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CONSENT TO SEXUAL ACTIVITY IN ACCORDANCE WITH ARTICLE 197 OF THE CRIMINAL CODE

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Abstract
In the 21st century, legislation in many jurisdictions is moving away from defining the crime of rape based on the use of coercion and instead focusing on the violation of the injured person's will. This analytical article aims to highlight changes in the understanding of the features of a crime under Article 197 of the Criminal Code, aligning it with the current societal awareness and views. This issue is relatively absent in scientific discourse, likely because phenomena such as stealthing have only recently received attention. The authors posit that, given the current interpretation of the features of the crime of rape in both doctrine and case law, the present legal framework satisfies the criteria of Article 36 of the Istanbul Convention. However, the doctrine, jurisprudence, and potentially the legislator face the challenge of adapting the crime of rape to contemporary needs. The conclusions drawn from the conducted research reveal problems that are only briefly touched upon in criminal law literature.

Keywords: rape, consent, criminal law, sexual crimes, stealthing

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INTRODUCTION

Article 36 of the so-called 'Istanbul Convention'[1] requires States Parties to criminalise vaginal, anal, or oral penetration of another person's body with any part of the body or object, as well as other acts of a sexual nature towards another person without their consent. This also includes causing another person, without their consent, to engage in acts of a sexual nature with a third party. According to paragraph 2 of this article, consent must be given voluntarily as an expression of free will, which must be assessed in light of the circumstances. This regulation is highly specific, which may be seen as advantageous, as it clearly demonstrates the complexity of the current approach to protecting sexual freedom.

It seems reasonable to conclude that the succinct formulation of the elements of the offences set out in Articles 197, 198, and 199 of the Criminal Code (CC), as enacted in 1997, and their interpretation, do not meet today's needs. Subsequent amendments to the content of these articles have not addressed this issue. An analysis of the relevant literature indicates a dualistic approach to the problem – whether or not sexual activities were coerced in some way. What is often overlooked is that consent can be limited to specific forms of sexual contact and can be withdrawn at any point. It should also be noted that current Polish criminal law does not adequately protect sexual freedom from certain methods of coercing sexual activity. For example, one can mention inducement to perform or submit to sexual activity through threats of committing a misdemeanour or initiating disciplinary proceedings.

The introduction of a new definition of rape, such as the one proposed in the Istanbul Convention, will undoubtedly lead to even greater evidentiary difficulties than those involved in determining the manner or circumstances under which sexual activity was undertaken without the victim's consent. It is reasonable to assume that, following the change in the definition of rape, there will be allegations of this offence even when the perpetrator has not used violence, threats, or deception.[2] This is, after all, the primary purpose of this change. Consequently, new situations are likely to arise that are not covered by the current legal framework, where the issue will not necessarily be establishing the facts but rather determining whether, in a particular case, the behaviour of one of the parties could be interpreted as consent to sexual contact. This will, in turn, require establishing the broader social context in which they operate. It is also noted that currently, the victim is often forced to recount the incident in a humiliating manner and demonstrate that they attempted to stop the perpetrator. As a result, the proportion of cases where evidence of the offence relies on physical traces on the victim's body or biological traces of the perpetrator is likely to decrease.

However, the aforementioned limitations in the scope of protection of sexual freedom justify a closer examination of the issue of consent to sexual intercourse

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[1] Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210).

[2] It is worth adding that the Istanbul Convention, in Article 36, requires that intentional sexual acts simply without the consent of another person be subject to criminal liability. In contrast, the draft amendment to Article 197 of the Criminal Code, which has been submitted to the Sejm (Draft 209), contains a requirement for informed and voluntary consent.

or other sexual acts in light of current legislation. Consent to sexual activities has historically been of secondary importance in the analysis of the crime of rape, due to the way the elements are framed. In cases involving unlawful threats or deception, the lack of consent is clear. In contrast, when violence is used by the perpetrator, commentators often focus on the victim's resistance to this violence as a manifestation of non-consent, which can lead to inconsistencies in the interpretation of the elements of the offence.

CAUSING SEXUAL ACTIVITY BY VIOLENCE OR THREAT

Violation of sexual freedom under Article 197 CC consists in causing a person to perform or submit to a sexual act against the will of the victim, or in a situation where a decision of the will is impossible due to the actions of the perpetrator. The former situation primarily occurs when violence or unlawful threats are used. In both cases, it can be inferred that the legislator expects a certain degree of determination from the victim in order to protect their freedom. This contrasts with offences such as performing a medical procedure without the patient's consent (Article 192 CC) or violations of domestic trespass (Article 193 CC), where it is sufficient that the perpetrator does not comply with the request of the authorised person. An analysis of this issue can be based on a case reported in the media, in which the court found no rape because the woman did not scream during the incident.

A case with the following course of events may serve as a starting point for our analysis: a woman[3] visited her family for Christmas. Due to limited sleeping arrangements, guests had to share beds, with several people in one bed. The woman in question initially slept with her cousins, but finding it uncomfortable, she moved to a bed where another distant relative was supposed to sleep. This relative returned drunk at around 3 a.m., after which sexual activities occurred. The Regional Court found that rape had occurred because the victim pushed the perpetrator away, tried to move away, cried, and expressed that she did not want it. However, the Supreme Court ruled that rape had not occurred, reasoning that the victim's actions – such as pushing the accused's hands away when he leaned over her, crying, and telling him to leave her – did not demonstrate sufficient resistance when compared to the accused's actions, which included turning the victim, extending her legs, removing his underwear, and then the victim's underwear, and engaging in sexual acts.[4] This view expressed by the Supreme Court provides a basis for analysing certain elements of the crime of rape. In assessing the Court's position, it is necessary to answer the question: what form and intensity must resistance to violence take for the perpetrator to be considered to have brought about sexual activity by violence?

