Ius Novum
2025, vol. 19, no. 3, pp. 11–28

FORNICATION AS A NOTION APPLICABLE IN POLISH LAW

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DOI 10.2478/in-2025-0021

Abstract
This paper concerns fornication as a past and current notion in Polish law. Legal theory, particularly criminal law theory, is reviewed, and legal regulations relating to fornication are analysed. Fornication was a concept present in the Polish Penal Code of 1932 and the Polish Penal Code of 1969. The current Polish Penal Code of 1997 does not include this notion. However, it still appears in other current legal regulations. The main aim of this article is to analyse the comprehensibility of the notion of fornication and to draw conclusions regarding necessary amendments to laws aimed at eliminating this term from Polish legal language. The conclusions presented in this work are original and significant for Polish legal theory and penal law practice.

Key words: fornication, law, criminal law, crime, misdemeanour

INTRODUCTION

The notion of fornication in Polish appears archaic, and there seems little reason to analyse it from the standpoint of contemporary penal law. At most, it could be examined from a historical perspective. Undoubtedly, such a historical approach is essential, yet it is not the only relevant perspective, as the notion of fornication still appears in binding legal acts. Consequently, it is necessary to analyse this concept from both historical and current perspectives and to draw meaningful conclusions

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for the future. Due to limitations of space, only the most significant opinions of legal theoreticians on the issue of fornication are discussed in this article.

Fornication is generally perceived negatively. It is regarded as immoral and contrary to ethical norms and principles of social conduct, particularly in matters of sexuality and decency. The notion of fornication is a legal category concerning human sexual behaviour. The concepts of harlotry and fornication appear in both past and current legal acts and, for the purposes of this study, are treated as synonymous.

'FORNICATION' IN THE POLISH PENAL CODE OF 1932

In the Polish Penal Code of 11 July 1932,[1] Chapter XXXII was entitled 'Fornication'. This chapter covered offences currently recognised as crimes against sexual freedom and decency. These included: committing an act of fornication against a person under 15 years of age or a person wholly or partially deprived of the ability to understand the nature of the act or to control their conduct (Article 203); rape, defined as causing another person to submit to or perform such an act by force, unlawful threat, or deception (Article 204); causing another person to submit to fornication or to perform such an act by exploiting a relationship of dependence or a critical situation (Article 205); incest (Article 206); offering oneself to a person of the same sex for fornication in exchange for gain (Article 207); facilitating the fornication of others for profit (Article 208); deriving financial benefit from the fornication of others (Article 209); inciting another person to engage in professional fornication (Article 210); deporting another person from the country in order to compel them to engage in professional fornication (Article 211); committing an act of fornication in public or in the presence of a minor under the age of 15 (Article 213); distributing magazines, prints, images, or other pornographic materials, as well as preparing, storing, or transporting such items for dissemination (Article 214).

The term 'fornication' had an explicitly moralistic character during the interwar period, and this was recognised by commentators on the Code. Its creator, Juliusz Makarewicz, wrote that:

> 'An act of fornication should be understood as any action aimed at satisfying the sexual drive in a way other than that which is determined by a society well-organised in terms of purity of morals, i.e. through marital copulation. It is just as much fornication to satisfy this drive with animals or persons of the same sex ("fornication against nature") as with a person of the opposite sex, whether in the form of copulation or of another sexual act ("perversions"). Fornication is not a crime in itself according to the Polish Code; it becomes so only by adding a certain factor, whether it is acting without the will or against the will of another person, or acting out of the desire for profit (in the case of fornication involving people of the same sex), or acting in public or with close family members.'[2]

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1 Journal of Laws of 1932, No. 60, item 571.

2 J. Makarewicz, *Kodeks karny z komentarzem*, Lwów, 1932, p. 298.

This approach to the notion of 'fornication' is also discussed by Magda Olesiuk-Okomska in her analysis of sexual and anti-morality crimes contained in the Penal Code of 1932.[3]

Moreover, according to Wacław Makowski:

> 'The morality of sexual life, or sexual morality, has been normalised within existing social institutions, primarily the institution of marriage. Extramarital sexual intercourse is not criminal in itself from the point of view of the law, provided that it does not infringe upon another juridical good. This other legal good may be personal freedom, if it has been violated in any way for sexual purposes, or the so-called moral sense, which is offended by actions within the sphere of sexual relations. In the factual circumstances of offences against established norms of sexual conduct – covered by the general term "fornication" – two objects of the crime may be considered. On the one hand, there is the interest in sexual morality, the public interest connected to the development of the human species; on the other hand, the personal interest of the individual and his freedom to dispose of his sexual life. The latter concept prevails in modern doctrine and legislation, although it also significantly limits the scope of criminal law's interference with relations arising from sexual life. Nonetheless, there may be factual situations to which the public interest attaches specific importance, such as incest.'[4]

Based on the two quotations above, it may be concluded that their authors believed that, in principle, sexual relations within marriage could not constitute fornication. However, this assumption was incorrect, as evidenced by the phenomenon of marital rape. Nonetheless, during the period when the Penal Code of 1932 was in force, the possibility of recognising fornication within marriage was at least disputed and sometimes outright denied.

Kazimierz Sobolewski and Alfred Laniewski adopted a more liberal understanding of this concept, though they still excluded sexual relations within marriage. According to them, 'the concept of "fornication" will include an act that has its source in the sexual drive and at the same time aims at satisfying this drive. This will include both the normal sexual act and *amor lesbicus*, pederasty, and more generally lewd acts'. These authors believed that 'it will be the task of the judge to determine whether a given act bears the hallmarks of a "fornication act" or merely an act of familiarity or caressing, not exceeding the limits permitted within a given social sphere. Such an act of caressing may constitute the essence of a personal insult or an offence under Article 33 of the Law on Petty Crimes'. The aforementioned authors also stated that 'these crimes can be committed even against people professionally engaged in fornication' and that 'both women and men fall under the protection of this chapter because the Code is consistently applicable to "other persons"'. Moreover, 'the Code does not recognise fornication with animals'.[5] These

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[3] M. Olesiuk-Okomska, 'Regulacje kodeksu karnego z 1932 r. w zakresie penalizacji przestępstw konwencyjnych przeciwko wolności seksualnej i obyczajności', *Czasopismo Prawno-Historyczne*, 2023, No. 2, p. 56.

