of the Polish Penal Code. This regulation includes two basic types (Article 197(1) and 197(2) of the Polish Penal Code) and two aggravated types (Article 197(3) and 197(4) of the Polish Penal Code). Rape of the basic type involves forcing another person to:

1) sexual intercourse by means of violence, unlawful threat or deception (Article 197(1) of the Polish Penal Code states that whoever forces another person to sexual intercourse by means of violence, unlawful threat or deception is punishable by imprisonment from 2 to 12 years);

2) submit to or perform another sexual activity (Article 197(2) of the Polish Penal Code that an offender who, in the way as specified in Article 197(1), forces another person to submit to or perform another sexual activity is punishable by imprisonment from 6 months to 8 years).

Aggravated rape is rape committed together with another person, rape of a minor under the age of 15, rape of an ascendant, descendant, adoptive child, adoptive parent, brother or sister and rape committed with special cruelty.13

So there are two alternative forms of rape, each resulting in a different punishment.14 There are voices in the doctrine that those forms are “overlap for many sexual offences and they should actually be interpreted identically under every regulation that contains them.”15 If we were to explain those terms synthetically, we would have to assume that “sexual intercourse” means “not only the act of copulation but also its surrogates, i.e. acts analogical to copulation and leading (or potentially leading) to satisfaction of the sex drive, especially oral and anal sex.”16 According to M. Mozgawa, the term includes also homosexual intercourses.17 Furthermore, the doctrine assumes that “the existence of sexual

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13 J. Piórkowska-Flieger, Komentarz do art. 197 k.k., in: Kodeks karny. Komentarz, Issue VII, ed. T. Bojarski, Warsaw 2015, LEX, thesis 1.
14 S. Hypś, Komentarz do art. 197 k.k., in: Kodeks karny. Komentarz, ed. A. Grześkowiak, K. Wiak, Warsaw 2021, Legalis, thesis 3.
15 J. Warylewski, Komentarz do art. 197 k.k., in: Kodeks karny. Komentarz, ed. R. Stefański, Warsaw 2021, Legalis, thesis 61.
16 M. Mozgawa, Komentarz do art. 197 k.k., in: Kodeks karny. Komentarz aktualizowany, M. Budyn-Kulik, P. Kozłowska-Kalisz, M. Kulik, M. Mozgawa, Warsaw 2021, LEX, thesis 4.
17 M. Mozgawa, Komentarz do art. 197 k.k..., LEX, thesis 4.
intercourse requires engagement of sex organs of at least one person – the offender or the victim;”\textsuperscript{18} however, recognising an act as rape does not require the offender to have acted purposefully in order to satisfy their sex drive.\textsuperscript{19} In turn, “other sexual acts” are understood as “conduct of the offender which is related to human sexual life in a broad sense of the terms and involves bodily contact between the offender and the victim or is sexual in nature and involves physical or mental engagement of the victim.”\textsuperscript{20}

It is relevant from the perspective of the issues addressed in the Article that in order to meet the criteria of rape the forcing of another person to sexual intercourse and to submit to another sexual act must happen through violence, unlawful threat or deception. Deception is understood as “the offender taking actions in order to confuse the victim, exploiting their mistake or engaging in deceptive acts to eliminate the resistance of the victim or the victim’s conscious expression of will.”\textsuperscript{21} Deceptive action must be characterised by a premeditated intention to weaken or eliminate the victim’s chances at opposing to being forced to engage in the acts described in Article 197 of the Polish Penal Code. So the deception leads the victim to make a decision regarding their sexual autonomy based on false grounds or brings the victim to a condition when they are unable to know what they are doing. For example, the doctrine and the case law state that a deceptive act is to give alcohol to another person (but only if the person does not know how it works and drinking the alcohol precludes the person from expressing their will regarding their sexual autonomy\textsuperscript{22}) or to use a date rape drug.\textsuperscript{23} Threat under Article 115(12) of the Polish Penal Code is understood as the offender telling another person that they will commit a crime to harm that person or their loved one or cause criminal proceedings or other proceedings or spread information that

\textsuperscript{18} \textit{Ibidem}, thesis 2.