Violence as an element of the crime of rape is defined by S. Hypś as the use of physical force against the victim, a person close to the victim, or a thing, in order to

[3] The victim was 14 years old at the time of the act, but this is irrelevant to the discussed aspects of the offence under Article 197 CC.

[4] Decision of the Supreme Court of 5 October 2021 (ref. no. V KK 316/21), http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/V%20KK%20316-21.pdf [accessed on 14 July 2023].

prevent or break resistance. This resistance must be real and comprehensible to the perpetrator.[5] It may be added that, according to V. Konarska-Wrzosek[6], K. Nazar, and J. Warylewski,[7] violence may also be used against someone other than the victim or the person closest to the victim, distinguishing these acts from the use of unlawful threats.

According to M. Berent and M. Filar, in cases involving violence, the victim's resistance is fundamentally important, and it need not always be physical; for example, it can be expressed through crying, screaming, or loud calls for help. Resistance should be viewed as the externalisation of disagreement. At the same time, it is not required of the victim to exhaust all possible means of resistance.[8] Based on this position, one can challenge the equivalence of the use of violence with a lack of consent. For instance, if sexual activities (e.g., touching of the breasts) occur while the other party is completely physically passive but verbally indicates non-consent, can it still be considered that the sexual activity was brought about by violence? On the other hand, this externalised non-consent must be sufficiently intense; simply expressing an objection is not enough – it must manifest through actions such as screaming or crying.

M. Budyn-Kulik and M. Kulik agree with M. Filar's view[9] that one cannot speak of violence if the victim does not resist, and this resistance does not necessarily have to be physical.[10]

Taking the above into account, it should be stated that the definition of the elements of the offence under Article 197 CC departs from the linguistic wording of this provision. Since violence is physical force used to overcome resistance, and resistance is understood as an unequivocal expression of opposition to the behaviour of the perpetrator, including non-verbal expressions, there is a certain contradiction. How can resistance occurring in the form of a loud cry for help be broken by force? If the perpetrator does not, in such a situation, block the victim's mouth or otherwise force them to stop screaming, would that not constitute rape? It is difficult to imagine breaking through resistance by physical force when the resistance takes the form of crying, especially when the perpetrator is committing another sexual act. It is unreasonable to consider that mere touching of intimate parts of the victim's body, in the presence of the victim's physical passivity (e.g., no pushing away of the perpetrator or similar behaviour), constitutes the use of physical force to prevent or break resistance. In the absence of physical resistance by the victim, there is no use of violence by the perpetrator, since, as A. Marek states, violence involves acting

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[5] Hypś, S., 'Przestępstwa przeciwko wolności seksualnej i obyczajności', in: Grześkowiak, A. (ed.), *Prawo karne*, Warszawa, 2009, p. 317.

[6] Konarska-Wrzosek, V., in: Konarska-Wrzosek, V. (ed.), *Kodeks Karny. Komentarz*, Warszawa, 2018, p. 942.

[7] Nazar, K., Warylewski, J., in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 1369.

[8] Berent, M., Filar, M., in: Filar, M. (ed.), *Kodeks Karny. Komentarz*, Warszawa, 2015, pp. 1141–1142.

[9] Filar, M., *Przestępstwo zgwałcenia w polskim prawie karnym*, Warszawa–Poznań, 1974, p. 93.

[10] Budyn-Kulik, M., Kulik, M., in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny. Komentarz*, Warszawa, 2013, p. 605.

by physical means to prevent or break the resistance of the victim.[11] It is also worth quoting the position of the Supreme Court: violence is 'a broadly defined physical action directed (…) against the victim himself, which forces him to submit to the will of the perpetrator and to behave in a certain way'.[12] It follows that there must be two stages in the commission of the crime of rape: first, the perpetrator must use violence, and then the sexual act must occur.

Difficulties arise in understanding the view expressed in the doctrine that 'It is therefore sufficient for the victim to externalise the lack of consent to sexual intercourse by his or her action, to put up real resistance to the perpetrator, and for the perpetrator to break it'[13]. Does this mean that it is necessary both to express the lack of consent and to offer physical resistance to the perpetrator, or is the mere externalisation of the lack of consent already considered such resistance? However, in the case of resistance that is not physical, it is difficult to refer to it as being broken; the perpetrator ignores such resistance rather than breaking it.