[4] W. Makowski, *Kodeks karny 1932. Komentarz*, Warszawa, 1933, p. 472.

[5] K. Sobolewski, A. Laniewski, *Polski kodeks karny z 11. VII. 1932 r. wraz z prawem o wykroczeniach, przepisami wprowadzającemi i utrzymanemi w mocy przepisami kodeksu karnego austriackiego, niemieckiego, rosyjskiego i skorowidzem*, Lwów, 1932, pp. 106–107.

observations were modern at the time they were formulated, particularly regarding the distinction between 'fornication' and a 'fornication act' or caressing, as well as the recognition of the possibility of harm being caused to a person engaged in prostitution by such an act, and the equal treatment of victims in this respect, regardless of gender.

As Tomasz Szczygieł describes, the issue of 'fornication' featured prominently in the drafting of the Code. Its drafters introduced the term 'fornication against the will', which encompassed, in particular, rape, disgrace, and enslavement to fornication. At the same time, 'fornication' was understood as any act leading to the satisfaction of the sexual drive, also described using terms such as 'lewd acts', 'disgrace', 'fornication', and 'sexual intercourse'. Particular attention was given to 'fornication contrary to nature', which was understood as 'any satisfaction of the sexual drive that is not an act of copulation between people of opposite sexes', including, in particular, homosexuality, bestiality, masturbation, necrophilia, and so-called 'perverse' sexual acts between a man and a woman – that is, acts not typically resulting in fertilisation. The punishment of such acts was eventually abandoned.[6] Interestingly, and worth emphasising, the status of 'perverse' was then ascribed to all sexual contact between men and women that did not involve vaginal intercourse and was not aimed at procreation – particularly when contraceptives were used, with condoms playing a leading role at the time. Therefore, when pre-war individuals engaged in oral or anal sex or other forms of sexual activity that could not result in fertilisation, they risked being considered 'subversive' to the sexual morality of the time. Perhaps due to fear of social ostracism, as well as respect for the morality they adhered to, reinforced by the teachings of the Catholic Church, which advocated for sexual relations oriented towards procreation and viewed other forms unfavourably – society at large refrained from initiating a revolution in this sphere. Such change was experienced only by the most progressive circles, particularly the artistic bohemia of the time and others who stood apart from the dominant sexual morality of the Second Polish Republic.

Finally, the legislator at the time employed three terms concerning 'fornication'. First of all, 'fornication', as such was used as the title of the relevant chapter, and the crimes described therein were referred to as 'fornication'. At the same time, Articles 208 and 209 prohibited facilitating the 'fornication' of others and deriving profits from such 'fornication' out of a desire for gain – likely treating 'fornication' for the purposes of these provisions differently from the general understanding of 'fornication' as reflected in the chapter title, which encompassed all the prohibited acts described therein. Secondly, Articles 210 and 211 distinguished 'professional fornication' as different from the 'fornication' referred to in the provisions mentioned above, with the former undoubtedly to be equated with what is generally understood as prostitution, while the latter was probably akin to it in nature. Moreover, in Articles 203, 204, 205, and 213, the term 'fornication' was also

[6] T. Szczygieł, 'Przestępstwa przeciwko moralności w pracach Komisji Kodyfikacyjnej II Rzeczpospolitej', *Z Dziejów Prawa*, 2017, Vol. 10, pp. 89, 95–96.

used. In these provisions, it was understood to encompass any sexual conduct that met the criteria for the offences described.

Jan Skupiński stated that: 'The term "fornication" signifies a negative assessment of an act involving the satisfaction or arousal of one's own or another person's sexual drive. Without a detailed analysis of this well-known concept, it is only worth noting that the two elements it contains – biological (arousing or satisfying the sexual drive) and ethical (incompatibility with prevailing social morality) – differ in terms of their flexibility. While the biological element is decidedly static, the ethical element is subject to continual change, shaped by periodic shifts in societal morality.' The author further observed that: 'The separation of the concept defining the nature of the offences contained in the chapter title seems to indicate their generic uniformity. However, an examination of the various provisions of Chapter XXXII reveals that, despite their common link to sexual life, a number of these offences differ significantly from each other.' He believed that:

> 'Among the crimes in question, certain groups may be distinguished. The first and most prominent group comprises the provisions of Articles 203, 204, 205, 206, and 213 of the Criminal Code. These crimes are characterised by the fact that the perpetrator is directly involved in committing or attempting to commit a specific act of fornication. In the cases covered by Articles 203, 206, and 213, the perpetrator must personally participate in the act, while in others (Articles 204 and 205), he need not participate himself but merely "cause" the act. Nevertheless, across this group, the perpetrator's conduct is directly linked to a specific act of fornication and involves active participation. (…) The second group consists of the offences set out in Articles 208 to 211. These differ from the first group in that the perpetrator is not personally involved in committing the act of fornication. The perpetrator in this context commits a completely different act – one related solely to the commission of fornication by another person. Thus, the primary difference between the crimes in the two groups mentioned above lies in the fact that the perpetrator's connection to fornication in the second group manifests only indirectly.'

