Poland

Wojciech Jasiński, Karolina Kremens

A. Background

I. General attitude in society towards sexual relations

Poland is for the most part a conservative, Catholic country. This fact has a strong impact on social relations also in the sphere of sexuality. Even though members of the younger generation are more liberal and tolerant, most Poles represent the traditional approach. This is particularly true regarding those who are responsible for decision-making in law and reflected in provisions concerning sexual offences.

A recent debate concerning modifications in the investigation of rape in Poland may serve as a good example of the traditional perspective towards sexual relations. In 2013, an amendment[1] of the Criminal Code (CC)[2] and the Code of Criminal Procedure (CCP)[3] was adopted that introduced entirely new provisions. These amendments abolished rule that rape was only investigated and prosecuted upon a victim's complaint and introduced a system in which rape cases were in all cases investigated *ex officio*, that is, without the need for an official complaint from the victim.[4] While some scholars expressed their positive opinion on this change,[5] the majority of academics and state entities issuing official opinions during the legislative process advanced critical arguments. They complained of a "dramatic interference in the personal sphere of the victim" if all rapes were

1 Act of 13 June 2013 on changes in the Criminal Code and Code of Criminal Procedure 2013. The Act entered into force on 21 January 2014.
2 Criminal Code 1997.
3 Code of Criminal Procedure 1997.
4 See on the distinction between offences investigated upon complaint and without complaint Wojciech Jasiński and Karolina Kremens, *Criminal Law in Poland*, 2019, 215–216.
5 See Monika Płatek, 'Kryminologiczno-epistemologiczne i genderowe aspekty przestępstwa zgwałcenia', 32 *Archiwum Kryminologii* 345 (2010); Wojciech Jasiński, 'Uwagi o trybie ścigania przestępstwa zgwałcenia', 1 *Prokuratura i Prawo* 68 (2014).

to be investigated.[6] It was also argued that preserving the system of investigating rape only upon complaint is essential to protect the victim from the trauma inevitably connected with going through the criminal process.[7] And although the amendment also introduced significant changes in the process of reporting rape and other sexual offences and modified the way in which the victim was questioned to reduce trauma, scholars doubted that the changes would affect the number of reported cases of rape and other forms of sexual assault.[8]

Most importantly in the context of this report, the Polish system has to date not responded to the "only yes means yes" movement and has not accepted a definition of rape based upon lack of consent. Although at least one research study exploring the results of the 2014 amendment recommended that the requirement of consent should be included in the definition of rape in accordance with the standards of the ECHR and the Istanbul Convention,[9] the traditional approach towards the definition of crimes concerning sexual relations focusing on force and deceit is still prevalent.[10] As a result, there is a lack of significant Polish case law and academic literature on issues of consent in the context of sexual assault. This causes significant difficulties in reconstructing the nature of consent in these crimes and has resulted in calls for changes in the law.[11]

II. Background of criminal laws on sexual conduct

In the old CC of 1969, sexual offences were dispersed among chapters related to liberty (rape) and decency (dissemination of pornography, pimping, adultery and child abuse). By contrast, the present CC contains a comprehensive chapter dedicated to sexual offences, entitled Offences against Sexual Liberty and Decency (Chapter XXV).

---

6 See National Council of Judiciary, *Report on the member of parliament's draft bill on changes in the Criminal Code and Code of Criminal Procedure*, 2012 (in Polish).

7 Andrzej Sakowicz, *Opinia prawna na temat projektu ustawy o zmianie ustawy – Kodeks karny oraz ustawy – Kodeks postępowania karnego* (druk nr 532), 2012.

8 Łukasz Cora, 'Bezwarunkowy tryb ścigania przestępstwa zgwałcenia a "podmiotowość" pokrzywdzonego', 4 *Wojskowy Przegląd Prawniczy* 55, 71 (2015).

9 Artur Robert Pietryka, *'Odmowy wszczęcia i umorzenia postępowań w sprawach o zgwałcenia popełnione po zniesieniu wnioskowego trybu ścigania'*, 2014, 80.

10 See Sec. 1.2.

11 Monika Płatek, 'Zgwałcenie. Gdy termin nabiera nowej treści. Pozorny brak zmian i jego skutki', 218 *Archiwum Kryminologii* 263, 317 (2018).

Although during the legislative process it was argued that the offences defined in Chapter XXV of the CC of 1997 are directed simultaneously against sexual liberty and decency (public morals), it is believed that the individual interests of victims should have priority over interests related to public morals and that the latter have only secondary significance.[12] However, it is a disputed question whether rape and similar offences including sexual relations without valid consent exclusively protect sexual liberty or also affect decency understood as a set of social rules related to acceptable sexual conduct. Some authors criticize the idea that such rules of decency, if it is even possible to identify them, should be a reason for criminalisation.[13] At present, the protection of sexual liberty by the criminal law has become a point of a major interest, which was not necessarily the case in the past.

III. Definition of sexual coercion offences

The Polish CC contains several sexual offences related to non-consensual sexual penetration and other sexual acts. The first one, defined in Article 197 CC, is commonly named rape (*zgwałcenie*). This is also a statutory term, although paradoxically it is used only in Article 197 § 3 CC constituting aggravated types of rape and not in the definition of rape itself (§§ 1–2). Articles 198 and 199 CC criminalise subjecting a person to sexual penetration or other sexual acts where the victim is vulnerable or is for various reasons unable to express valid consent to engage in sexual activity. The way of classifying sexual offences is clearly based on the assumption that rape is inherently related to the use of force or the threat of its use. In ordinary language, the terms "*gwałt*" or "*zgwałcenie*" are associated with the use of force or the threat of its use in order to engage in sexual penetration.[14] The statutory definition in Article 197 CC is however perceived as broader, since it encompasses deceit as a method of inducing a person to sexual penetration and forms of sexual activities other than penetration.[15]

---

12 See Jarosław Warylewski in: Jarosław Warylewski (ed), *System Prawa Karnego. Tom 10. Przestępstwa przeciwko dobrom indywidualnym*, 2nd edn. 2012, 577–588.