Regarding Article 197 CC, M. Budyn-Kulik and M. Kulik state that 'Thus, the consent of the victim excludes the unlawfulness of the perpetrator's behaviour; his/her act does not constitute a crime.' It is difficult to agree with this statement in the context presented. Indeed, sexual contacts are originally legal and not merely legalised by the decision of the consenting person, a point highlighted by A. Michalska-Warias. Giving consent to sexual contact results in the absence of the crime of rape, but this consent cannot be equated with the countertype of the victim's consent.[14] In such a case, the elements of the criminal act are simply not fulfilled. J. Warylewski also expresses this position, stating that a necessary condition for committing an offence under Article 197 CC is the lack of legally effective consent from the victim. This lack of consent may involve the expression of a negative decision or the absence of a positive decision. This author unequivocally defined the lack of consent of the victim as an unspoken element of the crime of rape.[15] M. Budyn-Kulik and M. Kulik agree with this view, while stressing that the absence of positively expressed consent may mislead the perpetrator, which should be considered in light of Article 28 CC.[16]

An example of this is when the victim is unable to resist the sexual assault due to paralysing fear ('frozen fear'). The lack of objection by the victim will inevitably be interpreted by the perpetrator as implicit consent to the sexual activity. Therefore, it is difficult to agree with the aforementioned position of J. Warylewski that rape also occurs in the case of a 'lack of positive decision' by the victim. The absence of a positive decision, which is not accompanied by manifested resistance of a certain

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[11] Marek, A., *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa, 1997, p. 449.

[12] Judgment of the Supreme Court of 12 August 1974, Rw 403/74, OSNKW 1974, No. 11, item 204.

[13] Nazar, K., Warylewski, K., in: *Kodeks karny*…, op. cit., p. 1368.

[14] Michalska-Warias, A., *Zgwałcenie w małżeństwie. Studium prawnokarne i kryminologiczne*, Warszawa, 2016, pp. 153–154.

[15] Warylewski, J., in Wąsek, A. (ed.), *Kodeks Karny. Część szczególna. Tom I. Komentarz do artykułów 117 – 221*, Warszawa, 2006, p. 809.

[16] Budyn-Kulik, M., Kulik, M., in: *Kodeks karny*…, op. cit., p. 605.

intensity, even when the victim internally did not consent to the sexual acts, does not fall within the scope of criminalisation set by Article 197 CC.

M. Rodzynkiewicz is of the opinion that resistance is an expression of lack of consent to sexual activity.[17] It should be noted that examples of resistance other than physical, such as screaming or crying, as cited in the literature, indicate that this expression of non-consent must assume a certain degree of intensity. This view is also reflected in jurisprudence; the Court of Appeal in Gdańsk rightly noted in this context: 'It is impossible to agree that the mere blocking of a car door to prevent the wronged woman from exiting through it, or disregarding her verbal opposition, can prove the use of violence by the accused in relation to the crime of rape,' and further stated: 'The complainant rightly emphasises – following the Supreme Court (V KKN 95/99) – that possible forms of resistance on the part of the victim of the crime of rape may also be, for example, loud calls for help, shouting, crying (…); however, the point is that in the circumstances of the present case such behaviour did not take place.'[18]

The above review of the views presented in doctrine and jurisprudence leads to the thesis that the crime of rape, in the form of the use of violence, is understood as bringing another person to engage in sexual activity despite that person's objection.

SCOPE OF CONSENT, IF GIVEN

While in cases involving violence, the victim has the possibility to object to participating in the sexual activity, in cases involving deception, this possibility is intrinsically excluded. The doctrine distinguishes between two situations where the perpetrator is considered to have used deception: misleading or exploiting the victim's mistake regarding the prerequisites for the correct decision-making process concerning sexual involvement (narrow approach), and leading the victim, by misleading or exploiting their mistake, to a state in which they are unable to make a free decision on the matter due to the deactivation of the volitional-motor apparatus (broad approach).[19] There are also considerations as to how this misrepresentation may occur.

The doctrine commonly accepts that in the first situation – misrepresentation or exploitation of a mistake as to the motivational premises of sexual activities – one can distinguish between material mistakes, the induction or exploitation of which determines the fulfilment of the elements of the offences under Article 197 CC, and incidental mistakes, which are of no fundamental importance for the motivational premises.[20] Taking the object of protection, which is sexual freedom, as the starting

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[17] Rodzynkiewicz, M., in: Zoll, A. (ed.), *Kodeks Karny. Część szczególna. Komentarz. Tom II. Komentarz do art. 117 277 k.k.*, Kraków, 2006, p. 605.

[18] Judgment of the Court of Appeal in Gdańsk of 23 June 2022, II AKa 152/22, LEX No. 3436633.

[19] Budyn-Kulik, M., Kulik, M., in: *Kodeks Karny*…, op. cit., pp. 610–611.

[20] Hypś, S., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, 7th ed., Warszawa, 2021, Article 197, n. 20; Berent, M., Filar, M., in: *Kodeks Karny*…, op. cit., Article 197, nt. 15.

point, M. Filar rightly argued that there can be no question of deception 'where the victim consciously agrees to the intercourse, remaining only in a mistake as to the incidental motives of this decision'.[21] Collateral circumstances, such as the partner's age, property status, marital status, confessions of love, declarations of marriage, or promises to pay, are often cited.[22] Recently, M. Grudecki attempted to question this well-established approach in the doctrine, indicating that the possible reprehensibility of motives considered as incidental cannot deprive criminal protection in cases of engaging in unwanted sexual acts.[23] In his argument, the author provided the following examples: a promise of marriage, a promise of payment for sexual intercourse, a false declaration of love, and the removal of a condom by a man during sexual intercourse to which the woman consented only on the condition that he used protection.[24] It is difficult to agree with the author that the first three cases involve 'unwanted sexual activities'; in each instance, both parties wish to engage sexually, there is no confusion about the partner, and the unfulfilled promises occur after the engagement and do not influence it. The protection of sexual freedom under criminal law cannot extend to the possible expected benefits of voluntary sexual engagement. The analogies made by the aforementioned author to the crime of fraud are inaccurate, partly due to the differing objects of protection under Article 286 CC and Article 197 CC. In the case of fraud, both the purpose of the perpetrator's action and its negative consequences are clearly defined. In the crime of rape, neither the purpose of the perpetrator's action nor the reasons for the lack of consent of the victim are relevant. It is also irrelevant why this consent was given, provided it included the nature of the act and the partner, as Article 197 CC does not address these issues. In contrast, the fourth situation differs substantially from the previous three because it involves a mistake not about the motivation but about the form of the sexual act.