\textsuperscript{19} Judgment of the Appellate Court in Cracow dated 11/05/2018, II AKa 40/18, LEX No. 2614566.

\textsuperscript{20} S. Hypś, \textit{Komentarz do art. 197 k.k....}, Legalis, thesis 5.

\textsuperscript{21} \textit{Ibidem}, thesis 18.

\textsuperscript{22} Judgment of the Appellate Court in Cracow dated 08/09/2015, II AKa 145/15, KZS 2015, No. 10, item 49.

\textsuperscript{23} B. Gadecki, \textit{Komentarz do art. 197 k.k...}, in: \textit{Kodeks karny. Część szczególna. Art. 148-251. Komentarz.}, M. Banaś-Grabek, B. Gadecki, J. Karnat, A. Łyżwa, R. Łyżwa, Warsaw 2020, Legalis, thesis 14.
would dishonour the threatened person or their loved one if the person fails to comply with a specific demand. So a threat is telling another person that their legal interests will be violated if that person refuses to behave as demanded by the offender. Contra to deception, there is no need for the offender to actually intend to carry out the threat. Still, the threat must be real. This means that it the addressee must have reasons to be afraid that it will be fulfilled. As far as the manifestation of the threat is concerned, it may be expressed either verbally and non-verbally. It is important that the information included in the threat reach the awareness of addressee. In contrast, violence is a very broad term. It means “any use of physical force which is to prevent the victim from resisting or to overcome the victim’s resistance and extort specific sexual acts not approved by the victim.” Violent action does not need to be taken directly against the victim but it may be directed against its surroundings and third parties. According to judgments of the Supreme Court, the intensity of the violence is of no significance as long as it is objectively substantial and may affect the motivation of an average person. The important thing is that the violence is inflicted by the offender in order to overcome the resistance of another person.

So the regulations currently in force require the victim’s resistance understood as the victim’s lack of consent to sexual intercourse, manifested either verbally or non-verbally, and noticeable to the offender. The doctrine emphasises that the resistance of the victim does not have to be physical but it can take the form of yelling, crying or clenching the fists. As N. Kłączyńska states, “while resisting, the victim does not have to use all the hypothetically available forms of resistance (...) but it is enough if the victim manifests the absence of consent with their actions and the offender breaks the resistance.” This way,
according to the current wording of Article 197 of the Polish Penal Code, rape in all forms requires the victim’s resistance which is demonstrated and visible to the offender. Consequently, if there is no sufficiently demonstrated resistance, situations where the offender forces a victim to sexual intercourse by means of violence, threat or deception are not classified as rape and the offender goes unpunished. Such a legal solution is the expression of the theory of sexual freedom which assumes that “actions of the offender are not a crime if the refusal to engage in a sexual activity was not explicit or obvious enough, meaning there was no visible resistance of the victim against the offender.” The concept must be deemed defective because absence of demonstrated resistance does not always mean consent. This is so for at least two reasons.

First of all, absence of resistance may be caused by the victim’s fear of additional injuries (lethal or extra brutal). There is no doubt that in certain situation resistance may have opposite consequence sand may escalate violence from the rapist (for example where the offender has a weapon, a knife or another dangerous tool). According to works by R.A. Knight and R.A. Prentky, who created a classification of sexual offenders, some rapists are sadists who engage in aggressive, cruel and brutal behaviour and draw satisfaction from the victim’s suffering (type 4 and 5 – sadistic). In turn, R.R. Hazelwood called such offenders ‘predatory rapists.’ Literature emphasises that such offenders undertake complicated preparations to ensure their control over the victim, they have special tools of control, intimidation and torture. So there is no doubt that if the

30 Letter of the Ombudsman of 13 February 2021, ref. no. XI. 518.88.2020.ASZ, https://www.rpo.gov.pl/sites/default/files/wystapienie_RPO_do_premiera_ws_definicji_zgwalcenia_02_2021.pdf (access: 15/03/2021).