13 Warylewski (note 12), 580–590.

14 The word "*gwałt*" is an old-fashioned equivalent of the word "*przemoc*" (force).

15 See Jarosław Warylewski, 'Zgwałcenie – zagadnienia definicyjne' in: Lidia Mazowiecka (ed), *Zgwałcenie. Definicja, reakcja, wsparcie dla ofiar*, 2016, 18 (arguing that the statutory definition is too broad).

The way offences are formulated in Articles 197–199 CC clearly proves not only the inherent relation between sexual abuse and the use of force (or threat of use of force), but also the notion that only these types of forced sexual relations are perceived as highly blameworthy. It is symptomatic that the statutory penalty for the offence defined in Article 197 § 1 CC is imprisonment between two and twelve years, while the penalty for sexual abuse of a vulnerable person without recourse to force in Articles 198 and 199 CC is imprisonment between six months and eight years and up to three years, respectively. Moreover, while the statutory penalty range for rape in Article 197 §§ 1–2 CC was raised significantly in 2005, the offences covered by Articles 198 and 199 CC remained unchanged. Also, while Article 197 CC contains aggravated types such as group rape or rape committed with particular cruelty, Articles 198 and 199 CC do not possess similar features.[16] This clearly demonstrates that the lawmakers took the perpetrator's and not the victim's perspective, as the protection of the victim seems to be much weaker.

The law also provides for the offence of engaging in sexual intercourse or other sexual activity with a minor under 15 years of age (Article 200 § 1 CC). The victim of this crime as well as of other offences prescribed in Articles 197–199 CC can be of any gender. Sexual maturity is irrelevant.

The definition of the offenses discussed relies on a distinction between "*obcowanie płciowe*" (sexual penetration) and "*inna czynność seksualna*" (other sexual act). The first term covers vaginal, oral and anal sex. In the case law, *obcowanie płciowe* has been extended to the penetration of body orifices (e.g., anus) with the hand or with objects (e.g., dildo, bottle).[17] In the literature, however, the penetration of the victim's body orifices other than the vagina by objects has not always been qualified as *obcowanie płciowe*. On a more general level, *obcowanie płciowe* is understood as a sexual activity during which there is a penetration of the female or male genitalia or anus on the side of the victim or a penetration of other natural orifices of the victim's body that may be considered a surrogate of the female genitalia, regardless of the sex of the victim.[18] It is also controversial

16 That is a clear axiological inconsistency, as Marek Bielski has rightly pointed out. See Marek Bielski, 'Komentarz do art. 198, t. 2' in: Włodzimierz Wróbel and Andrzej Zoll (eds), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117–211a*, 2017.

17 Marek Bielski, 'Komentarz do art. 197, t. 24' in Włodzimierz Wróbel and Andrzej Zoll (eds), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117–211a*, 2017.

18 Marek Bielski, 'Komentarz do art. 197, t. 26' in Wróbel and Zoll (n. 17).

whether forcing a victim to insert an object into her vagina should be qualified as "*obcowanie płciowe*". There are both proponents[19] and opponents[20] of that view.

The term "*inna czynność seksualna*" covers a variety of behaviours which do not constitute "*obcowanie płciowe*" yet are of a sexual nature. Their sexual nature should be assessed based on their objective cultural context, not necessarily on the intent of the perpetrator. His intent can be sexual but the behaviour may not be qualified as such, and vice versa.[21] Legal doctrine defines "*inna czynność seksualna*" as a sexual activity other than sexual penetration which involves physical contact between the participants, or at least physical contact with the intimate parts of the body of the perpetrator or of the victim which in the specific cultural context is of a sexual nature and can therefore be regarded as a form of gratification or stimulation of the human sex drive, even if it does not involve physical contact between the persons involved. "Other sexual activity" must involve the touching of an intimate area of the body, that is, the vaginal, genital, and anal areas or the female breasts.[22] It is not possible to list all forms of other sexual acts, but it bears emphasis that not all types of behaviour that might have a sexual context can be qualified as sexual activity as regulated in Article 197 § 2 CC. Behaviour like forcing a kiss, pinching a buttock, touching a knee, exposing the body, or verbal molestation are perceived as falling outside of the scope of that provision.[23] The same applies to masturbation without any contact with another person[24].

With regard to the offences defined in Articles 197–199 and 200 § 1 CC, the perpetrator does not have to be the person performing the sexual activity; The victim can also be forced to engage in sexual activity with another person.[25]

In the crime of rape (Article 197 CC), the central element is not the lack of the victim's consent. The decisive factor is the perpetrator's use of

19 Marek Bielski, 'Komentarz do art. 197, t. 28' in Wróbel and Zoll (n. 17).
20 Konrad Lipiński, 'Komentarz do art. 197' in Jacek Giezek (ed), *Kodeks karny. Część szczególna*, 2021.
21 Ibid.
22 Marek Bielski, 'Wykładnia znamion "obcowanie płciowe" i "inna czynność seksualna" w doktrynie i orzecznictwie sądowym', 1 *Czasopismo Prawa Karnego i Nauk Penalnych* 211, 227 (2008).
23 Ibid., 228–229. Such behaviour might be qualified as a violation of physical integrity prohibited by Article 217 § 1 CC.
24 Marek Bielski, 'Komentarz do art. 197, t. 38' in Wróbel and Zoll (note 17).
25 Marek Bielski, 'Komentarz do art. 197, t. 19' in Wróbel and Zoll (note 17).