This phenomenon, referred to as 'stealthing', has only recently become a subject of consideration in Polish criminal law literature. It involves the removal of a condom during intercourse by a man, without the consent of the other person, whether woman or man, or the intentional damaging of a condom before or during intercourse by a partner.[25] The last interpretation of the term brings to mind the issue mentioned by R. Krajewski of a woman falsely assuring her partner that she is taking birth control pills.[26] In all these cases, the question of whether the sexual contact was consensual must be answered affirmatively. Furthermore, there was no misrepresentation affecting the motivation of one of the partners. The sexual activity took place because both parties wanted it. However, it must be assumed that the

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[21] See Filar, M., *Przestępstwo zgwałcenia…*, op. cit., p. 109.

[22] Bielski, M., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117–211a*, Warszawa, 2017, Article 197, nt. 54.

[23] Grudecki, M., 'Podstęp jako znamię przestępstwa zgwałcenia a uboczne motywy podjęcia decyzji o obcowaniu płciowym', *Studia Prawnoustrojowe*, 2022, No. 55, p. 77.

[24] Ibidem, pp. 75–76.

[25] Staroń, M., 'Stealthing', *Prokuratura i Prawo*, 2023, No. 5, p. 73.

[26] Krajewski, R., 'Podstęp przy przestępstwie zgwałcenia', *Studia Prawnoustrojowe*, 2018, No. 40, p. 269.

encounter would not have occurred if one of the parties had known what the course or circumstances of the encounter were to be.

M. Bielski points out that the distinction between a material and an incidental error is based on the assessment of whether the circumstance about which the victim was in error, from the point of view of cultural patterns, could have been the main premise for making a conscious decision on sexual involvement.[27] Sz. Tarapata agrees, writing that the freedom to make a decision about one's sexual activity is ensured when the individual has the possibility to recognise all the elements that, in our cultural circle, are relevant for deciding to engage in an intimate relationship.[28] Such a definition of the conditions for free decision-making should be considered too broad, since, as is not in doubt in the doctrine, the purpose of engaging in sexual activity does not necessarily have to be the satisfaction of sexual desire. Other purposes may include, as has been discussed in criminal law literature, the attainment of financial gain, marriage, or more broadly, a certain social status. In psychology, such aims as revenge or reparation for harm or betrayal are also indicated.[29] Adopting such a definition of the freedom to make decisions regarding sexual activity would first require deciding what these relevant circumstances are from the point of view of 'our cultural circle'. Are they those that are socially accepted, such as procreation, or those that actually motivate sexual contact in a given culture, but are generally not disclosed or seen as negative, such as demonstrating dominance, betrayal, or drowning out one's own emotional problems? Furthermore, it is not easy to determine whether the existence of common cultural patterns of sexual involvement can be assumed, for example, in women of different ages, with different life experiences, or from different environments.[30] It is also difficult for a court to analyse all possible elements influencing the decision to engage in a sexual act in terms of misrepresentation, as many of them go far beyond the realm of sexuality.

The position, which is common in doctrine and jurisprudence, that the freedom of decision of the will, as far as the elements of the offence under Article 197 CC are concerned, must be violated in relation to the nature of the activity and the choice of a partner, can be considered optimal. This is because this scope of freedom of decision coincides with the area of sexual freedom protected by the aforementioned provision. Otherwise, it would not only be sexual freedom that is protected, but

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[27] Bielski, M., in: *Kodeks karny*…, op. cit., Article 197, n. 54.

[28] Tarapata, S., 'Podstęp jako jedna z form przestępstwa zgwałcenia – zagadnienia wybrane', *Prawo w Działaniu. Sprawy Karne*, 2022, No. 51, p. 53.

[29] Nowacka, V., *Nieseksualne powody seksu*, https://www.self-psychologia.pl/medium/nieseksualne-powody-seksu [accessed on 22 August 2023].

[30] It is worth emphasising that, on the one hand, there is a worldwide trend towards the globalisation of culture; on the other hand, societies themselves are becoming increasingly diverse. One of the symptomatic examples are religious conversions, such as the relatively popular adoption of Islam by Poles (see Kulig, R., 'Dlaczego Polacy przechodzą na islam?', *Onet*, 20 August 2012, https://wiadomosci.onet.pl/religia/dlaczego-polacy-przechodza-na-islam/5n9dk [accessed on 15 September 2023]), as well as other nations (see Piętak, P., 'Dlaczego islam jest tak atrakcyjny i pociągający dla miliardów ludzi?', *Dziennik Gazeta Prawna*, 7 September 2016, https://www.gazetaprawna.pl/wiadomosci/artykuly/973761,islam-demokracja-cywilizacja-zachodnia.html [accessed on 15 September 2023]).

also the realisation of short- or long-term goals that a person wanted to achieve by engaging in sexual activity.