Skupiński further wrote:

> 'It should be noted that these acts relate to fornication in a slightly different sense. First, they are no longer connected with the evaluation of an individual event, i.e. "fornication", but with "fornication" as a broader concept. By this term, we understand a judgment regarding an entire course of conduct – in other words, a certain procedure. Secondly, the offences in the first group concern criminal acts of fornication, which is evident in light of the relevant provisions, while the facts of the second group generally relate to non-criminal fornication (mainly prostitution), and even the potential criminality of the conduct to which these acts are related is irrelevant to the perpetrator's liability. Somewhat on the margins of these two distinct groups stands Article 207, which, on the one hand, seems to lean towards the first group due to the perpetrator's connection with a specific act of fornication, but on the other hand, inclines towards the second group owing to the element of profit motive and its relation to an overall pattern of conduct rather than an individual event. Also peripheral is Article 214 on pornography, which, although related to sexual life, is so loosely connected that it is difficult to classify this offence within the category of fornication-related crimes at all.'[7]

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[7] J. Skupiński, 'Problematyka kodyfikacji przestępstw „nierządu"', *Palestra*, 1960, No. 4, pp. 44–46.

According to Józef Macko, the relevant provisions concerned: 'Crimes against sexual morality, generally referred to as fornication, because prostitution is nothing other than a form of fornication, bearing the characteristics of addiction. Moreover, all forms of fornication, under certain conditions, may directly cause prostitution and its consequences'.[8] This view, especially regarding the causes and consequences of prostitution, seems highly exaggerated – even from the perspective of the time it was formulated. It also contradicts the intention of the legislator of that period, who used the term 'fornication' more broadly than simply as a synonym for prostitution.

As Marian Filar explained, the use of the term 'fornication' in the 1932 Code was the result of a literal translation of terminology from the German Penal Code of 1871 and the Russian Penal Code of 1903, which referred to acts other than coitus, often involving the coercion of a woman into sexual acts. The Polish legislator, by adopting the term 'fornication', intended to create a comprehensive and synthetic concept encompassing the widest possible range of sexual behaviours. This choice was criticised by post-war criminal law scholars, as a result of which the draft of the new Penal Code of 1968 replaced 'fornication' with the term 'sexual intercourse'. However, when this change appeared to be a foregone conclusion, the term 'act of fornication' was ultimately retained during the legislative process.[9] Earlier drafts of the new Penal Code – specifically those from 1956 and 1963 – also abandoned the use of the term 'fornication' in favour of the phrase 'causing the satisfaction of the sexual drive' by prohibited means and against specific categories of people, as noted by Jarosław Warylewski. This professor, an unquestioned authority in the field of sexual crimes, observed that while the broad and imprecise term 'fornication' contributed to the simplicity of the regulations typifying such crimes, it was at the same time a fundamental weakness in this area.[10]

Jan Skupiński likewise assessed positively the rejection of the concept of 'fornication' in the 1956 draft of this legal act. He wrote: 'Rejecting the concept of "fornication" seems most appropriate. It is easy to see that, as regards crimes involving the perpetrator committing an act of a sexual nature – i.e. under the 1932 Penal Code, an "act of fornication" – the introduction of this concept is quite unnecessary. From the notion of "fornication", which appears in the provisions of Articles 203–205 and 213, we are merely to understand the biological nature of the given act, so that once the perpetrator fulfils the further elements of the offence described in one of these articles, the act may be deemed criminal. The fact that this act of satisfying or arousing the sexual drive is described in the Penal Code already implies its negative ethical assessment. Therefore, the ethical element embedded in the concept of "fornication" is the same as that contained in the relevant provision of the Penal Code. The matter differs slightly in Articles 208 and 209, where the term "fornication" is also used. In these cases, it cannot be said that this

[8] J. Macko, *Nierząd jako choroba społeczna*, Warszawa, 1938, p. 58.
[9] M. Filar, *Przestępstwa seksualne w polskim prawie karnym*, Toruń, 1985, pp. 41–42.
[10] J. Warylewski, *Przestępstwa seksualne*, Gdańsk, 2001, pp. 61–62.

label is unnecessary, as a negative ethical assessment of the conduct to which the perpetrator's act relates is an indispensable condition for punishability. However, since the next two articles (210 and 211) refer to "professional fornication", it is worth considering why the legislator did not use this same terminology in the preceding provisions. It seems that the conduct defined in Articles 208 and 209 – referred to as pimping, procuring, and pandering – is inherently and exclusively connected with "professional fornication", that is, prostitution.'[11]

Lech Gardocki considered the title of the chapter 'Fornication' in the 1932 Penal Code to be archaic, even in the 1930s.[12] Andrzej Marek, by contrast, argued that the concept of 'fornication' under that Code encompassed involuntary and extramarital relations, but extended far beyond the societal understanding of 'fornication' as equivalent to prostitution at that time.[13]

During the interwar period, prostitution was widespread, particularly in large cities. Women undertook this occupation primarily due to poverty, often after leaving rural areas to work in urban households as domestic servants. However, many of them ended up working in brothels or soliciting on the streets. As Monika Piątkowska describes, they formed a complex world of prostitution, which included 'handkerchiefs' – girls offering sexual services on the streets for very modest pay that barely covered their basic needs. In a slightly better position were 'hat girls', who waited for clients outside entertainment venues, as well as 'fordanserki', 'kokotki', and 'grandesy' – women working in dance halls and entertainment venues who discreetly 'hunted' for clients. The dangers faced by these clients included theft, blackmail, and syphilis, which were widely 'offered' in brothels and similar establishments.[14] It is therefore not surprising that the authorities of the time sought to control 'fornication'. In 1922, a system of regulations was adopted to address prostitution from a sanitary and, to some extent, public order perspective. This approach was reflected in the regulation issued by the Minister of Public Health, in agreement with the Minister of Internal Affairs, on 6 September 1922 concerning the supervision of fornication.[15] Under this regulation, sanitary and moral commissions were established. According to § 3 of the act, these commissions consisted of the heads of the first-instance administrative authority, district doctors, representatives of the state police, representatives of local government, and delegates from associations or social unions tasked with combating fornication. Their scope of activity, as defined in § 4 of the act, included investigating the causes of fornication, combating sexually transmitted infections, determining the existence of professional fornication, and referring individuals for sanitary examinations. It is worth emphasising that the 'fight against fornication' was explicitly stated in the title of this legal act.