force, unlawful threats, or deceit[26]. As a result, the significance of consent is marginalized, and situations where the victim does not consent are equated with those where the perpetrator uses force, unlawful threats, or deceit. There exist, however, situations where the perpetrator uses neither force nor unlawful threats nor deceit, but the victim does not consent to sexual acts. This can happen when the victim is too scared or paralysed or overwhelmed by the whole situation to object to sexual penetration. In such a case, the perpetrator cannot be found guilty of rape. That is an important lacuna in the protection of sexual integrity. It is surprising that some Polish scholars claim that the reference to the use of force, unlawful threats, or deceit is better than reference to consent, considering the latter as being too subjective and problematic.[27]

Articles 198, 199 and 200 § 1 CC define various situations in which the perpetrator undertakes sexual activity without valid consent, but without recourse to the use of force, unlawful threats, or deceit. The lack of valid consent (although factual consent can be given) stems from the victim's age (under 15 years of age – Article 200 § 1 CC), her psychophysical helplessness (Article 198 CC), the relation between perpetrator and victim, or the situation (Article 199 CC). However, in the case of a victim's helplessness due to temporary incapacitation (Article 198 CC) it is claimed that the victim's consent is valid if it was given before the victim, being a person generally capable of sexual self-determination, reached the state of helplessness.[28]

Article 198 CC provides for two characteristics of the victim that constitute necessary elements of the offence: 1) helplessness (*bezradność*) and 2) inability to recognise the meaning of the act or to control her conduct resulting either from a mental deficiency (*upośledzenie umysłowe*) or a mental disease (*choroba psychiczna*).

Article 199 CC is focused on situations where consent in sexual activities is affected by objective external factors, such as the existence of a relationship of dependency (e.g., at work) or a crisis situation (e.g., the victim lacks money for medical treatment) and the abuse of such situations by the perpetrator. A relationship of dependency can be of any kind (formal or informal, continuous or temporary). It is also irrelevant whether the

26 For an explanation of the terms force, unlawful threat and deceit, see 2.3 below.

27 Krzysztof Szczucki, 'Rola zgody w strukturze przestępstwa na przykładzie przestępstwa zgwałcenia', 1 *Czasopismo Prawa Karnego i Nauk Penalnych* 31 (2011).

28 Marek Bielski, 'Komentarz do art. 198, t. 4' in Wróbel and Zoll (note 17).

relationship of dependency or the crisis situation of the victim has been caused by the perpetrator.[29]

The offences defined in Articles 197–199 and 200 § 1 CC can only be committed with direct intent.[30]

IV. General role of consent in criminal law

Consent of the "person disposing of the protected interest" (*dysponent dobra chronionego*) is relevant for criminal liability for several reasons. First, consent can be an element of a crime (e.g., termination of pregnancy with the consent of the pregnant woman but in violation of the law – Article 152 CC). Second, the lack of consent can be an element of an offence. It may be expressed in the relevant provision explicitly (e.g., termination of pregnancy without the consent of the woman – Article 153 § 1 CC) or implicitly (e.g., theft, which implies lack of consent to the taking of one's property). Third, consent can be a ground for excluding the unlawfulness of a prohibited act (*kontratyp*). This approach is based on the presumption that the person disposing of the protected interest is free to decide about his or her interests. This freedom implies the ability to express consent to at least some behaviours that are generally prohibited as posing danger to socially recognised and protected interests (e.g., bodily integrity, property). However, not all such behaviours are subject to consent. In the case of important interests that society wishes to protect (e.g., life), consent is irrelevant.[31]. The view that consent is a ground for excluding the unlawfulness of a prohibited act is not universally accepted. Some scholars claim that in case of a valid consent there exists no danger for the protected interest (personal freedom, property, etc.) and therefore behaviour accepted by the person disposing of the protected interest cannot constitute an offence. According to this view, such an act is completely legal and does not need to be legalised by excluding its unlawfulness.[32]

---

29 Marek Bielski, 'Komentarz do art. 199, t. 14–19' in Wróbel and Zoll (note 17).

30 See: Marek Bielski, 'Komentarz do art. 197, t. 102'; 'Komentarz do art. 198, t. 24'; 'Komentarz do art. 199, t. 34'; 'Komentarz do art. 200, t. 46' in Wróbel and Zoll (note 17).

31 This is expressly provided for cases of human trafficking and of euthanasia.

32 For a general discussion on the role of consent in criminal law see Jerzy Lachowski in: Lech Paprzycki (ed), *System Prawa Karnego. T. 4. Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej*, 2016, 497–498 and sources cited therein. For a critique of treating consent as a ground excluding the unlawfulness

Leaving these doctrinal disagreements aside, the discussion concerning consent in criminal law is a consequence of acknowledging an individual's right to self-determination and the subsidiary role of criminal law. In cases where the interests protected by criminal law are perceived as primarily or exclusively private, the individual is left with some discretion in deciding whether his or her interests should be protected by the criminal law. An additional important factor influencing the role of consent in determining criminal liability is the evaluation of the risk posed to the legally protected interest in question. Where the risk for society is too high, consent will be irrelevant for attributing criminal liability. But even in cases where consent does not negate criminal liability, it may nonetheless play a role in sentencing, as a factor influencing the amount of social harm and blameworthiness.[33]

Several conditions must exist for consent to be valid. Apart from the condition that consent must concern an interest that is at the disposal of the person consenting, consent must be voluntary, conscious, informed, and given prior to or at the time when the act is committed. Post-factum consent does not exclude criminal liability, although it may influence the sentence.[34] It should also be noted that consent can be withdrawn, at least in situations where the actor can still stop his or her action.[35] For consent to be valid, the person giving it must have a certain level of maturity[36]. The last important condition is that the perpetrator must be aware of the consent. Otherwise, he or she can be held criminally liable for his or her acts.[37]

---

of a prohibited act see, e.g., Elżbieta Hryniewicz, 'Czy zgoda dysponenta dobra może wyłączyć bezprawność czynu?', 9 Prokuratura i Prawo 55 (2014).