31 R.A. Knight, R.A. Prentky, Classifying Sexual Offenders, The development and Corroboration of Taxonomic Models, in: Handbook of sexual assault: Issues, theories, and treatment of the offender, ed. W.L. Marshall, D.R. Laws, H.E. Barbaree, New York 1990, p. 23 et seq. and R.A. Knight, Validation of a Typology for Rapists, “Journal of Interpersonal Violence”, 1999, Vol. 14, No. 3, s. 303 et seq.

32 C. Matkowski, Przestępstwa seksualne z wykorzystaniem środków psychoaktywnych – doświadczenia brytyjskie, “Wrocławskie Studia Erasmiańskie. Zeszyty Studenckie Zeszyty Studenckie = Studia Erasmiana Wratislaviensia. Acta Studentium” 2009, No. 2, p. 196 et seq.

33 P. Marcinkiewicz, Charakterystyka psychologiczna sprawców seryjnych przestępstw seksualnych, in: Seksualność człowieka z różnych perspektyw. Wybrane zagadnienia, ed. G. Iniewicz, M. Mijas, Kraków 2011, p. 134.
offender has an advantage (e.g. by having a weapon or a dangerous tool), it may be pointless and risky for the victim to continue to resist.

Secondly, it is not always possible to demonstrate the absence of consent through loud protests, begging or yelling because of the physiological and psychological powerlessness of the victim, taking the form of passiveness, numbness, immobility or freezing. Such a physiological reaction is not a marginal phenomenon but it is quite common in victims of sexual crimes. Research conducted by Swedish Research Council in collaboration with ALF funding from the Stockholm County Council clearly shows that people facing extreme danger (such as sexual assault) may, just like animals, respond with a state of involuntary, temporary motor inhibition, known as tonic immobility or thanatosis. The phenomenon was first observed in the world of animals as an evolutionary defence reaction to an attack of a predator, applied in a situation where other defence methods cannot be used for various reasons. In humans, this phenomenon was described as an involuntary state of temporary motor inhibition in response to situations connected with intense fear, which may take the form of catatonia, seizures, inability to produce a sound (called aphonia) or absence of an internal reaction to

34 R.C. Kessler, P. Berglund, O. Demler, R. Jin, K.R. Merikangas, E.E. Walters, Lifetime prevalence and age-of-onset distributions of DSM-IV disorders in the National Comorbidity Survey Replication, “Arch Gen Psychiatry” 2005, No. 62, https://jamanetwork.com/journals/jamapsychiatry/fullarticle/208678 (access: 19/03/2021).
35 A. Möller, H.P. Söndergaard, L. Helström, Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression, “Acta Obstetricia et Gynecologica Scandinavica,” 2017, Vol. 96, Issue 8, pp. 932-938.
36 The issue of tonic immobility of sexual assault victims already emerged in research by G. Galliano, L.M. Noble, L.A. Travis, C. Puech l z 1993 r. According to that research, as many as 37% of sexual assault victims experienced significant tonic immobility (G. Galliano, L.M. Noble, L.A. Travis, C. Puech, Victim reactions during rape/sexual assault: A preliminary study of the immobility response and its correlates, “Journal of Interpersonal Violence” 1993, Vol. 8, pp. 109-114). The 2005 study by J.M. Heidt, B.P. Marx, J.P. Forsyth revealed that 52% of sexual assaults victims experienced complete tonic immobility (J.M. Heidt, B.P. Marx, J.P. Forsyth, Tonic immobility and childhood sexual abuse: Evaluating the sequela of rape-induced paralysis, “Behavior Research and Terapy” 2005, No. 43, pp. 1157-1171.
37 D.H. Barlow, B.F. Chorpita, J. Turovsky, Fear, panic, anxiety, and disorders of emotion. In D.A. Hope, in: Current theory and research in motivation, Vol. 43. Nebraska Symposium on Motivation, 1995: Perspectives on anxiety, panic, and fear, Lincoln 1996, pp. 251-328.
38 B.P. Marx, J.P. Forsyth, G.G. Gallup, T. Fusé, J.M. Lexington, Tonic immobility as an evolved predator defense: implications for sexual assault survivors, “Clinical Psychology: Science and Practice” 2008, Vol. 15, issue 1, p. 74.
stimuli. The above research conducted by Swedish scientists shows that as many as 69.8% raped women experienced significant tonic immobility and 47.7% experienced extreme tonic immobility during the assault.\(^{39}\) So 7 out of 10 women in that sample reported significant immobility and almost a half extreme immobility. This means that a vast majority of victims do not resist the offender in a way visible outside because of the stupor.