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[11] J. Skupiński, 'Problematyka kodyfikacji…', op. cit., pp. 51–52.

[12] L. Gardocki, *Prawo karne*, Warszawa, 2023, p. 282.

[13] A. Marek, *Prawo karne*, Warszawa, 2003, p. 488.

[14] M. Piątkowska, *Życie przestępcze w przedwojennej Polsce. Grandesy, kasiarze, brylanty*, Warszawa, 2012, pp. 275–286, 321.

[15] Journal of Laws of 1922, No. 78, item 715.

'FORNICATION' IN THE PENAL CODE OF 1969

In the Penal Code of 19 April 1969,[16] when defining sexual offences and their scope, the legislator used the term 'lewd act', as well as other expressions such as 'lascivious act', 'fornication', and 'sexual intercourse', the last of which was used exclusively in the context of incestuous relations. As Igor Andrejew explained, 'sexual intercourse' referred specifically to intercourse with another person, while a 'lewd act' meant any behaviour aimed at arousing or satisfying the sexual drive, and was used particularly to describe conduct involving a child under 15 years of age. 'Fornication', meanwhile, was equated with prostitution. The term 'fornication' caused some confusion, as in the 1932 Penal Code it had been associated with all sexual relations outside of marriage – a notion that no longer aligned with evolving moral standards. Consequently, the term came to refer instead to behaviours that met the legal criteria for specific offences.[17]

Probably not as a continuation of that earlier distinction – namely, that only extramarital sexual relations were considered 'fornication' by definition – but for other reasons, Martyna Jakubowicz sang in her 1982 song *There Is No Free Love in Concrete Houses* that: 'in concrete houses, there is no free love, only marital relations and fornication acts; Casanova is no guest here'. Perhaps, however, such a view was still occasionally held at the time, as part of a strict moral assessment of sexual relations outside marriage. This does not mean, however, that Polish society was prudish in general; it was, in fact, incomparably more liberal about sex than it had been in the interwar period.

The term 'fornication' was used to describe, among others: rape (Article 168); sexual abuse involving helplessness or insanity (Article 169); sexual abuse involving helplessness or a critical situation (Article 170); and committing such acts in the presence of a person under 15 years of age or in public (Article 177). Additionally, 'fornication' appeared in provisions concerning prostitution-related offences: pandering, pimping, and procuring (Article 174).

Under the Penal Code of 1932, Mieczysław Siewierski understood the concept of 'fornication' as 'Covering both the normal act of copulation and other acts aimed at satisfying the sexual drive or arousing excitability through contact with another person's body, such as touching the sexual organs'.[18] This interpretation was retained by commentators on the Penal Code of 1969, particularly by the same Mieczysław Siewierski, as well as Jerzy Bafia and Kryspin Mioduski.[19]

According to Janusz Wojciechowski:

> 'The concept of a "fornication act" should be understood as behaviours aimed at satisfying the sexual drive, consisting in contact with the body of another person. In particular, sexual intercourse as well as other types of bodily contact during which the perpetrator's genitals came into contact with any part of the victim's body, or when the perpetrator touched the victim's genitals with any part of his body.'

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16 Journal of Laws of 1969, No. 13, item 94, as amended.

17 I. Andrejew, *Polskie prawo karne w zarysie*, Warszawa, 1983, p. 392.

18 M. Siewierski, *Kodeks karny i prawo o wykroczeniach. Komentarz*, Warszawa, 1958, p. 274.

19 J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warszawa, 1987, p. 137.

Wojciechowski believed that lewd acts committed in public, which did not involve such contact – such as exhibitionism – fell outside the scope of a 'fornication act'.[20] However, he was mistaken in asserting that a 'fornication act' necessarily involved contact between the genitals of the perpetrator and the victim. Such acts could also include other forms of sexual behaviour, such as inserting a finger or object into the victim's anus, which is not a genital organ. Nevertheless, an exhibitionist act should not be understood as a 'fornication act', even though it was referred to in Article 177 of the Penal Code of 1969 and punishable on that basis.

Witold Świda understood the term 'fornication' differently – 'in a narrower sense, as natural and degenerate copulation. In a broader sense, it includes all actions aimed at stimulating or satisfying one's own or another person's sexual drive, contrary to social norms in the sexual sphere, and thus also, for example, exhibitionism.'[21] This broader interpretation must be acknowledged, as the legislator, in both Penal Codes, applied the term not only to crimes involving bodily contact between the perpetrator and the victim – such as rape, sexual abuse of helplessness or insanity, and abuse of dependency or critical position – but also to acts of fornication committed in public, such as exhibitionism, which did not involve direct physical interaction.

As noted earlier, the drafts of the new Penal Code proposed abandoning the concept of 'fornication'. For this reason, Marian Filar wrote that: 'It was reborn in the new Penal Code like a phoenix from the ashes.' He was of the view that:

> 'Its interpretation could only be accepted axiomatically, consisting of two factors: biological and evaluative. In the biological sense, it is, generally speaking, an act of a sexual nature; in the evaluative sense, it is an act contrary to sexual morality.'