33 Dominik Zając, 'Zgoda dzierżyciela dobra prawnego na zachowanie ryzykowne jako okoliczność wpływająca na zakres odpowiedzialności karnej', 2 *Czasopismo Prawa Karnego i Nauk Penalnych* 89, 104–109 (2018).

34 Jerzy Lachowski in: Lech Paprzycki (ed), *System Prawa Karnego. T. 4. Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej*, 2016, 502; Zając (note 33), 91.

35 Paweł Daniluk, 'Warunki determinujące skuteczność zgody uprawnionego w prawie karnym', 2005 (1–2) *Palestra* 34, 39.

36 Lachowski (note 34), 502.

37 Ibid., 503.

B. Requirements for valid consent to sexual acts

I. General capacity to give consent

1. Age

The problem of capacity to give consent with regard to age seems to be resolved in Polish law by Article 200 § 1 CC, which declares punishable any sexual act with a minor below the age of 15. This provision covers any form of engagement in sexual acts or leading a minor to submit to such acts or to perform such acts. The age limit is a consequence of the assumption that the consent to sexual acts given by a person under 15 is not covered by the concept of sexual freedom since younger persons cannot freely dispose of this good due to their objective immaturity in this respect.[38]

There is however an ongoing discussion concerning sexual relations between a person under 15 and a slightly older partner, e.g., a 17-year-old, with the consent of the minor. According to M. Płatek, it is necessary to adopt in the CC a new 'ground excluding the unlawfulness of a prohibited act' (*kontratyp*) or to make such an act at least unpunishable when the age difference between the perpetrator and the victim does not exceed three to four years and the circumstances indicate that the victim's trust was not abused, which is not that exceptional considering German and Dutch legislation.[39]

2. Consciousness and mental health

Valid consent may also be given only with proper discernment, free from any factors that disturb the intellect or will of the victim[40]. Sexual penetration of a person who is unable for the above reasons to provide valid consent is considered a crime (Article 198 CC) separate from rape. The reason for the criminalization of this conduct is the victim's lack of capability to express valid consent and the offender's taking advantage of this situa-

38 Cf. Judgment of Supreme Court of 14 July 1988, II KR 163/88, OSNKW 1988, No. 11–12, Item 83. See also Jarosław Warylewski in: Andrzej Wąsek (ed) *Kodeks karny. Komentarz, Część szczególna, t. 1*, 2006, 917.

39 Monika Płatek, 'Pozorna ochrona dziecka przed wykorzystaniem seksualnym (po nowelizacji k.k.)' 2011 (2) *Państwo i Prawo* 3, 17.

40 Daniluk (note 35), 36.

tion.[41] However, if the perpetrator had caused the victim to enter such a state of incapacity, he will be convicted of rape (Article 197 § 1 and § 2 CC). In other words, in the case of Article 198 CC, the perpetrator merely finds the victim in a state of helplessness (which the perpetrator did not cause), whereas in the case of Article 197 § 1 and 2 CC, such state has been caused by the perpetrator.[42]

As mentioned in section A.III., Article 198 CC provides for two characteristics of the victim that constitute necessary elements of the offence: 1) helplessness (*bezradność*) and 2) inability to recognise the meaning of the act or to control her conduct.

A helpless person within the meaning of Article 198 CC has been defined in case law as "a person with such properties or in such a situation that deprives her of the ability to dispose of herself in the field of sexual freedom. Helplessness thus is not necessarily of a physical or physiological nature. It can be a disability, even a temporary physical weakness, but can also be an inability to cope with a given situation because of various objective as well as subjective reasons".[43] What matters is that the victim is incapable of resisting the perpetrator's behaviour[44] even though her helplessness does not necessarily involve a loss of consciousness.[45]

The state of helplessness is treated in Polish law as complementing the lack of the victim's ability to recognise the meaning of the act or to control her conduct[46]. This expression ("lack of victim's ability…") must be considered in the light of Article 31 § 1 CC that discusses the state of insanity (*niepoczytalność*) of the perpetrator of a crime.[47]. It has been acknowledged that the mental deficiency and the mental illness of the victim must be determined by two experts of psychiatry.[48]

41 Judgment of Court of Appeal in Katowice of 26 August 2010, II Aka 213/10, Lex 686856.
42 Judgment of Court of Appeal in Łódź of 11 December 2012, II Aka 256/12, Lex 1353514.
43 Judgment of Supreme Court of 20 April 2006, IV KK 41/06, Lex 183010.
44 Judgment of Supreme Court of 25 November 2009, V KK 271/09, Lex 553764.
45 Decision of Supreme Court of 20 April 2016, III KK 489/15, Lex 2044482.
46 Decision of Supreme Court of 2 June 2015, V KK 36/15, LEX 1750151.
47 Decision of Supreme Court of 19 January 2002, I KZP 30/01, OSNKW 2002, Nr 3–4, poz. 16.
48 Decision of Supreme Court of 16 December 1974, Z 41/74, OSNKW 1975, Nr 3–4, poz. 48; Judgment of Supreme Court of 16 October 2012, V KK 262/12, LEX 1226785.

