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Criminal policy on offences against women's sexual liberty in Poland. A post-Foucauldian and institutional-legal analysis

Abstract: The research problem addressed in the text concerns the state's criminal policy on offences against women's sexual liberty in Poland, examined from both the post-Foucauldian and an institutional-legal perspective. The analysis focuses on the offence of rape, with particular attention to the amendments introduced by the Act of 28 June 2024 amending the Criminal Code and certain other acts, concerning the redefinition of the indicia of the prohibited act set out in Article 197 of the Criminal Code. The main purpose of the analysis is to characterise the criminal policy on sexual offences, with particular emphasis on legal solutions concerning rape, together with their doctrinal practice of interpretation, from the post-Foucauldian and institutional-legal perspective. The text presents the following research questions: (1) How can the legal solutions altering the scope of the definition of the offence of rape in Polish criminal law following the 2024 amendment be assessed from the post-Foucauldian perspective?, (2) How can the legal solutions altering the scope of the definition of the offence of rape in Polish criminal law following the 2024 amendment be assessed from the institutional-legal perspective? The scope and purpose of the analysis thus defined determine the individual sections of the text, which are: (1) a description of the study's normative assumptions, including a presentation of such categories as: the 'apparatus', the 'apparatus of sexuality' and sexual autonomy, (2) the characterisation of the structure of the offence, chiefly with regard to the new elements introduced in 2024, as well as the relationship between the categories of violence and resistance in the offence of rape.

Keywords: legal policy, criminal policy, sexual liberty, sexual autonomy, offences against sexual liberty, the offence of rape



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Introduction

The scope of the research problem addressed in the text concerns the state's criminal policy on offences against women's sexual liberty in Poland, examined from both the post-Foucauldian and an institutional-legal perspective. The analysis will focus in particular on the offence of rape as the most serious offence against sexual liberty. However, the analysis will not fully characterise all the types of offences under Article 197 of the Polish Criminal Code, but only the amendments introduced by the Act of 28 June 2024 *amending the Act – the Criminal Code and certain other acts* (Journal of Laws 2024, item 1228). In other words, the amendments are concerned with an attempt to redefine the indicia of the offence of rape.

It must be recognised that criminal policy is a specific aspect of legal policy in a state, whose purpose is to determine how to respond to behaviour deemed particularly harmful to society. Criminal law itself should be regarded as the state's strongest subsidiary means and the last resort (Latin: *ultima ratio*) (cf. Horvatić, Derenčinović, Cvitanović, 2025, pp. 32–38). When referring to criminal law as one of the tools of criminal policy, it is important to bear in mind that it fulfils specific functions, which include, *inter alia*: (1) protection, (2) repression, (3) guarantee, and (4) prevention. And so first and foremost, the law is there to protect the members of the political community from threats that the community find relevant. Furthermore, the law is an instrument for the realisation of social justice through retribution for the offence committed. Criminal law also serves to deter potential or actual offenders, which it does in at least two ways: (1) the first one is to illustrate the measures the authorities have at their disposal to deal with them, (2) the other one is to foster desired attitudes (for more on this see: Cywiński, Kojder, 2014, pp. 102–105; Mozgawa, 2020, pp. 28–31; Utrat-Milecki, 2022, pp. 228–297; Kulesza, 2023, pp. 37–46; Horvatić, Derenčinović, Cvitanović, 2025, pp. 28–30; Pohl, 2025, pp. 30–38). By examining the functions of criminal law from the post-Foucauldian perspective, and through the lens of the three modalities of the 'apparatus' of power, it is worth noting that: (1) the 'legal dispositif' is responsible for establishing norms and criminal sanctions that define prohibited or permitted behaviour, (2) the 'disciplinary dispositif' is responsible for influencing individuals by shaping attitudes and fostering the internalisation of social norms, thereby fulfilling a preventive function, (3) the 'dispositif of security' is responsible for managing

social phenomena through strategies aimed at mitigating risk and protecting specific legal interests (cf. Ostrowicka, 2015, pp. 153–162; Ostrowicka, 2019a, pp. 178–187; Ostrowicka, 2019b, pp. 75–94). The post-Foucauldian approach to criminal law in relation to offences against women's sexual liberty can be interpreted through the lens of the 'apparatus of sexuality', within which criminal sanctions, preventive mechanisms as well as various institutional practices form a system for regulating behaviour in the sphere of sexuality. The 'apparatus of sexuality' typically operates through legal classification mechanisms, standards of evidence and normative models of credibility, thereby contributing to the process of creating and legitimising various forms of knowledge about sexual violence, including, in particular, the processes of defining, identifying and proving the offence of rape.