He further explained:

> 'The evaluative component is essentially empty phraseology, because we learn that this act is contrary to sexual morality – and thus to the general order of social life – solely from the fact that it is included in the Penal Code, where only such acts are found. So, an act is "fornicating" because it is in the Penal Code, and it is in the Penal Code because it is "fornicating"! It is difficult to state the matter more clearly! Therefore, only the biological factor remains "on the battlefield": it is an act related to the sphere of human sexual life. However, this sphere is a dynamic one. So, what part of it falls within the concept of "fornication"? It is certain that normal heterosexual intercourse (copulation) falls within this scope, as it forms the content of a separate, narrower concept: "sexual intercourse". But what beyond that? Although narrower interpretations of this concept have emerged from attempts to give it a reasonable framework under the new Penal Code – complemented by criminological and social considerations – in light of grammatical and logical interpretation, such readings are unfortunately arbitrary. As such, they fall outside the scope of any interpretation recognised in law, apart from one based on "purposefulness". How can it logically be demonstrated, on the basis of the above types of interpretation, that an "act of fornication" under Article 168 of the Penal Code is limited only to physical contact between partners in the form of copulation or its equivalent, when an identical term – "act of fornication" – appears in Article 177, and yet, in established legal practice under

[20] J. Wojciechowski, *Kodeks karny. Krótki komentarz praktyczny*, Rawa Mazowiecka, 1994, pp. 201, 213.

[21] W. Świda, *Prawo karne*, Warszawa, 1982, p. 516.

> this provision, there was never the slightest doubt that its application did not require any bodily contact between two persons? Exhibitionists, for example, were regularly held liable under this provision. In fact, such cases were not only frequent – they could be regarded as typical applications of Article 177. Could the new legislator have intended to use the term "fornication" in two different senses: a narrower one in Article 168, and a broader one in Article 177? From a logical standpoint, such a position would represent a fundamental inconsistency – one that is difficult to attribute to the legislator.'[22]

Therefore, at that time, both perpetrators of rape and exhibitionists were held criminally liable under the concept of 'fornication'.

Anna Gimbut, commenting on crimes related to the exploitation of prostitution under the Penal Code of 1969, considered to what extent the drafters of the Code, who had intended to eliminate the concept of 'fornication' – an intention that ultimately was not realised – had, in referring to 'fornication', meant only prostitution. She noted that the legislator's intent could not be disregarded, particularly because the terms 'fornication' and 'fornication act' should be understood as distinct, a conclusion arising from the fact that the legislator clearly differentiated between them.[23]

As Marian Filar pointed out:

> 'In the Penal Code of 1932, the concept of "fornication" was applied in two senses. Firstly, with the addition of the adjective "professional", it was treated as a synonym for prostitution. Secondly, the concept of "fornication" was used without the adjective "professional", describing sexual intercourse also engaged in by individuals who were not involved in prostitution. The Penal Code of 1969 broke with this duality and introduced the term "fornication", treating it in all cases as equivalent to the former concept of "professional fornication" – i.e. prostitution.' At the same time, this eminent expert on sexual offences advocated for the removal of the term 'fornication' from the Penal Code and its replacement with: 'An objectified biological concept, such as "sexual intercourse", which would include acts of copulation and possibly its surrogates, treated by the perpetrator as equivalent to copulation.' He argued that: 'The term "fornication" is an anachronism, suggesting that certain sexual activities are, by definition, burdened with the mark of fornication and thus carry a pejorative social assessment. Sexual activities, however, are a normal and proper function of the human body and, as such, should not be subject to ethical evaluation. What is subject to such evaluation is the manner in which they are performed.'[24]

With full respect and gratitude to the late Professor, it must be acknowledged that the concept of 'fornication' in the Penal Code of 1969 was indeed outdated. However, it is difficult to fully share his view that only the manner of performing sexual activities may be subject to ethical assessment, while the activities themselves may not. In reality, such activities may also be subject to axiological evaluation – particularly in cases such as paedophilic behaviour, which is assessed negatively regardless of how it is carried out. The same applies to incest, which is commonly

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[22] M. Filar, 'Pojęcie „czynu nierządnego" w kodeksie karnym', *Palestra*, 1973, No. 2, pp. 8–9.

[23] A. Gimbut, 'Wewnątrzkrajowe przestępstwa eksploatowania prostytucji w prawie polskim', *Annales Universitatis Mariae Curie-Skłodowska*, 1973, Vol. XX, pp. 80–81.

[24] M. Filar, 'Przestępstwa w dziedzinie stosunków seksualnych', in: Andrejew I., Kubicki L., Waszczyński J. (eds), *System prawa karnego. O przestępstwach w szczególności*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź, 1989, pp. 165, 229.

viewed as ethically unacceptable, even if its criminalisation is subject to debate on the grounds of personal freedom.

Nonetheless, 'fornication' was primarily synonymous with prostitution, which in the post-war period developed in line with the social and economic conditions of the time. As Michał Antoniszyn and Andrzej Marek noted, in the first years following the end of the war, prostitution expanded rapidly in the Tri-City area and in Szczecin, as well as in other cities, where prostitutes were categorised according to the places in which they worked – 'gruzinki', 'kolejówki', and 'lokalówki'. As early as 1945, the sanitary registration of prostitutes began, and in 1948, on the initiative of the League of Polish Women, a nationwide commission for the fight against prostitution was established. Advisory committees for the fight against prostitution began to be formed at national councils; however, these were liquidated in 1949. The registration of women practising prostitution was then taken over by newly created sections of the Citizens' Militia designated to combat prostitution. In 1952, an abolitionist model for addressing prostitution was adopted in Poland, which led to the dissolution of these special sections. However, due to the rapid increase in prostitution, they were reinstated in 1956. This re-establishment proved useful in the eyes of the authorities at the time, as in the following decades – alongside the country's industrialisation – prostitution continued to grow.[25] In any case, the People's Republic authorities seemed to tolerate its existence, given that even in the 1970s and 1980s TV series *07 Zgłoś się*, Lieutenant Sławomir Borewicz – played by Bronisław Cieślak (the series and its protagonist likely aimed to soften the image of the Citizens' Militia) – frequently had encounters with 'young ladies', meaning that such women appeared in various cases he handled. Borewicz himself also often enjoyed the company of numerous attractive women.