In view of the foregoing, it must be stated that in its current form Article 197 of the Polish Penal Code (which requires the victim to actually resist in a way manifested outside and visible to the offender) is defective. The scope of its criminalisation does not cover all those situations where the victim is unable to express resistance. The case law does not convalidate this regulation either. True, in its judgment delivered on 08/09/2005 in case II K 504/04, the Supreme Court stated that a court must determine each time if the person consented to the sexual activity and if so then to what extent and at what time;\(^{40}\) however, this does not invalidate the position of the Supreme Court in the judgment delivered on 08/10/1997 in case V KKN 346/96, according to which confirming a rape requires demonstrating the resistance of the victim, understood as resistance manifested outside, without considering the situation where the victim was unable to express this resistance for various reasons.\(^{41}\) This way, as A. Bodnar rightfully points out, “the courts take into account various types of resistance while assessing if a crime has been committed but in the opinion of the courts that resistance should be somehow manifested outside; so it is not a crime to force someone to sexual intercourse if the victim is unable to express that resistance for some reasons.” Additionally it must be noted that as far as this is concerned, the legislator fails to fully perform its obligation to properly establish statutory criteria for the crime. For this reason, more and more attention is now paid in public space to the need to change the current legislation in this respect.\(^{42}\) The legislative changes would require first considering the convention-based requirements that the new regulation should meet.

\(^{39}\) A. Möller, H.P. Söndergaard, L. Helström, *Tonic immobility*..., p. 935.

\(^{40}\) Judgment of the Supreme Court of 08/09/2005, II KK 504/04, Lex No. 200229.

\(^{41}\) Judgment of the Supreme Court of 08/10/1997, V KKN 346/96, Lex No. 51679.

\(^{42}\) For example, the Polish Ombudsman states that the theory of sexual freedom (whereunder absence of resistance equals consent) must be abandoned in favour of sexual autonomy (where a sexual relation without consent is a rape) – vide: *Pismo Rzecznika*…
3. Convention-based standards applicable to the problem of the definition of rape

Modern standards on the protection of human rights (including victims of sexual abuse) rely on the theory of sexual autonomy, which assumes that an intercourse without an informed and voluntary consent is a rape\(^{43}\) (only yes means yes approach). International legislative measures require states to effectively prevent and punish such conduct based on the requirement to place consent at the centre of the legislative criminal definition of rape.\(^{44}\) One of the first documents of this type was the Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence (hereinafter: Recommendations). Paragraph 35(2) of the Recommendations requires the member states to criminalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance. Paragraph 35(3) of the Recommendations sets forth the obligation to criminalise sexual penetration of any nature whatsoever or by any means whatsoever of a non-consenting person.

The Istanbul Convention\(^{45}\) also requires the participating states to take actions to criminalise and effectively prosecute any non-voluntary sexual act. Article 36(1) of the Istanbul Convention states that: “Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

1) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
2) engaging in other non-consensual acts of a sexual nature with a person;
3) causing another person to engage in non-consensual acts of a sexual nature with a third person.”

So the Istanbul Convention directly addresses the issue of consent of the holder of a personal right and precisely states that the consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances (Article 36(2)). So the countries

\(^{43}\) Ibidem.
\(^{44}\) Ibidem.
\(^{45}\) Council of Europe Convention on preventing and combating violence against women and domestic violence made in Istanbul on 11 May 2011 Journal of Laws of 2015, item 961, hereinafter: Istanbul Convention).
that are the parties to the convention are required to extend the legal protection of the victims to protect them not only from pressures in the form of violence, unlawful threat or deception but also from any non-consensual acts. In accordance with the memorandum to the regulation in question, the signatory states should take account of the body of case law of the European Court of Human Rights (hereinafter: ECHR), which has emphasised on numerous occasions that absence of consent is the fundamental factor deciding whether a sexual act should be classified as rape. The case law of the ECHR is also clear that sexual intercourse that took place without the consent of one of the individuals involved is a rape regardless of whether the victim consciously resisted and irrespective of the relations between the victim and the offender. In the judgment delivered in the case M.C. vs. Bulgaria (case no. 39272/98), ECHR was clear that “any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy (...) positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.” This way the ECHR decided that the practice of the states which required both the proof that the offender used physical force and the victim’s reaction in the form of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy (...) positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.”