Sexual offences, including rape, infringe upon one of the fundamental rights protected by law, namely liberty, and within that, sexual autonomy. In brief, sexual autonomy can be understood as an individual's right to make decisions about their own sex life, particularly with regard to the right to engage in or refuse sexual activity without coercion and of their own free will. Analyses of criminal policy and the criminal law doctrine distinguish two main models of understanding of the concept: the classical 'force-based model' and the 'consent-based model'. In the first model, sexual liberty is primarily associated with the use of violence, threats or other forms of negative influence, which for a long time constituted the dominant perspective on the offence of rape. In the other model, however, the emphasis is placed not so much on the coercive measures themselves as on identifying a violation of sexual autonomy by demonstrating the absence of voluntary and informed consent to sexual acts (cf. Schulhofer, 2017, pp. 335–352; Tuerkheimer, 2019, pp. 166–183; Tuerkheimer, 2021, pp. 609–636; Tuerkheimer, 2024, pp. 55–105; Uhnoo, Erixon, Bladini, 2024, p. 100668; Wróbel, 2025).

Given the scope of the title and the research question, the main purpose of the analysis in the present text is to characterise criminal policy on sexual offences, with particular emphasis on legal solutions concerning rape and their doctrinal interpretation, through a post-Foucauldian and institutional-legal lens. In order to elaborate the material scope of the research problem, the following research questions have been presented in the text: (1) *How can the legal solutions altering the scope of the definition of the offence of rape in Polish criminal law following the 2024 amendment be assessed from the post-Foucauldian perspective?*, (2) *How*

can the legal solutions altering the scope of the definition of the offence of rape in Polish criminal law following the 2024 amendment be assessed from the institutional-legal perspective?

The analysis presented in the text is illustrative and based primarily on interpretations drawing on the post-Foucauldian and institutional-legal approaches. The first approach focuses on the potential use of the concepts of 'apparatus' and the 'apparatus of sexuality' to analyse specific issues relating to criminal policy on the offence of rape against women. As regards the other approach, the focus is on a formal-dogmatic interpretation, which essentially involves referring to legal solutions established by the legislature, together with the practices of their application or doctrinal settlements (Dean, 1994, pp. 271–296; Foucault, 1995, pp. 71–117; Zieliński, 1998, pp. 1–20; Nowacki, Tobor, 2016, pp. 293–313; Ostrowicka, 2019a, pp. 178–187; Ostrowicka, 2019b, pp. 75–94; Bekrycht, Leszczyński, Łabieniec, 2021, pp. 187–215; Pohl, 2025, pp. 75–82).

1. Characteristics of the normative assumptions underlying the analysis

1.1. The categories of 'apparatus' and 'apparatus of sexuality'

The category of 'apparatus', introduced into scholarship by M. Foucault and developed by his successors, should be understood as a set of institutions, procedures, analyses, reflections and tactics enabling the exercise of a specific and complex form of power directed primarily at populations, yet at its very core generating many specific technologies of governance and forms of knowledge (Agamben, 2010, pp. 82–100; Elliott, 2014, pp. 104–106; Ostrowicka, 2015, pp. 153–162; Ostrowicka, 2019b, pp. 75–94). It would appear that the 'apparatus' can be likened to Weber's concept of legitimacy; however, in Foucault's conception, this is largely supplanted by an analysis of the production of conditions of obedience (through normalisation, expertism, standards of evidence, statistics, etc.) (Brenner, 1994, pp. 679–709). It can therefore be argued that the link between the two thinkers is the process of the rationalisation of power – whilst Weber focused on tracing advanced forms of rationalisation, such as legal and bureaucratic institutions, Foucault was interested in the rationalisation of historical techniques of governance ('governmentality') (Gordon, 1987, pp. 293–316). To put it another way, one might

say that Weber attempts to explain how order is justified, whereas Foucault explains how order operates even when it appears to us as neutral (O'Neil, 1986, pp. 42–60). With this in mind, the 'apparatus' can be described as a specific form of power based on different formations (concurrently three perspectives): knowledge, power and the subject, as well as different modes of 'dispositif', i.e., different mechanisms of power, expressing disparate rationalities of governance (i.e. modalities related to law, discipline and security) (Agamben, 2010, pp. 82–100; Ostrowicka, 2019b, pp. 75–94).