The term 'act of fornication' survived in the Penal Code of 1969 until its repeal on 1 September 1998, which means it remained in force nearly a decade after the collapse of Communist Poland in 1989. It outlasted several political systems. Therefore, it can be argued that there was a certain attachment to the term – an attachment that is still, to some extent, 'cultivated' in Polish criminal law.

'FORNICATION' IN CURRENT LEGAL ACTS

The Penal Code of 6 June 1997[26] does not recognise the concept of 'fornication'. As indicated in its justification:

> 'Guided by the postulates of the doctrine, this Code omits such terms as "fornication" and "lewd act". Instead of these concepts, the Code uses expressions that are less evaluative. It distinguishes between "sexual intercourse" and "other sexual activities".'[27]

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[25] M. Antoniszyn, A. Marek, *Prostytucja w świetle badan kryminologicznych*, Warszawa, 1985, pp. 36–38.

[26] Journal of Laws of 2024, item 17, as amended.

[27] *Nowe kodeksy karne z 1997 r. z uzasadnieniami. Kodeks karny. Kodeks postępowania karnego. Kodeks karny wykonawczy*, Warszawa, 1997, p. 196.

The phrase 'fornication' has long been considered both outdated and negatively evaluative, as well as inadequate in relation to its colloquial understanding. If this term is used at all, it is extremely rarely and only applicable to describe prostitution.

Therefore, it is difficult to agree with Bruno Hołyst's view that the expressions 'professional formication' or 'practising formication are accurate descriptors of prostitution in legal language.[28] Legal language, after all, is the language used by lawyers – who refer to 'prostitution', not 'fornication'. Consequently, 'fornication' is no longer an element of legal language as a subset of the specialised professional language.

Nevertheless, it remains part of legal language, i.e., the language used by the legislator. This is the case under the Civil Code of 23 April 1964,[29] the Code of Petty Offences of 20 May 1971[30] and the Act of 9 June 2022 on the Support and Resocialisation of Juveniles.[31]

In the first of these acts, the term 'fornication act' appears, as according to Article 445 § 1: 'In the cases provided for in the preceding article, the court may award the injured party an appropriate sum of money as compensation for the harm suffered' and its § 2 states that 'The above provision shall also apply in the case of deprivation of liberty and in the case of inducing submission to a fornication by means of deceit, rape or abuse of the relationship of dependency.' The category of 'fornication' used in this provision appears to include 'sexual intercourse' and 'other sexual activity'. Moreover, the term 'rape' as used in this provision, should be understood as a method of coercion involving violence and unlawful threats, characteristic of the offence of rape.

Representatives of the civil law doctrine interpret the term 'act of fornication' in various ways. For instance, Adam Olejniczak defines it broadly, stating that it includes: 'not only bodily intercourse in heterosexual or homosexual relationships, but also other behaviours in the sexual sphere of a person, such as sexual acts constituting surrogates for copulation, exposing or touching intimate parts of the body, or photographing a naked person'. At the same time, Olejniczak holds the view that: 'Not every act of fornication towards a minor meets the conditions set out in this provision.'[32] Although he does not elaborate on this point, a literal reading of the provision suggests that, unless the perpetrator's act of fornication involves deceit, rape, or abuse of a relationship of dependence with respect to the minor, it does not provide a basis for compensation. This interpretation would apply in particular where the minor consents to the sexual act.

Earlier, Adam Szpunar expressed his opinion on this concept, noting that: 'The concept of "fornication" is a subject of controversy,' and that: 'The Penal Code uses less evaluative and pejorative terms,' such as 'sexual intercourse' and 'other sexual activities'. At the same time, he emphasised: 'It is indisputable that a "fornication

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28 B. Hołyst, *Kryminologia*, Warszawa, 2016, p. 670.

29 Journal of Laws of 2024, item 1061, as amended.

30 Journal of Laws of 2023, item 2119.

31 Journal of Laws of 2024, item 978.

32 A. Olejniczak, 'Komentarz do art. 445', in: Kidyba A. (ed.), *Kodeks cywilny. Zobowiązania. Część ogólna*, Warszawa, 2010, pp. 488–489.

act" cannot be equated with "sexual intercourse". The matter is quite obvious, for example, in the case of homosexual rape.' He also observed:

> 'There is no doubt that the main preventive and repressive tasks in this respect fall to criminal law. The protection provided by criminal law is of fundamental importance. Civil law may also play a role through its compensatory function, creating the possibility of claiming compensation from the perpetrator for the harm suffered. The protected good here is sexual integrity, which should be understood broadly. Other personal rights of the injured party – such as health, freedom, and honour – are also most often violated in such situations.'[33]

As early as the interwar period, Roman Longchamps de Bérier wrote on this subject, referring to 'moral reparation', which, in his view, should include: 'both reparation for physical suffering and moral harm, and is due to the aggrieved party himself.'[34]

According to Radosław Strugała: 'Inducing, using violence, deceit, or abuse of a relationship of dependency, to submit to a "fornication act" through rape, deceit, or abuse of a relationship of dependency does not have to exhaust the features of any prohibited act under Articles 197 et seq. of the Penal Code.'[35] However, this would be a relatively rare scenario – if imaginable at all – from the perspective of criminal law, within which such acts typically meet the characteristics of prohibited offences.

The second legal act referenced – the Code of Petty Offences of 1971 – contains Article 142, which provides: 'Whoever persistently, by imposing himself or in any other way violating public order, proposes to another person to commit an act of fornication with him, in order to obtain a material benefit, shall be subject to the penalty of arrest, restriction of liberty, or a fine.' The term 'fornication' used in this provision should be interpreted as referring to prostitution.