46 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, https://rm.coe.int/16800d383a (access: 22/03/2021).
47 A good example is the judgment of the ECHR in the case M.C. vs Bulgaria, judgment of the ECHR of 04/12/2003 in the case M.C. vs Bulgaria, application no. 39272/98, § 163-166.
48 Judgment of the ECHR of 20/03/2012, in the case of C.A.S. and C.S. vs Romania, complaint no. 26692/05, § 76-77, as well as judgment of the ECHR of 04/12/2003 in the case M.C. vs. Bulgaria, complaint no. 39272/98, § 163-166.
49 Judgment of the ECHR of 22/11/1995 S.W. vs. the United Kingdom, complaint no. 20166/92, § 44.
50 W. Zalewski, Komentarz do art. 36, in: Konwencja o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej, ed. E. Bieńkowska, L. Mazowiecka, Warsaw 2016, LEX, thesis 2.
the offender’s aggression, and it is not resistance by forced non-consensual sexual act that is the fundamental criterion of rape (to encompass any non-consensual sexual act).”\textsuperscript{51} When it comes to the understanding of the term that is crucial from the perspective of the matter at hand – the notion of consent, it must be stated that the ECHR uses the term ‘affirmative consent,’ which means an informed, free, autonomous, voluntary and unforced consent,\textsuperscript{52} which can only be expressed by a person who is sane and of legal age.

It should also be emphasised at this point that the ad hoc International Criminal Tribunal for the former Yugoslavia used the absence of consent as the criterion to determine if rape took place in a specific case. For example, in the case \textit{Prosecutor vs. Kunarac, Kować and Vuković} (case no. IT-96-23)\textsuperscript{53} the Tribunal decided that the fundamental criterion for determining whether a rape was committed was not the presence of force, threats and violence but the absence of affirmative, voluntary, unforced consent to the intercourse. In other words, the Tribunal stated \textit{expressis verbis} that a situation where the sexual autonomy of a person is violated is a rape.

The purpose of the amendment to domestic legislation to account for sexual autonomy (the concept of consent and absence thereof) by the European Institute for Gender Equality (hereinafter: EIGE),\textsuperscript{54} as well as by Convention on the Elimination of All Forms of Discrimination against Women (hereinafter: CEDAW).\textsuperscript{55} The EIGE defines rape as “sexual penetration, whether vaginal, anal or oral, through the use of object or body parts, without consent, using force, coercion or by taking advantage of the vulnerability of the victim.”\textsuperscript{56} The CEDAW emphasises

\begin{itemize}
  \item \textsuperscript{51} W. Zalewski, \textit{Komentarz do art. 36…}, LEX, thesis 5.
  \item \textsuperscript{52} Judgment of the ECHR of 04/12/2003 \textit{M.C. vs. Bulgaria}, complaint no. 39272/98, § 1127.
  \item \textsuperscript{53} Judgment of the Criminal Tribunal for the former Yugoslavia of 22/02/2001 in the case \textit{Prosecutor vs. Kunarac, Kować and Vuković}, case no. IT-96-23, § 104.
  \item \textsuperscript{54} The European Institute for Gender Equality (EIGE) is an EU agency for gender equality in and beyond the EU.
  \item \textsuperscript{55} The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is a unit of the United Nations which was established by way of Article 17 Convention of the liquidation of all forms of discrimination against women, adopted by the General Assembly of the United Nations in 1979.
  \item \textsuperscript{56} The European Institute for Gender Equality (EIGE), \textit{Glossary of definitions of rape, femicide and intimate partner violence}, https://eige.europa.eu/publications/glossary-definitions-rape-femicide-and-intimate-partner-violence (access: 22/03/2021).
\end{itemize}
that absence of physical resistance to a sexual offender in no way means consent to sexual contact.\textsuperscript{57} A legislative change putting the notion of consent (as opposed to resistance) at the centre of the definition was implemented by many European countries. Laws consistent with convention-based standards and respecting the case law of the ECHR already function in Belgium, Greece, Germany, Ireland, Iceland, Luxembourg, Sweden, United Kingdom, Denmark, Croatia, Cyprus, Malta\textsuperscript{58} and in New York and Canada.\textsuperscript{59} They are currently being implemented by Spain and Finland. So the change in the understanding of the notion of rape intended to expand the protection of sexual assault victims is now the dominant trend, preventing secondary victimisation, which should be fought in accordance with the Directive 2012/29/EU (establishing minimum standards on the rights, support and protection of victims of crime).\textsuperscript{60}