Each of the three forms of 'apparatus' (law, discipline, and security) serves a different purpose. Thus, the 'legal dispositif' demarcates the boundaries of what is permitted and what is not, penalising undesirable behaviour without, however, serving a preventive function. The 'disciplinary dispositif' standardises and shapes the 'normal subject', preventing undesirable phenomena. This is a set of micro-level power techniques that usually operate in the background of everyday practices, and yet are internalised by the subject. By contrast, the functioning of the 'security dispositif' is not based on eliminating phenomena deemed undesirable but on stimulating those deemed desirable. Its activity also focuses less on regulating subjects than on managing phenomena considered impossible to eliminate, but that can be controlled within socially acceptable norms. All three mentioned 'dispositifs' do not constitute stages of action, but coexist and intersect with one another, thus reinforcing their impact or, in certain situations, competing with one another (cf. Dean, 1994, pp. 271–296; Bussolini, 2010, pp. 85–106; Ostrowicka, 2015, pp. 153–162; Ostrowicka, 2019b, pp. 75–94).

The 'apparatus of sexuality', as analysed by Foucault in *The History of Sexuality*, is not a specific modality of 'apparatus' in its own right; nor is it a research tool, but rather a subject of research. It must therefore be recognised that the 'apparatus of sexuality' is a form of historical 'dispositif', producing its own truth about sexuality and possessing its own strategies, within which Foucault identified: (1) the hysterisation of women's bodies, (2) the pedagogisation of children's sexuality, (3) the socialisation of procreation, and (4) the psychiatrisation of perversion (Foucault, 1995, pp. 71–117; Ostrowicka, 2019b, p. 95). In *The History of Sexuality*, Foucault employs an intellectual approach similar to the one he used earlier in writing about a logic of power that differed from that posited by political philosophers. In his view, the hypothesis regarding the repressiveness of authority – the long-held belief that sexuality has

been suppressed by that authority by various means since the 17th century – is ideological and therefore flawed. This does not, of course, mean that over the centuries there were no repressive mechanisms whatsoever; however, greater significance is attached to the actions of the authorities in producing discourses, identities and norms (Foucault, 1995, pp. 22–51; Gutting, 2005, pp. 114–124; Elliott, 2014, pp. 99–104).

Given the above premises of the Foucauldian thought, it must be assumed that a subject's sexuality is shaped primarily by specific field-related discourses on sexuality that are produced and disseminated, e.g., ones found in the medical, psychiatric, pedagogical and legal fields. This means that the exercise of power does not consist in eliminating speech or expression, but in organising, intensifying and classifying them. Instead of silence, there is the imperative of confession, which serves as a mechanism for uncovering the truth about oneself. Consequently, the narrative of sexual liberation – the struggle against repression that stifles subjects' sexuality – does not reveal human nature, but rather reproduces a pattern of thinking that presupposes its existence as a primary fact. In turn, subjects themselves thus become bearers of various kinds of norms – most often non-legal ones – such as moral, medical or psychological norms, and are therefore social constructs (Foucault, 1995, pp. 22–51).

New strategies of the 'apparatus of sexuality' may address sexual autonomy in the context of sexual violence against women, such as rape. If the 'apparatus' generates sexuality as a truth about the subject, then the debate over such elements of discourse as whether there 'was consent', 'there was violence', and whether 'the victim is credible' is not merely a matter of facts, but is socially constructed. Hence, it is important to consider how particular discourses and the techniques of influence employed make certain events seem more or less credible or plausible. A specific discourse may be linked to particular disciplinary techniques, as is clearly evident in the disputes over the definition of rape in criminal law, where the moral assessment (classification) concerns not the perpetrator but the victim. On the one hand, the victim becomes the subject of public scrutiny; on the other, they become the subject of scrutiny during an interrogation. Equally important is the link between this discourse and disciplinary techniques in the context of the criminal act itself, where victims are required to demonstrate an active stance of resistance, appropriately manifested outwardly.

It seems possible to link the various modalities – traditionally attributed to the 'apparatus' – with specific new strategies of the 'apparatus of

sexuality' concerning sexual autonomy in the context of violence against women, thereby creating a kind of intellectually useful framework (Table 1).

Table 1. A matrix of sexual apparatus of violence (modalities and strategies).

Elements of the apparatus sexuality	Modality of law	Modality of discipline	Modality of security
Definition of rape and consent	How are the indicia of a prohibited act formulated? How is the absence of consent defined – from the perspective of passivity or activity?	Norms for the victim's reaction indicating consent or opposition	How does the interpretation of the indicia of a prohibited act contribute to the classification of certain acts as criminal?
Standard of evidence and credibility	How does the law justify the assessment of evidence?	Examining the victim in respect of: coherence of their account, emotions and reactions	Scope of rationalisation and acceptance of violence, e.g. by citing the argument of the risk of bias
Discourse	Identification of the concepts making up the classification of a prohibited act: consent, deception, vulnerability, etc.	Moralising and normalising behaviours. Pointing out appropriate behaviour	Terminological characteristics of law enforcement language with regard to procedural capacity and incapacity.
Visibility of the evidence	What the law considers relevant: injuries, marks, etc.	The visibility of the victim's body as 'evidence'. How does the system equate the absence of external marks of violence with the absence of 'probative viability'?	Equating rape with physical violence, and therefore with external injuries

Source: own study.