This interpretation has been and continues to be accepted by scholars of petty offences law. For example, Arnold Gubiński stated that: 'The regulation contained in this provision aims to ensure that the behaviour associated with prostitution does not exceed the boundaries accepted by society. It does not target prostitution as such, but the excesses committed by those who practise it.'[36] Andrzej Marek argued that: 'This provision creates a basis for combating scandalous and disturbing manifestations of prostitution, which as such is not punishable.'[37] Marek Bojarski added: 'The offence under Article 142 of the Code of Petty Offences is not directed against prostitution *per se*, but penalises such manifestations of prostitution as simultaneously disturb public order.'[38] Thus, while the provision refers to a 'fornication act', legal scholars consistently interpret it as referring to prostitution. Given the archaic nature of the

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[33] A. Szpunar, *Zadośćuczynienie za szkodę niemajątkową*, Bydgoszcz, 1999, pp. 172–173.

[34] R. Longchamps de Berier, *Zobowiązania*, Lwów, 1939, p. 294.

[35] R. Strugała, 'Komentarz do art. 445', in: Gniewek E., Machnikowski P. (eds), *Kodeks cywilny. Komentarz*, Warszawa, 2019, p. 991.

[36] A. Gubiński, *Prawo wykroczeń*, Warszawa, 1989, p. 335.

[37] A. Marek, *Prawo wykroczeń (materialne i procesowe)*, Warszawa, 2002, p. 139.

[38] M. Bojarski, Z. Świda, *Podstawy materialnego i procesowego prawa o wykroczeniach*, Wrocław, 2002, p. 181.

term 'fornication', it is not surprising that authors writing on petty offences law instead use the term 'prostitution'.

However, there are also indications that the term used is 'fornication act', as exemplified by Tadeusz Bojarski's formulation, according to which: 'The provision of Article 142 of the Code of Petty Offences penalises offering oneself to commit a fornication act specifically.' [39] Similarly, Krzysztof Wala argues that the subject of this offence cannot be assumed to be solely a person engaged in prostitution. Nonetheless, its perpetrator is most often someone practising such conduct. According to his interpretation of Article 142 of the Code of Petty Offences, 'fornication' refers to: 'any conduct within the broadly understood scope of sexual life, i.e. both sexual intercourse and other sexual activities which, based on accepted cultural patterns, constitute the intimate sphere of every human being. Therefore, their exposure – whether through performance or proposition – may constitute a violation of public decency.'[40] This interpretation should be accepted, as linking this offence exclusively with prostitution would be both unjustified and overly restrictive. Jarosław Janikowski shares this view, rightly pointing out that the offence can also be committed by: 'a person leading a morally upright life who, under the influence of intoxicants, engages in conduct constituting this offence.'[41]

As Marek Mozgawa explains, the term 'fornication' used in this provision was inherited from the Penal Code of 1969. In contrast, the Penal Code of 1997 employs the concepts of 'sexual intercourse' and 'other sexual activities'. Therefore, under Article 142 of the Code of Petty Offences, it is possible to interpret the term as covering 'sexual intercourse', 'other sexual intercourse' (in the sense used previously), as well as 'other sexual activities'.[42] Such a provenance explains its presence in the Code of Petty Offences, which dates from the same period as the former Penal Code, but does not justify its continued use. Accordingly, it should be proposed that Article 142 of the Code of Petty Offences be amended to replace the term 'fornication' with 'prostitution', as is already the case in Articles 202 and 203 of the Penal Code of 1997. Legal language ought to be consistent across the legal system, and consequently, the same conduct should be defined using the same terminology in various legal acts. However, this proposal is sensible only if the aim is to criminalise solely the offering of sexual services by prostitutes. If the intended scope is broader, then Krzysztof Wala's proposal is more appropriate – namely, to replace the term 'fornication' in this provision with 'sexual act', a term that includes both 'sexual intercourse' and 'other sexual activity'.[43]

Julia Kosonoga-Zygmunt also supports the unification of the conceptual framework between the Code of Petty Offences and the Penal Code. Nevertheless,

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[39] T. Bojarski, *Polskie prawo wykroczeń. Zarys wykładu*, Warszawa, 2009, p. 227.

[40] K. Wala, *Wykroczenie nieobyczajnego wybryku na tle pozostałych wykroczeń przeciwko obyczajności publicznej*, Warszawa, 2019, pp. 349, 360.

[41] J. Janikowski, 'Wykroczenie proponowania czynu nierządnego', *Prokuratura i Prawo*, 2017, No. 4, p. 1114.

[42] M. Mozgawa, 'Uwagi na temat wykroczenia z art. 142 k.w.', in: Mozgawa M. (ed.), *Prostytucja*, Warszawa, 2014, pp. 123–124.

[43] K. Wala, *Wykroczenie nieobyczajnego*…, op. cit., p. 350.

in the title of the study where she addresses this issue, she still uses the phrase 'proposing to commit a fornication act' for financial gain as a description of one of the offences.[44] In the opinion of Jarosław Janikowski: 'Sexual behaviour that does not conform to socially accepted standards is defined as acts of fornication.' However, it appears that this usage reflects everyday language more than precise legal terminology.[45] With all due respect to the author of these words, I do not believe that such a term is used in everyday language – let alone in legal language – to describe this type of behaviour. For example, I doubt that anyone would say that the perpetrator of rape committed an 'act of fornication'. Nor do I believe that the actions of prostitutes who attempt to attract passers-by by displaying their physical attributes while standing by the roadside – behaviour that is sometimes, and incorrectly, treated as constituting all the elements of the offence discussed in Jarosław Janikowski's article – would be referred to using this term.