4. Rape against the postulated legal background

So far, Poland has not complied with its obligation to adapt the criminal law definition of rape to convention-based standards. This is why a bill to amend the Criminal Code in this area was submitted in the lower house of the Parliament on 08 March 2021. It was prepared mainly under the auspices of women’s organisations, mostly the Fundacja Feminoteka foundation.\textsuperscript{61} The bill is based on criminal redefinition of rape and it assumes that rape should mean “forcing another person to sexual intercourse without informed and voluntary consent from that person.”\textsuperscript{62}

\textsuperscript{57} Communication no. 18/2008: Committee on the Elimination of Discrimination against Women, https://digitallibrary.un.org/record/791502 (access: 27/03/2021).

\textsuperscript{58} https://www.amnesty.org/en/latest/campaigns/2020/12/consent-based-rape-laws-in-europe/ (access: 15/03/2021).

\textsuperscript{59} Letter of the Ombudsman...

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 L 315, 14.11.2012, p. 57–73).

\textsuperscript{61} The analysis in this article focuses exclusively on the issue of defining the crime of rape. Due to the limited scope of the publication, the Author does not address the other proposed changes, including the proposal to increase the criminal sanction.

\textsuperscript{62} MP’s bill amending the Polish Penal Code, No. 1091, IX Term of the Parliament, http://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-429-2021/$file/9-020-429-2021.pdf (access: 25/03/2021).
In other words, authors of the bill believe that a sexual act should be considered illegal if it takes place without the consent of another person. Pursuant to the bill, Article 197(1) is to be worded as follows: Whoever forces another person to sexual intercourse without an informed and voluntary consent of that person is punishable by imprisonment for at least 3 years.” (instead of: “Whoever forces another person to sexual intercourse by means of violence, unlawful threat or deception is punishable by imprisonment from 2 to 12 years”).

The postulated definition of rape is based on the notion of consent and not confirmation of resistance. So it assumes that consent to a sexual act is the only “factor in the absence of which the conduct of the person initiating sexual contact can be qualified as rape.”  

According to the proposed amendment any non-consensual sex is rape. Such a legislative proposal means adoption of the notion of consent (only yes means yes approach) instead of the concept of resistance (no means no). The consent-based concept requires the person initiating a sexual act to make sure that the other person unequivocally and voluntarily consents to sex (existence of ‘unequivocal and voluntary agreement’ and requiring proof by the accused of steps taken to ascertain whether the complainant was consenting). Such a legislative solution excludes the presumption of default consent to sexual intercourse, which in the current legal background may be debunked only through resistance proven with evidence. However, the bill does not define the term ‘concept.’ The authors of the legislative proposal state only that ‘the definition of consent, especially concludent consent, will be developed through case law and judicature, analogically to the consent that applies to patient rights, i.e. consent expressed in a way raising no doubt as to the will of the person engaging in sexual intercourse.’

However, there is no doubt that the consent must be informed, free, autonomous and voluntary, and the holder of the personal right may withdraw it at any time.