The field of the first modality – the legal one – is defined by legal classification and the final ruling; consequently, it provides answers to questions regarding the constituent elements of: the indicia, the admissibility of evidence, and the grounds for classifying an act as a criminal offence.

In this case, the offence of rape. The field of the second modality – the disciplinary one – is defined by norms of behaviour; consequently, it provides answers to questions about how an individual should behave to be regarded as credible. The field of the third of these modalities – namely, security – defines what the authorities may deem procedurally acceptable, detectable, and provable – in other words, what is worth pursuing in terms of evidence. At the same time, it should be noted that elements such as: (1) the definition of rape and consent, (2) the standard of evidence and credibility, (3) discourse, and (4) the visibility of evidence are not merely a list of problems, but rather a kind of *topoi* of truth generation. This stems from the assumption that each of them involves such processes as: classification of events, selection of social facts, normalisation of behaviour, and construction of subjects. In the context of sexual violence, this in turn leads to the assumption that rape is not merely a fact as such, but an epistemological fact for that matter.

Undoubtedly, the starting point in analysing the strategy of the ‘apparatus of sexuality’ encompasses the very strategies concerned with the definition of rape and consent, which follows from the fact that, at the legal level, the structure of the indicia of the prohibited act, as well as the normative models of the absence of consent on the part of the victim define at least the formal boundaries of the classification of the act, whilst incidentally serving as a lexicon for defining sexual autonomy in the institutional dimension. Within the field of disciplinary modality, the same institutional definition is transformed into a tool for normative assessment of the victim’s response; within the field of security, however, it becomes a tool for selecting events that are economically viable in litigation. From a procedural perspective, however, the standard of evidence and credibility serves as a disciplinary technique through examination, as it determines the threshold for evidence and doubt. At the same time, it activates disciplinary mechanisms that involve generating knowledge about the subject by testing the coherence of their narrative, emotion, and memory. Within the very field of security modalities, specific standards of evidence and credibility are rationalised through a restrictive evidence threshold and rhetoric that invalidates the victim’s experiences. Another strategy stems from institutional discourse, which – across various disciplines – describes and constructs what is to be visible and recognisable as a prohibited act or a victim. Thus, in law, it provides the terminology that enables facts to acquire normative status; in discipline, it functions as a practice of normalising behaviour; and in security, it takes the form

of technocratic rationalisation, within which structures of domination are reproduced under the guise of neutrality. The last strategy identified – the visibility of evidence – reveals the epistemology of sexual violence, within which intersecting modalities privilege sexual violence that is physically detectable and therefore, by definition, easily documentable, thereby determining which experiences may be recognised in terms of both cognition and legal proceedings.

1.2. The category of sexual autonomy

It is noteworthy that the Polish Criminal Code uses the categories of sexual liberty and public decency to define the legally protected interests that are at risk from offences commonly referred to as sexual offences. L. Gardocki writes that the specific offences listed in Chapter XXV of the Criminal Code – namely sexual offences – can be categorised according to the nature of the interests infringed upon, namely sexual liberty and public decency (Gardocki, 2023, pp. 281–294). However, some representatives of legal doctrine indicate that the acts criminalised in this chapter infringe upon both the legally protected good of sexual liberty and that of public decency (Konarska-Wrzosek, 2018, p. 939). Noteworthy, K. Lipiński argues that an attack on public decency occurs in any situation where an individual's freedom to decide about their sexual relationships, or their exposure to content of that nature is not infringed upon. It must therefore be accepted that public decency constitutes an interest of a supra-individual nature; consequently, it cannot be infringed by acting against an individual legal interest, namely sexual liberty (Giezek, 2021, pp. 604–605).

It is noteworthy that under the 1969 Criminal Code, the offence of rape was classified under the chapter on offences against freedom as such (Chapter XXII, Journal of Laws 1969, no. 13, item 94, as amended). Consequently, in a 1975 judgement, the Supreme Court ruled that the offence of rape is an offence against personal freedom and primarily infringes upon a person's right to freely dispose of their sexual life (Judgement of the Supreme Court of 3 July 1975, ref. no. II KR 66/75). Therefore, this leads to a follow-up assumption whereby the offence of rape may be committed whenever a victim has not given legally valid consent to the perpetrator's conduct, and the absence of such consent entails a failure to express both a positive and a negative decision (Judgement of the District Court for Gdańsk-Północ in Gdańsk of 8 June 2026, ref. no. II K 49/16).