The term 'fornication' also appears in the Act on the Support and Rehabilitation of Juveniles of 2022. Article 4 of this Act lists 'fornication' as one of the manifestations of juvenile demoralisation, repeating the term from its predecessor, the Act of 26 October 1982 on Proceedings in Juvenile Cases,[46] which likewise, in Article 4, treated 'practising fornication' as a circumstance indicating the demoralisation of a minor. While the use of this term in the older of these acts may be explained by the time of its drafting, its incorporation into a legal act in 2022 must be regarded as incomprehensible – perhaps explicable only by legislative carelessness, rather than by any recognisable linguistic tradition in this area. It is quite possible that even minors engaging in statutory 'fornication' have no idea that their activity was once described using such terminology. What is certain, however, is that it is no longer referred to in this way, either in general usage or in the language they themselves use.

Accordingly, Agnieszka Kilińska-Pękacz is right to state, in the context of underage prostitution, that: 'practising fornication' is an archaic phrase, because nowadays the term 'prostitution' is in use.'[47] Representatives of criminal law and its auxiliary sciences – especially criminology – when referring to the demoralisation of minors, no longer use the term 'fornication', but rather 'practising prostitution', as do Jan Widacki and Magdalena Grzyb,[48] or they speak simply of 'prostitution', as in the approach of Waldemar Cisowski.[49] However, references to 'practising fornication' as a behaviour indicating juvenile demoralisation are still present in the literature – for example, in the study by Janina Błachut, Andrzej Gaberle,

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[44] J. Kosonoga-Zygmunt, 'Proponowanie dokonania czynu nierządnego w celu uzyskania korzyści materialnej', *Ius Novum*, 2022, No. 4, pp. 35, 41.

[45] J. Janikowski, 'Wykroczenie proponowania…', op. cit., p. 108.

[46] Journal of Laws of 2018, item 969, as amended.

[47] A. Kilińska-Pękacz, 'Prostytucja nieletnich', in: Krajewski R. (ed.), *Postępowanie z nieletnimi i młodocianymi. Wybrane zagadnienia teorii i praktyki*, Bydgoszcz, 2017, p. 65.

[48] J. Widacki, W. Dadak, M. Grzyb, A. Szuba-Boroń, *Kryminologia*, Warszawa, 2022, p. 258.

[49] W. Cisowski, 'Przestępczość nieletnich', in: Łabuz P., Malinowska I., Michalski M. (eds), *Kryminologia*, Warszawa, 2020, p. 168.

and Krzysztof Krajewski.[50] Regardless of individual doctrinal interpretations, the statutory 'practice of prostitution' ultimately refers to as it is currently understood.

Based on Article 4 of the 2022 Act on the Support and Rehabilitation of Juveniles, Adam Balicki states:

> '"Fornication" should be understood as any action that aims to satisfy the sexual drive, using deception, threat, or any form of violence, against a person unable to defend themselves, exploiting an employment relationship, targeting someone incapable of recognising the act, or taking advantage of another person's forced situation. For a minor under 15 years of age, pimping, incest, and fornication are also prohibited. A manifestation of fornication indicating the demoralisation of a minor will therefore be any act of satisfying the sexual drive performed by a minor against another person in the circumstances indicated above.'[51]

In his opinion, it is not only the engagement in prostitution by a minor, but any sexual behaviour on their part that fulfils the elements of a prohibited act that constitutes 'practising fornication'. This view, however, cannot be accepted – both due to the nature of the concept of demoralisation itself, and because such behaviour would then constitute a punishable act, forming an independent basis for proceedings against the minor, separate from demoralisation. Moreover, such an approach aligns more closely with the understanding of an 'act of fornication' characteristic of the Penal Codes of 1932 and 1969, rather than with contemporary interpretations, in which 'fornication', if it is understood at all, is recognised in the context of prostitution rather than in any broader sense.

Undoubtedly, it is necessary to call for the removal of the term 'fornication' from the 2022 Act on the Support and Rehabilitation of Juveniles, and its replacement with 'prostitution' or another term synonymous with it – ideally using the expression 'prostitution'. This change would serve two purposes: first, to align the language of the Act with contemporary Polish usage; and second, to promote coherence within the legal system, where – by principle – the same terms should not bear multiple meanings.

CONCLUSION

'Fornication' is a well-established conceptual category, having been present in Polish law for over ninety years. While the legislator no longer uses this term in the Penal Code of 1997 – unlike in the Penal Code of 1932 and the Penal Code of 1969 – the notion still appears in the Civil Code of 1964, the Code of Petty Offences of 1971, and the Act on the Support and Rehabilitation of Juveniles of 2022. This is striking, as in the latter two acts the term should have been replaced accordingly. While its presence in older laws may be explained by legislative inertia, its use in 2022 Act is difficult to justify, except perhaps, as a result of a lack of basic legislative diligence.

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[50] J. Błachut, A. Gaberle, K. Krajewski, *Kryminologia*, Gdańsk, 2006, p. 318.

[51] A. Balicki, 'Komentarz do art. 4', in: Drembkowski P., Kowalski G. (eds), *Ustawa o wspieraniu i resocjalizacji nieletnich. Komentarz*, Warszawa, 2023, pp. 43–44.

Therefore, an amendment in this area is necessary to preserve the semantic coherence of the legal system and, ultimately, to eliminate the terms 'fornication' and 'fornication act' from legal language as completely archaic expressions – obsolete not only in legal usage but also in contemporary colloquial language. Even if a segment of society continues to assess sexual behaviour in a more conservative or less liberal spirit than the majority, it is highly unlikely that such conduct would today be referred to as 'fornication'. This applies equally to prostitution, which is no longer described using the terms 'fornication' or 'fornication act', but rather through more modern synonyms. Nevertheless, it was previously identified with 'fornication'.

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Cite as:

Krajewski R. (2025), *Fornication as a Notion Applicable in Polish Law*, Ius Novum (Vol. 19) 3, 11–28. DOI 10.2478/in-2025-0021