3. Lack of intoxication

Intoxication should be discussed separately, although Polish law regards it as a case of helplessness falling under Article 198 CC[49]. It is currently uncontested that a state of helplessness may result from alcohol intoxication or from the use of drugs.[50] If a person is unable to resist the perpetrator due to her intoxication, she must be considered to be helpless.[51] A state of intoxication therefore makes a victim unable to give valid consent to sexual acts. Importantly, it makes no difference if the victim brought herself to the state of intoxication willingly and consciously.[52]. There are however voices in Polish legal doctrine that dissent from this view. J. Warylewski claimed (in 2020!) that "it is of vital importance whether the person consuming the alcohol foresees not only the consequences in terms of exclusion or limitation of her capacity for understanding but also whether she consumes the alcohol in circumstances which – even hypothetically – could lead to sexual intercourse or other sexual acts. If she does so in the company of others (regardless of their sex), she in principle accepts all the consequences, including sexual intercourse".[53]

II. Ways of giving valid consent

Although lack consent is not mentioned in the definition of rape, giving valid consent is generally understood as negating the existence of rape. The court is therefore obliged in every case to determine whether valid consent had been given.[54] The way in which valid consent can be given thus plays a role in examining liability for rape.

Still, not much has been written on the form and validity of consent in cases of sexual offences beyond the form of the resistance (see below). Without any reference to sexual assault offences, it is accepted that the victim's consent must be externalised.[55] The law does not, however, pro-

49 See 2.3. below.
50 Decision of Supreme Court of 20 April 2016, III KK 489/15, LEX 2044482.
51 Judgment of Supreme Court of 25 November 2009, V KK 271/09, Lex 553764.
52 Judgment of Supreme Court of 16 March 2006, IV KK 427/05, LEX 190765.
53 Jarosław Warylewski, 'Komentarz do art. 198, nb. 40' in Ryszard Stefański (ed), *Kodeks karny. Komentarz,* 2021.
54 Judgment of Supreme Court of 8 September 2005, OSNwSK 2005, Nr 1, poz. 1617.
55 Daniluk (note 35), 40 and quoted literature.

vide for any formal requirements for consent; it is assumed therefore that consent may be given implicitly as well as explicitly.[56] Again, it must be emphasized that the way in which Article 197 CC has been written suggests that a lack of consent does not automatically make the person responsible for committing any sexual offence. Therefore, according to Polish law, the lack of expressing a positive decision to engage in sexual intercourse or even mere indifference should not be equated with lack of consent.[57] In this context, "lack of consent" should rather be regarded as a negative decision, which makes the sexual act illegal. This suggests that silence may indeed be considered a valid way of expressing implied consent under Polish law.

In a controversial judgment, the Court of Appeal in Cracow stated that if the victim gives consent but does so reluctantly, the ensuing sexual penetration cannot be considered rape.[58] One author claims that even a consent expressed with "disgust" may be considered as valid, since what counts is the content of the victim's decision, not her emotions.[59]

It is widely agreed that marital rape is a crime.[60] The fact that a woman is married thus does not imply a generalized consent to sexual intercourse with her husband. Yet some scholars argue that because of the bond that exists between spouses (*debitum carnale*), if one of them is drunk or in another way helpless an implied consent to sexual intercourse nevertheless persists.[61] As a result, the other spouse may be held responsible for taking advantage of the helpless spouse only if the latter objects to the intercourse. This view is doubtful since a drunken, unconscious spouse is unable to express valid consent.[62]

The definitional association of force with physical force and coercion in the case of rape as defined in Article 197 § 1 and § 2 CC generates the requirement of some form of *resistance* (*opór*) on the victim's part which

56 Ibid., 41.
57 Szczucki (note 27), 47.
58 Judgment of Court of Appeal in Cracow of 23 March 1994, II Akr 11/94, KZS 1994, z. 4, poz. 18.
59 Natalia Kłączyńska, 'Komentarz do art. 197, nb. 11' in Jacek Giezek (ed), *Kodeks karny. Część szczególna. Komentarz*, 2014.
60 See e.g. Radosław Krajewski, *Prawa i obowiązki seksualne małżonków. Studium prawne nad normą i patologią zachowań*, 2009, 233; Aneta Michalska-Warias, *Zgwałcenie w małżeństwie. Studium prawnokarne i kryminologiczne*, 2016.
61 Stanisław Śliwiński, *Prawo karne materialne. Część szczególna*, Nakład Gebethnera i Wolffa 1948, 121. See also Konrad Lipiński, 'Komentarz do art. 197, nb. 13' in Giezek (note 20).
62 See more in section C.I.2 above.

should be externalised and visible to the perpetrator.[63] However, "the victim's resistance does not have to take a physical form and, depending on the situation, its manifestation, perceived by the perpetrator, may come down to other forms, e.g., crying, oral statements, jerking, or attempts to call for help".[64] Moreover, the absence of body injuries, including the lack of genital abrasions, does not automatically imply that there was no resistance.[65] It is also unnecessary to express resistance in all possible forms, nor is it necessary to resist throughout the sexual act. On the contrary, it is sufficient if the victim remains passive after her initial resistance was broken once.[66] The victim's resistance must, however, be real. Pretended or unreal resistance (*opór pozorny* or *opór nierzeczywisty*), traditionally called *vis haud ingrata*, is not enough for a rape conviction. If an act of resistance is part of a scenario agreed upon and accepted by the persons concerned, or if it belongs to a specific "love game" characteristic of a given culture or community, even if force is used there is no "real resistance".[67]

III. Grounds for negating validity of formal consent

According to Article 197 § 1 CC, rape means subjecting another person to sexual penetration using force, unlawful threats, or deceit. What may be called "grounds for negating validity of formal consent" are thus included in the definition of rape.