While much attention has been paid in the literature and case law to considering when free expression of will can be established, the analysis of the scope and nature of consent has received less attention. In practice, however, consent can only be given for certain forms of sexual activity and not for others. The aforementioned example of consent to sexual intercourse on the condition that a condom is used, or consent by a woman or a man to oral sex on the condition that ejaculation does not take place in the mouth, illustrate this problem well. Obviously, deception in these cases of sexual intercourse can only occur through the element of surprise, because if the victim became aware that the partner was removing the condom or intended to ejaculate in their mouth, they would need to express their objection. Otherwise, it would have to be assumed that although the parties had agreed on a different course of sexual activities, there was implicit consent to change it.

In jurisprudence, the issue of the scope of consent, as described above, has not been fully recognised. Regarding the scope of consent to sexual acts, one can refer to a judgment of the Supreme Court, which stated: 'The fact that the victim accepted the sexual act, or even wanted the act, does not at all prejudge her consent to every form of it. Indeed, it should be assumed that we are dealing with an attack on sexual freedom not only when the victim does not accept the act of sexual intercourse, but also when her lack of acceptance refers to the manner in which the perpetrator performs the act. Obviously, this does not mean that each and every attempt to violate the sexual freedom of another person understood in such a manner exhausts the elements of the crime of rape. For this depends on whether his or her conduct exhausts the elements of this crime described in the Criminal Code.'[31] In the case at hand, the victim accepted the act of sexual intercourse as such, but objected to her partner's use of the instrument he inserted into her anus.

As in the cited judgment, the considerations in jurisprudence and literature to date regarding the scope of consent to sexual activities focus on the issue of forcible transgression of this scope. In such cases, however, the qualification of the sexual activity as rape is not in doubt, as firstly, the victim realises that the form of the sexual activity is being altered, secondly, they object to this, and thirdly, the perpetrator uses violence or unlawful threats to perform the activity in an altered form.

Meanwhile, the phenomenon of stealthing, or ejaculation in a partner's mouth despite a prior explicit reservation of non-consent to this activity, concerns an entirely different problem. M. Staroń is of the opinion that if the use of a condom was an absolute condition for consent to sexual intercourse, its removal should be classified as rape.[32] Of course, there is immediately the problem of proving that the man intended to remove the condom even before sexual contact. What about in a situation where he makes the decision during sexual intercourse? The problem

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[31] Decision of the Supreme Court of 9 April 2001, II KKN 349/98, OSNKW 2001, No. 7–8, item 53.

[32] Staroń, M., *Stealthing…*, op. cit., p. 80.

seems to arise from the well-established assumption that it is necessary to consider consent as something that is given before the sexual activity starts and is either given or not. The situation would be different if we viewed a failure to comply with the conditions of the given consent as a form of deception.

In the doctrine of criminal law, based on Article 197 CC, it is often emphasised that consent is an 'unspoken element' of this offence. However, the importance attached to the prerequisites of legally effective consent and possible violations in this respect is much less than, for example, in the case of personal data protection provisions. The GDPR provisions explicitly indicate what conditions must be met by consent to the processing of personal data, it is to be 'any freely given, specific, informed and unambiguous indication of the data subject's wishes by which the he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her'.[33] Furthermore, the Preamble devotes significant attention to explaining what the different elements of consent consist of in light of the cited definition, i.e., voluntariness, awareness, etc. (e.g., recitals 32 and 42 GDPR). Similarly, in the literature, the issue of consent for the processing of personal data, including its necessary conditions, scope, or form, is one of the central issues and is analysed in detail.[34] In contrast, in the criminal law literature on Article 197 CC, despite emphasising the essence of consent to sexual activities, there is no broader consideration of its scope, which is, after all, of crucial importance.

There is no doubt that, as with the processing of personal data, consent to sexual activities should be voluntary, specific, conscious, and unambiguous. It follows from this that consent can be limited in scope and may pertain only to specific modes of conduct and forms of intercourse. Clearly, in intimate situations, obtaining consent for sexual activities cannot be done in the same formal way as for the processing of personal data. However, it must be said that, much like the ubiquitous consent forms for data processing that we have grown accustomed to in everyday life, any change in the pre-established terms of sexual engagement should, at the very least tacitly, receive the approval of the other party. The challenge facing contemporary

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[33] Article 4(11) of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1.

[34] See, e.g., Lubasz, D., 'Warunki wyrażania zgody jako przesłanki legalizującej przetwarzanie danych osobowych', *Gdańskie Studia Prawnicze*, 2021, No. 4, pp. 62–79; Fajgielski, P., in: 'Komentarz do rozporządzenia nr 2016/679 w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych)', in: Fajgielski, P., *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz*, Warszawa, 2022, Article 4; Lubasz, D., Chomiczewski, W., Czerniawski, M., Drobek, P., Góral, U., Kuba, M., Makowski, P., Witkowska-Nowakowska, K., in: Bielak-Jomaa, E., Lubasz, D. (eds), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, Warszawa, 2018, Article 4; Litwiński, P., 'Rozporządzenie Parlamentu Europejskiego i Rady (UE) 2016/679 z dnia 27 kwietnia 2016 r. w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych)', in: Litwiński, P. (ed.), *Ogólne rozporządzenie o ochronie danych osobowych. Ustawa o ochronie danych osobowych. Wybrane przepisy sektorowe. Komentarz*, Warszawa, 2021, Article 4.

criminal law under Article 197 CC is how to address the issue of changing the terms of previously given consent by surprise, and its assessment under criminal law. Examples of such situations include the phenomenon of stealthing and ejaculation in a partner's mouth, despite an earlier explicit reservation of non-consent to this activity. These behaviours are likely not new in intimate relationships, but there has been a recent increase in media interest in these topics, driven by changes in societal attitudes and evaluations of sexual relationships, greater openness in this area, and increased self-awareness.