63 S. Cieślik, Zgoda dysponenta dobra prawnego na wkroczenie w sferę wolności seksualnej (analiza prawnoporównawcza modelu przyjętego w polskim Kodeksie karnym oraz koncepcji Yes Means Yes, “Czasopismo Prawa Karnego i Nauk Penalnych” 2019, Sheet 3, p. 77.
64 For more about the Yes Means Yes concept see: J.Friedman, J. Valenti, Yes Means Yes: Visions of Female Sexual Power and A World Without Rape, New York 2008.
65 MP’s bill amending the Polish Penal Code, No. 1091, IX Term of the Parliament, http://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-429-2021/$file/9-020-429-2021.pdf (access: 25/03/2021).
The proposed redefinition of rape was also met with critical voices. There are claims that the postulated amendment is an over-regulation, imposes excessive formalism and ruins the spontaneity and romanticism that usually accompany intimate relationships. The issue of redefining the crime of rape already emerged at the stage of implementing the Istanbul Convention. It was then that the Ministry of Justice adopted the position that there was no need to introduce the criteria of absence of the victim’s consent because “the Polish legal order already treats rape as a crime involving breaking the victim’s resistance so it criminalises any conduct undertaken despite the victim’s resistance, which means conduct undertaken despite verbalised absence of consent. In other words, the ministry believes that redefinition of rape would be a legal redundancy because resistance also means absence of consent. Secondly, the statutory regulation of the rape remains open to an interpretation consistent with the convention and it should be possible in specific circumstances of the act to account for absence of the victim’s consent understood as failure to give explicit approval.”\(^{66}\) However, it is hard to agree with the presented critical position. As far as the first objection is concerned, according to which “resistance also means absence of consent,” it fails to encompass all the situations where the victim for various reasons (described in this article) was unable to oppose. As regards the second objection, it must be stated that direct application of the Istanbul Convention is not possible because it does not apply \textit{ex proprio vigore}.\(^{67}\)

5. Conclusion

The above analysis leads to the conclusion that Article 197 of the Polish Penal Code does not fully protect the victims of sexual offences. The scope of the regulation fails to encompass all the situations where the victim, for various reasons, was unable to oppose despite not consenting to the sexual contact. The current definition of rape, reconstructed from Article 197 of the Polish Penal Code, is based on the presumption of default consent of the holder of the personal right to sexual intercourse and only their...

\(^{66}\) Reply to interpretation no 19896...

\(^{67}\) M. Płatek, \textit{Zgwałcenie. Gdy termin nabiera nowej treści. Pozorny brak zmian i jego skutki}, “Archiwum Kryminologii” 2018, No. XL, p. 266.
resistance, which must be proven, determines the absence of consent. So the construction of Article 197 of the Polish Penal Code is inconsistent with the convention standards and with the case law of the ECHR. This is not convalidated by the case law of domestic courts either because apart from single judgments pointing to the need to assess if the victim consented to the sexual contact there is still broad judicature which states that confirmation of rape requires demonstrating the victim’s resistance, understood as externally manifested objection, without accounting for situations where the victim may be unable to resist for various reasons. A redefinition of rape which involves adding the element of consent to the term will definitely improve a sense of omnipotence of the victims and thus increase the percentage of reported cases. This conclusion is based on the experience of European countries which changed the definition of rape in line with Article 36 of the Istanbul Convention. The legislative amendment will also help gradually change the notion still common in the society that absence of resistance from the victim means consent to a sexual act.

As regards the counterargument raised by the opponents of the amendment, that is the fear that such a legislative change will result in a plethora of false rape accusations, it must be stated that the burden of proof in rape cases will remain unchanged. This means that guilt will have to be proven. So the amendment does not introduce any changes in terms of the burden of proof. This makes the fear regarding a reverse burden of proof unfounded. As A. Bodnar emphasises, only the perspective of the procedure will change in the aspect of evidence as the postulated legislative change will rely on the theory of voluntary and informed consent expressed by the parties to a sexual act. This means that the evidentiary procedure will “focus on the sexual offender (by establishing if they have secured the consent of the partner) and not on the victim (whether they have expressed resistance), as is the case for rape definitions based on resistance.”

In view of the above, it must be stated that it seems necessary to redefine rape to make it rely on the ‘yes means yes’ rather than ‘no means no’ approach. Without sympathising with any specific political options engaged in the discourse regarding the amendment, I believe that the
legislative proposal put forward in the Parliament, to the extent discussed in this article, deserves in-depth consideration.

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