Force (*przemoc*) is understood as a physical impact (physical force) intended to break the victim's resistance and used in such a way that it creates coercion.[68] The physical force must have a certain degree of intensity. The Supreme Court has defined force as the objective ability to cause

63 Konrad Lipiński, 'Komentarz do art. 197, nb. 25' in Giezek (note 20).
64 Judgment of Court of Appeal in Katowice of 8 April 2009, II AKa 72/09, LEX No. 519644.
65 Judgment of Court of Appeal in Katowice of 26 October 2017, II AKa 430/17, LEX no. 2461349.
66 Decision of Supreme Court of 18 February 2014, II KK 19/14, LEX No. 1458630; Marek Bielski, 'Komentarz do art. 197, nb. 43' in Włodzimierz Wróbel and Andrzej Zoll (eds), *Kodeks karny. Część szczególna. vol. II, part I*, Wolters Kluwer online 2017.
67 Jarosław Warylewski, 'Komentarz do art. 197, nb. 13' in Stefański (note 53).
68 Judgment of Supreme Court of 14 June 2006, WA 19/06, OSNwSK 2006, nr 1, poz. 1243.

coercion in a way uncomfortable to the victim[69]. The intensity of force is measured in the light of expected reactions of an average person. However, it is unnecessary to evaluate how much force was used – using enough force to create a sense of coercion in a victim is sufficient.[70] Physical force used to influence the victim's decision-making process can be used on a person or an object[71]. Importantly, the association of force with physical force and coercion creates the requirement of some form of resistance by the victim.[72]

A person also commits rape if he makes a threat that he will use force (unlawful threats, *groźba bezprawna*). Polish criminal law contains various definitions of threats, namely the so-called criminal threat (*groźba karalna*),[73] the threat of initiating criminal or other proceedings in which an administrative penalty may be imposed, and the threat of making a statement that contains an insult to the honour of the threatened person or a person very close to him or her (Article 115 § 12 CC). An unlawful threat in the context of rape must bring about fear and feelings of helplessness in the victim. Even if the victim, after having been threatened, formally expresses consent or does not object to the sexual act, her consent is legally irrelevant.[74] The Supreme Court has indicated in many judgments that the seriousness and reality of the threat being carried out must be assessed from the victim's point of view.[75] A relevant threat thus exists even if the perpetrator does not intend to carry it out.

The third possible way by which rape can be committed is deceit (*podstęp*). Deceit consists in a misrepresentation or in exploitation of the victim's error in order to engage in sexual contact. Under Polish criminal law, the concept of deceit is understood broadly, including situations where 1) the victim makes an independent decision about entering into

---

69 Judgment of Supreme Court of 14 June 2006, WA 19/06, OSNwSK 2006, nr 1, poz. 1243.

70 Judgment of Supreme Court of 8 March1973, III KR 307/72, Lex 21556.

71 Szczucki (note 27), 45–46.

72 See section B.III above.

73 'Criminal threat' is a separate type of crime. Article 190 § 1 CC provides that "Whoever threatens another person with a crime to her detriment or to the detriment of a person closest to her, if the threat makes the threatened person reasonably afraid that it will be carried out, shall be subject to a fine, penalty of restriction of liberty or imprisonment for up to 2 years".

74 Szczucki (note 27), 47.

75 Judgment of Supreme Court of 17 April 1997, II KKN 171/96, Lex 30361; Judgment of Supreme Court of 26 January 1973, III KR 284/72, Lex 21544; Judgment of Supreme Court of 9 December 2002, IV KKN 508/99, Lex 75496.

sexual activity which is based on erroneous premises, or 2) the victim is deprived of the possibility to give valid consent because of the state in which she is due to the perpetrator's actions.[76] Examples of the latter form of deceit are giving the victim a "rape pill", tying the victim up under a false pretext, or causing a state of numbness of the victim. Importantly, if the perpetrator only takes advantage of the helplessness of another person while she is unconscious (as a result of fainting or epilepsy), asleep, under hypnosis, or drunk, sexual contact with the victim falls under Article 198 CC[77], which carries a lesser penalty. It is thus crucial who has caused the victim's state: If the perpetrator caused the disturbance of the victim's motivational processes, he is punishable for rape under Article 197 § 1 or 2 CC.

A difficult problem in this context arises where the perpetrator provides alcohol for the victim. In a 1974 judgment, the Supreme Court stated that "it does not constitute such deception to induce an adult woman who knows the effects of alcohol to drink alcoholic beverages, even if the inducer intended to have sexual intercourse with the intoxicated woman".[78] In that case the victim, a 19-year-old woman, had been drinking alcohol with two men and after consuming a considerable amount of alcohol lost consciousness and was raped by both of them.[79] The Supreme Court decided that there was no sign of deception and changed the legal qualification of the first-instance judgment from rape to taking advantage of the helplessness of another person – a crime carrying a lesser penalty (Article 169 CC of 1969, analogous to Article 198 CC).[80]

---

76 Judgment of Supreme Court of 27 May 1985, II KR 86/85, Lex 17642. See also Jarosław Warylewski, 'Komentarz do art. 197, nb. 39–42' in Stefański (note 53); Konrad Lipiński, 'Komentarz do art. 197, nb. 29' in Giezek (note 20).