It appears that stealthing or unconsented ejaculation in a partner's mouth has not yet been considered by the courts in Poland, although there have been rulings on these issues, at least concerning stealthing, in other parts of the world.[35] There is no doubt, however, that sooner or later, a domestic court will have to address the question of whether stealthing, unconsented ejaculation, or some other undetermined change in the form of sexual activity without the knowledge of the victim constitutes a crime under Article 197 CC, or whether these acts are not prohibited but only morally reprehensible, as R. Krajewski suggests.[36]

It seems, however, that even without the need to amend Article 197 CC, stealthing and similar behaviours may meet the elements of the crime of rape under the current legal framework. This position is based on the view that failing to comply with the conditions of previously given consent to a form of sexual activity could be considered as deception. Such an approach would require courts to examine consent more meticulously, not only in terms of whether it was given before the sexual activity but also to determine the extent of that consent in cases of an unanticipated change in the form of the activity. A surprise change in the form of the sexual act, to which the other party could not object and would have absolutely not consented if informed in advance, constitutes a violation of sexual freedom. This is not a case of introducing or exploiting a mistake as to motivation, which *in genere* are incidental circumstances, but rather a mistake concerning the sexual act itself, thus constituting a material error.

However, the example cited earlier of a woman's false assurance that she was taking contraceptive pills cannot be assessed in the same way. In such a case, the false assurance pertains to a circumstance that is indeed important but nonetheless incidental to the sexual engagement itself. There is no misrepresentation or exploitation of a mistake concerning the identity of the partner, the nature of the act, or the form of intercourse. The potential fear of an unplanned pregnancy falls under the category of motivations for which someone engaged in or refrained from sexual activity, and, as previously mentioned, the doctrine generally agrees that a mistake regarding the motivation for sexual activity is incidental. Sexual freedom was not violated if the sexual engagement was voluntary and there was no mistake

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[35] M. Głuchowski gives the example of a judgment of the Lausanne District Court in 2017, see Głuchowski, M., 'Stealthing – karalność zdjęcia prezerwatywy bez wiedzy partnerki', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2022, Vol. 84, No. 3, p. 100, while M. Staroń discusses, *inter alia*, a judgment of the Berlin Court of Appeal in 2022, see Staroń, M., *Stealthing*…, op. cit., p. 77.

[36] Krajewski, R., *Podstęp przy*…, op. cit., p. 269.

in the choice of partner. Accepting a different interpretation would necessitate considering even more far-reaching factual situations – what if a man wishes to have children and the woman, aware of this desire and outwardly approving of it, secretly takes birth control pills? Could it then be assumed that the man has been raped? It seems that the answer to this question is clearly negative.

DISCUSSIONS ON THE NEED FOR CHANGES TO THE DEFINITION OF THE ELEMENTS OF THE CRIME OF RAPE AND THE CHANGES MADE

The discussion on reshaping the elements of the crime of rape has been ongoing in various countries, as the existing definitions no longer align with modern expectations. It is evident that societal changes are reflected in the evolution of legal norms. In today's world of globalising culture, natural changes are often accelerated by foreign influences, and the distinction between national and supranational norms is increasingly blurred. Undoubtedly, the jurisprudence of the European Court of Human Rights and the adoption of the Istanbul Convention[37] have significantly influenced the reconsideration of rape crime regulations, sparking widespread discussions in many countries. Some foreign examples follow.

As early as 2012–2013, the Finnish government considered amendments to the Penal Code to redefine the crime of rape based on the lack of victim's consent. However, at that time, this was deemed unnecessary and contrary to Finnish criminal law tradition. It was emphasised that introducing detailed conditions for the effectiveness of such consent would undermine the principle of the free assessment of evidence by the court.[38] Nevertheless, the definition of the elements constituting the crime of rape, which is very similar to the Polish one, has been criticised by both Finnish researchers and foreign experts. For instance, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) has argued that such a framing of the offence results in the main focus in court proceedings being on the behaviour of the victim rather than on the act of the accused.[39]

In Finland, the offence of rape involves forcing sexual intercourse through the use of violence, the threat of violence, other coercion, or exploiting the victim's state of vulnerability. Forcing a sexual act other than intercourse by using these means constitutes a separate sexual offence. Sexual intercourse is defined in a manner analogous to Polish law, and its elements are fulfilled with the insertion of a finger into the vagina.[40]

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[37] Alaattinoğlu, D., Kainulainen, H., Niemi, J., 'Rape in Finnish criminal law and process – A discussion on, and beyond, consent', *Bergen Journal of Criminal Law and Criminal Justice*, 2020, Vol. 8, No. 2, p. 38.

[38] Ibidem, p. 39.

[39] Ibidem, p. 40.

[40] Ibidem, pp. 34–35.

In Germany, until 2016, the crime of rape consisted of forcing sexual activity by using violence or threats to deprive the victim of life or cause bodily harm, or by making the victim vulnerable and leaving them at the mercy of the perpetrator. According to T. Hörnle, this approach to the crime of rape had its roots in the Middle Ages and was perpetuated by subsequent German laws. Despite numerous modifications to German criminal law, the coercive approach was not challenged. Moreover, where there was room for interpretation, such as in the case of putting the victim into a state of defencelessness, the Federal Court of Justice (*Bundesgerichtshof*) interpreted this requirement very narrowly, demanding that the victim take all possible measures to resist the perpetrator.[41] The changes introduced in 2016 were the result of efforts by NGOs and women's organisations, and the impact of the Istanbul Convention cannot be overlooked as well.[42]

Currently, Section 177 of the German Criminal Code defines rape as conduct involving performing sexual acts with another person, forcing that person to perform sexual acts against their will, or compelling that person to perform or submit to sexual acts with a third person. In this view, the lack of consent of the victim is crucial, reflecting the 'no means no' principle. These changes have attracted a wave of criticism and predictions of an increase in false accusations.[43]

As far as Poland is concerned, attention should be drawn to A. Michalska-Warias' analysis of the scope of criminalisation of rape committed through the use of unlawful threats. The author rightly points to a number of diverse behaviours that may constitute threats influencing the will of another person, but which do not fulfil the elements of an offence under Article 197 CC. Examples include threats to initiate disciplinary proceedings, juvenile proceedings, or committing a crime to the detriment of a person other than the victim or someone close to the victim. Other threats, however, may be considered to fulfil the elements of the offence under Article 199 CC.[44] It should also be noted that the disparity in the severity of sanctions between these offences is significant. For the basic type of rape, the punishment ranges from 2 to 12 years of imprisonment, whereas for exploitation of a state of dependence, the sentence is up to 3 years of imprisonment.

Furthermore, the author states, '(…) from the point of view of analysing also such threats as means of exerting strong pressure on the victim's psyche, it seems entirely plausible that situations will arise in which the will of the victim will be paralysed to the same extent as in the case of a threat to cause criminal proceedings'.[45] This view must be fully agreed with. However, one might also ask whether the will of the victim needs to be paralysed at all. Is it not sufficient that the perpetrator's behaviour causes discomfort by putting the victim in a position of having to choose between two unfavourable and unwanted alternatives?

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[41] Hörnle, T., 'The New German Law on Sexual Assault and Sexual Harassment', *German Law Journal*, 2017, Vol. 18, No. 6, pp. 1310–1312.

[42] Ibidem, pp. 1314–1315.

[43] Ibidem, p. 1316.

[44] Michalska-Warias, A., 'Groźba bezprawna jako ustawowe znamię przestępstwa zgwałcenia', *Ius Novum*, 2016, No. 1, pp. 10–17.

[45] Ibidem, p. 13.

Regarding the fulfilment of the requirements of the Istanbul Convention by Polish legislation, E. Lewandowska and D. Solodov emphasise that the important aspect is achieving the objectives and standards of the Convention, rather than directly copying its provisions into domestic law.[46]

CONCLUSION

Although the elements of the crime of rape – violence, threat, and deception – have not changed since 1932, case law and, especially, doctrine show clear shifts in the interpretation of these concepts, particularly regarding 'coercion by violence'. It can be assumed that the doctrine has adopted an interpretation of violence in which the principle of 'no means no' applies. The violence does not need to overcome the physical resistance of the victim but must continue despite the victim's explicit opposition. In Polish criminal law, non-consent is framed quite specifically, which is why there are fewer issues with defining the crime of rape solely based on physical coercion. It can be concluded that Article 197 CC essentially fulfils the criteria of the Istanbul Convention.[47]

As noted, this state of affairs has been achieved through the evolution of doctrinal views and case law. The wording of the provision does not prevent sentences that may not align with the contemporary interpretation of the elements of the crime of rape. However, it should be noted that the emphasis on the victim's objection avoids the problems associated with focusing on defensive actions on the one hand and consent on the other. In the latter case, an evidentiary problem arises: how to prove the non-existence of something? In the case of Article 192 CC, consent is often formalised or given in front of witnesses – something that is rarely feasible in intimate situations. Conversely, requiring the victim to engage in very intensive defensive measures is outdated today. It would be paradoxical if, in this regard, domestic privacy were protected more than sexual freedom. Therefore, the adoption in Polish doctrine, whether explicitly or implicitly, of the principle 'no means no' should be regarded in the most positive light.

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[46] Lewandowska, E., Solodov, D., 'Zasadność sporu odnośnie nowej definicji zgwałcenia – uwagi na tle proponowanych zmian', *Studia Prawnoustrojowe*, 2021, No. 54, p. 579.

[47] Article 36 of the Convention:

'1. Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:
   a) 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;
   b) engaging in other non-consensual acts of a sexual nature with a person;
   c) causing another person to engage in non-consensual acts of a sexual nature with a third person.
2. Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.
3. Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.'

However, this does not mean that the current state of the law does not raise any concerns. Social changes mean that freedom, including sexual freedom, is increasingly valued. Therefore, changes in the content of the laws or their doctrinal and judicial interpretation are necessary. Behaviours such as threatening to commit a misdemeanour or committing a crime against a person other than the victim or their closest relation do not constitute rape. On the other hand, phenomena such as stealthing need to be properly assessed. Merely considering the issue of consent or objection to sexual contact is not sufficient; it is necessary to examine the scope of this consent and conduct a criminal law assessment of the violation of its conditions.