77 Judgment of Supreme Court of 2 May 1975, IV KR 361/74, Lex 21676 and Judgment of Supreme Court of 16 March 2006, IV KK 427/05, Lex 180765.

78 Judgment of Supreme Court of 26 September 1974, III KR 105/74, OSNKW 1974, nr 12, poz. 229.

79 According to the Supreme Court, it is crucial whether the person is aware of how alcohol works. In another case involving a 15-year-old girl it was accepted that if a person is unaware of the effect of alcohol the perpetrator will be responsible for rape under Article 197 § 1 CC (see Judgment of Supreme Court of 8 July 1983, IV KR 124/83, OSNKW 1984, nr 1, poz. 13).

80 This perspective is accepted by the majority of commentators. See, e.g., Konrad Lipiński, 'Komentarz do art. 197, nb. 33' in Giezek (note. 20); Jarosław Warylewski, 'Komentarz do art. 197, nb. 51' in Stefański (note 53). For an opinion disagreeing at least in part, see Natalia Kłączyńska, 'Komentarz do art. 197, nb. 15' in Giezek (note 59). See also, more broadly, Hubert Myśliwiec, 'Podstęp jako znamię przestępstwa zgwałcenia', 11 *Prokuratura i Prawo* 64, 74–77 (2012).

Other examples of rape by deceit are situations in which a gynaecologist subjects a patient to sexual intercourse under the pretext of gynaecological examinations, or a man has sexual intercourse at night with his twin brother's wife, who obviously is mistaken about her partner's identity.[81] However, a false promise of marriage or a false promise of material compensation for engaging in a sexual act have not been considered deception.[82]

C. *Reach of consent*

I. *Timing and finality of consent*

It is an obligation of the court to determine whether consent to sexual acts was given, when it was given, and what was its scope.[83] With regard to timing, consent to any sexual act must be given before the actor starts to perform an act that would be criminal unless covered by consent.[84] Consent given after the act has occurred does not change its criminal character.[85] It is also generally accepted that consent may be withdrawn.[86] However, withdrawal is regarded as valid only if undertaken before the act to which the victim had consented.[87] But if a woman, after consenting to sexual intercourse, changes her mind during the act and objects to the continuation of the intercourse, that is considered a valid withdrawal of consent. If the man in that situation uses force, threats of force, or deceit and thereby continues the sexual act, his act qualifies as rape. Withdrawal of consent in such a situation must however be clear and explicit, leaving no doubt to the other person.

81 Szczucki (note 27), 49.
82 Judgment of Supreme Court of 26 September 1974, III KR 105/74, OSNKW 1974, no. 12, poz. 229.
83 Judgment of Supreme Court of 8 September 2005, II KK 504/04, Palestra 2007, nos. 11–12, poz. 308.
84 Daniluk (note 35), 38 and quoted literature.
85 Ibid.
86 Seweryn Cieślik, 'Zgoda dysponenta dobra prawnego na wkroczenie w sferę wolności seksualnej (analiza prawnoporównawcza modelu przyjętego na gruncie polskiego Kodeksu karnego oraz koncepcji Yes Means Yes)', 11 *Czasopismo Prawa Karnego i Nauk Penalnych*, 12 (2018).
87 Daniluk (note 35), 39.

II. Scope of consent

According to case law, an attack on a person's sexual autonomy occurs if the actor engages in sexual acts in a way not consented by the victim.[88]. The scope of protected sexual autonomy extends to the place, time, and form of sexual acts[89]

There is no general answer in the law, case law and literature as to the extension of a general consent to sexual activities. The court must determine on a case-by-case basis how far the victim's consent to engage in sexual relations extended.[90] In most cases, the victim's resistance to a sexual act will be determinative. If the defendant then used force or threats of force to overcome her resistance and perform a new sexual act (e.g., oral or anal penetration), he is likely to be convicted of rape although the victim had earlier consented to vaginal intercourse.[91]

There is no discussion in Polish legal literature concerning the use and removal of a condom as a form of rape. It may however be argued that if the person consents to sexual intercourse only with the use of a condom and then during sexual intercourse the perpetrator secretly takes off the condom, such behaviour can constitute rape. Since rape can be committed by deceit, the act of lying about condom use falls in the scope of Article 197 § 1 CC. Given the lack of relevant case law, it is however debatable whether stealthing would be successfully prosecuted as a form of rape by deceit.

88 Judgment of Supreme Court of 9 April 2001, II KKN 349/98, OSNKW 2001, nos. 7–8, poz. 53 ("The fact that the victim accepted the sexual act, or even wanted it, does not at all prejudge her consent to every form of it").

89 Leon Peiper, *Komentarz do kodeksu karnego: prawa o wykroczeniach i przepisów wprowadzających wraz z niektórymi ustawami dodatkowemi i wzorami orzeczeń do prawa o wykroczeniach*, Leon Frommer1933, 423 quoted after Marek Bielski, 'Komentarz do rozdziału XXV, nb. 8' in Włodzimierz Wróbel and Andrzej Zoll (eds), *Kodeks karny. Część szczególna. vol. II, part I* (Wolters Kluwer online 2017).

90 Judgment of Supreme Court of 8 September 2005, II KK 504/04, Palestra 2007, nos. 11–12, poz. 308.

91 Judgment of Supreme Court of 9 April 2001, II KKN 349/98, OSNKW 2001, nos. 7–8, poz. 53; Jarosław Warylewski, 'Komentarz do art. 198, nb. 7' in Stefański (note 53).