BIBLIOGRAPHY

Adamski, M., 'Parlament Europejski chce jednej definicji gwałtu. Tylko „tak" oznacza „tak"', *Rzeczpospolita*, 13 July 2023, https://www.rp.pl/prawo-karne/art38733791-parlament-europejski-chce-jednej-definicji-gwaltu-tylko-tak-oznacza-tak [accessed on 14 July 2023].

Alaattinoğlu, D., Kainulainen, H., Niemi, J., 'Rape in Finnish criminal law and process – A discussion on, and beyond, consent', *Bergen Journal of Criminal Law and Criminal Justice*, 2020, Vol. 8, No. 2.

Berent, M., Filar, M., in: Filar, M. (ed.), *Kodeks Karny. Komentarz*, Warszawa, 2015.

Bielski, M., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117-211a*, Warszawa, 2017.

Budyn-Kulik, M., Kulik, M., in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny. Komentarz*, Warszawa, 2013.

Fajgielski, P., 'Komentarz do rozporządzenia nr 2016/679 w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych)', in: Fajgielski, P., *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz*, Warszawa, 2022.

Filar, M., *Przestępstwo zgwałcenia w polskim prawie karnym*, Warszawa–Poznań, 1974.

Głuchowski, M., 'Stealthing – karalność zdjęcia prezerwatywy bez wiedzy partnerki', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2022, Vol. 84, No. 3.

Grudecki, M., 'Podstęp jako znamię przestępstwa zgwałcenia a uboczne motywy podjęcia decyzji o obcowaniu płciowym', *Studia Prawnoustrojowe*, 2022, No. 55.

Hörnle, T., 'The New German Law on Sexual Assault and Sexual Harassment', *German Law Journal*, 2017, Vol. 18, No. 6.

Hypś, S., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, 7th ed., Warszawa, 2021.

Hypś, S., 'Przestępstwa przeciwko wolności seksualnej i obyczajności', in: Grześkowiak, A. (ed.), *Prawo karne*, Warszawa, 2009.

Konarska-Wrzosek, V., in: Konarska-Wrzosek, V. (ed.), *Kodeks Karny. Komentarz*, Warszawa, 2018.

Krajewski, R., 'Podstęp przy przestępstwie zgwałcenia', *Studia Prawnoustrojowe*, 2018, No. 40.

Kulig, R., 'Dlaczego Polacy przechodzą na islam?', *Onet*, 20 August 2012, https://wiadomosci.onet.pl/religia/dlaczego-polacy-przechodza-na-islam/5n9dk [accessed on 15 September 2023].

Lewandowska, E., Solodov, D., 'Zasadność sporu odnośnie nowej definicji zgwałcenia – uwagi na tle proponowanych zmian', *Studia Prawnoustrojowe*, 2021, No. 54.

Litwiński, P., 'Rozporządzenie Parlamentu Europejskiego i Rady (UE) 2016/679 z dnia 27 kwietnia 2016 r. w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych)', in: Litwiński, P. (ed.), *Ogólne rozporządzenie o ochronie danych osobowych. Ustawa o ochronie danych osobowych. Wybrane przepisy sektorowe. Komentarz*, Warszawa, 2021.

Lubasz, D., Chomiczewski, W., Czerniawski, M., Drobek, P., Góral, U., Kuba, M., Makowski, P., Witkowska-Nowakowska, K., in: Bielak-Jomaa, E., Lubasz, D. (eds), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, Warszawa, 2018.

Lubasz, D., 'Warunki wyrażania zgody jako przesłanki legalizującej przetwarzanie danych osobowych', *Gdańskie Studia Prawnicze*, 2021, No. 4.

Marek, A., *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa, 1997.

Michalska-Warias, A., 'Groźba bezprawna jako ustawowe znamię przestępstwa zgwałcenia', *Ius Novum*, 2016, No. 1.

Michalska-Warias, A., *Zgwałcenie w małżeństwie. Studium prawnokarne i kryminologiczne*, Warszawa, 2016.

Nazar, K., Warylewski, J., in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023.

Nowacka, V., *Nieseksualne powody seksu*, https://www.self-psychologia.pl/medium/nieseksualne-powody-seksu [accessed on 22 August 2023].

Piętak, P., 'Dlaczego islam jest tak atrakcyjny i pociągający dla miliardów ludzi?', *Dziennik Gazeta Prawna*, 7 September 2016, https://www.gazetaprawna.pl/wiadomosci/artykuly/973761,islam-demokracja-cywilizacja-zachodnia.html [accessed on 15 September 2023].

Rodzynkiewicz, M., in: Zoll, A. (ed.), *Kodeks Karny. Część szczególna. Komentarz. Tom II. Komentarz do art. 117 277 k.k.*, Kraków, 2006.

Staroń, M., 'Stealthing', *Prokuratura i Prawo*, 2023, No. 5.

Tarapata, S., 'Podstęp jako jedna z form przestępstwa zgwałcenia – zagadnienia wybrane', *Prawo w Działaniu. Sprawy Karne*, 2022, No. 51.

Warylewski, J., in: Wąsek, A. (ed.), *Kodeks Karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, Warszawa, 2006.

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