D. Intent as to lack of consent

To be found guilty of rape, the perpetrator must have been aware of the lack of consent. Any expression of non-consent is assessed objectively, not based on how the perpetrator interpreted the victim's conduct. According to the literature, it is theoretically possible that a person is mistaken as to the other person's lack of consent, for example, if a man mistakenly regards the woman's resistance as a form of foreplay. Article 28 CC provides that a justified error as to the circumstances that constitute an element of a prohibited act excludes criminal liability. Such an error must, however, be assessed very carefully, keeping in mind the context and the defendant's cultural background.[92]

There are no explicit evidentiary presumptions regarding consent in sexual offences in Polish criminal law. Generally, non-consent may be assumed. Some authors, however, claim that a person engaging in sexual intercourse with his or her spouse does not commit an offence, even where the spouse is helpless or mentally ill, claiming that married persons are presumed to consent to sex with their spouse. Hence, where the spouse does not object, according to these authors the offence defined in Article 198 CC is not committed.[93] The claimed presumption is based on Article 23 of the Family and Guardianship Code, which provides that spouses are obliged to maintain a sexual relationship. This view is subject to serious objections, however, since a presumption of a general consent to sex does not necessarily follow from Article 23 of the Family and Guardianship Code. It can well be argued that the marital obligation to engage in sexual relations is in every instance conditioned on consent.

The notion that a legally insane person can give valid consent to sexual acts is very problematic. But if such a person can enter into a marriage and the spouses are not only entitled but also obliged to engage in sexual relations, it is not possible to conclude that each act of sexual intercourse in such a marriage constitutes an offence under Article 198 CC. Therefore, each case needs to be assessed individually considering its specific circumstances, especially since sexual offences involving coercion require intention.

---

92 Marek Bielski, 'Komentarz do art. 197, t. 44' in Wróbel and Zoll (note 17).

93 Marek Bielski, 'Komentarz do art. 198, t. 7' in Wróbel and Zoll (note 17). See also the recapitulation of views expressed in the legal doctrine in: Krajewski (note 60), part II.3.2.

E. No requirement of lack of consent

In offences defined in Articles 198, 199 and 200 § 1 CC (see section A.III), the consent of the victim (if given) is irrelevant. Her factual consent may, however, be taken into consideration by the court in assessing the blameworthiness of the perpetrator's act. The situation where an adult sexually abuses a young child is radically different from the situation of a 17-year-old teenager having consensual sexual intercourse with a girl who is almost 15 years old.[94] In the offence defined in Article 199 CC, the situation and the pressure from the perpetrator makes the victim's factual consent legally irrelevant.[95]

F. Sexual offences and penal populism

Sexual offences is one of the areas where the influence of penal populism on Polish law is clearly visible.[96] M. Filar has shown that the waves of penal populism regarding sexual offences in 2005 and 2009 led to a significant increase in the statutory penalties for rape and sexual offences committed against minors, the elimination of the statute of limitations in cases where the offender is sentenced to imprisonment without probation for a crime against sexual freedom and decency if the victim was under 15 years of age, and to expanding the applicability of security measures (*środki zabezpieczające*) for sexual offenders, although there were no justified reasons stemming from an analysis of tendencies in sexual offences to introduce such drastic changes.[97]

None of these changes were introduced after a debate involving experts. Unfortunately, it does not seem that the current governing majority intends to change its attitude towards criminal policy regarding sexual

94 Marek Mozgawa, 'Komentarz do art. 197, t. 2' in Marek Mozgawa (ed), *Kodeks karny. Komentarz aktualizowany*, 2021.

95 Marek Mozgawa, 'Komentarz do art. 199, t. 3' in Mozgawa (note 94).

96 For a general accounts of Polish penal populism and the methods applied, see, e.g., Karolina Kremens, 'The new wave of penal populism from a Polish perspective' in: Elisa Hoven and Michael Kubiciel (eds), *Zukunftsperspektiven des Strafrechts: Symposium zum 70. Geburtstag von Thomas Weigend*, 2020, 123–136, Piotr Chlebowicz, 'Przejawy populizmu penalnego w polskiej polityce kryminalnej' 9 *Studia Prawnoustrojowe* 497 (2009).

97 Marian Filar, 'Kiedy ofiarą zgwałcenia pada zdrowy rozsądek' in Marek Mozgawa (ed), *Przestępstwo zgwałcenia*, 2012, 61–67.

offences. At the beginning of 2021, the Polish Ombudsman addressed the Minister of Justice, asking him to consider a change in the definition of rape, so that sexual activity without consent would qualify as such. The request was turned down, but the Minister of Justice concluded that he intended "to significantly increase the statutory threat of punishment also in the case of offences against sexual freedom and decency, which will be the subject of a separate legislative initiative".[98] This, unfortunately, shows a logic of penal populism that assumes that increasing statutory penalties is a universal measure for improving modern societies. Sadly, this attitude also blocks any attempt to commence a reasonable discussion on crucial problems regarding the criminalisation of sexual offences, their social background and their implications – issues that have been debated for a considerable time in many other European states. In Poland, it is time to rethink the way rape is perceived and regulated by law.

98 Łukasz Starzewski, 'Nie będzie zmiany prawa co do zgwałcenia. MS odpowiada Rzecznikowi Praw Obywatelskich' <https://bip.brpo.gov.pl/pl/content/nie-bedzie-zmiany-prawa-w-sprawie-zgwalcenia-ms-odpowiada-rpo> accessed 9 January 2022.