In the doctrinal approach, sexual liberty is understood as the right to dispose of one's body with regard to sexual intercourses, the right to choose one's sexual partners, their number as well as the time, place and form of sexual contacts, which should be free from actual coercion and threat (Judgement of the Circuit Court in Wrocław of 23 December 2013, ref. no. III K 198/13; Warylewski, 2001, p. 25). Importantly, contrary to certain judgements which emphasise the significance of the perpetrator's sexual motivations, it is worth noting that the perpetrator's striving to satisfy his or her sexual desire is not the indicium of the offence of rape. Therefore, the violation of the victim's sexual autonomy should be a key element in the offence of rape, but within the normative indicia of this prohibited act (Supreme Court Ruling of 9 April 2001, ref. no. II KKN 349/98). By way of illustration, this assumption is significant in the case of the perpetrator's actions that infringe upon sexual autonomy, the genital area, and their substitutes, e.g. through the use of objects. But also in a situation where the perpetrator's act is not motivated by his or her sexual urge, but, say, by a desire for revenge. Therefore, the criterion for assessing the offender's criminal conduct should not be their motivation, based on the satisfaction or arousal of sexual desire, but the fact that they have infringed upon the victim's sexual liberty (Judgement of the Supreme Court of 26 October 2002, ref. no. WA 25/01; Filar, 2002, p. 87). At the same time, it is not the case – as argued in the commentary edited by W. Wróbel and A. Zoll – that interference with the sexual organs during torture should be excluded simply because such behaviour is not associated with broadly understood forms of arousal or satisfaction of the perpetrator's sexual urge (Wróbel, Zoll, 2017, p. 668). Such a thesis should be qualified or placed within a broader context, or regarded as detrimental to the victim's perspective on sexual autonomy. The determining factor in assessing a violation of a victim's sexual autonomy should be the victim's perspective on their welfare being infringed upon, rather than the perpetrator's motivation. Therefore, one of the courts of appeal rightly indicates, holding that the purpose of the perpetrator's actions in committing an offence under Article 197 of the Criminal Code may be other than the satisfaction or arousal of their sexual desire (Judgement of the Court of Appeal in Warsaw of 15 November 2023, ref. no. VIII AKa 262/23).

It can be assumed that in the legal doctrine, in national and international case law, two contrasting interpretations of sexual autonomy can be identified: (1) the classical model of freedom ('force-based' model) and

(2) the model based on self-determination ('consent-based' model) (cf. Uhnoo, Erixon, Bladini, 2024, p. 100668).

The first one of the identified models – the classical one – is based on freedom understood in the negative sense, i.e., freedom from sexual violence. The primary indicia of the *ratione materiae* of the offence in question – namely, violence, unlawful threats, and deception – furnish the best examples of this perspective and way of thinking. The essence of the classical model of sexual liberty, therefore, is not the absence of consent itself, but the manner in which the victim's resistance is overcome. This boils down to the assumption that consent – in itself – does not constitute an explicitly defined indicium of a prohibited act; rather, it functions indirectly as a negative factor in assessing the factual circumstances. For example, if no coercion was used, the perpetrator's act must be regarded as not fulfilling the indicium of a criminal offence. In the dogmatic approach, this perspective is consistent with the criminal law's guarantee function. However, it must undoubtedly be regarded as a shortcoming that the provision fails to adequately capture situations in which there is no violence *sensu stricto*, yet the sexual act is not the result of a voluntary decision on the part of the victim (cf. Michalska-Warias, 2016, pp. 7–23; Tuerkheimer, 2019, pp. 166–183; Tuerkheimer, 2021, pp. 609–636).

The other identified model – the self-determination model – focuses on the absence of voluntary consent, in contrast to the classical model, which concentrates on methods used to overcome the victim's will. Thus, the crux of this perspective is not the mere fact that the perpetrator used a specific form of coercion, but the victim's absence of autonomy in their decision. Of course, this does not mean that such indicia as violence, threats and deception lose their significance; rather, their functions change, as they become examples of obvious defects in consent, i.e. situations in which consent cannot be regarded as voluntary. Under this model, the interest protected by criminal law is defined as sexual autonomy, i.e., self-determination in the sexual sphere or in the most intimate aspects of personal life. A change of perspective does not mean that the legal dogmatics become free from interpretative problems. The literature suggests that consent can take various forms: ranging from explicit consent, through implied consent inferred from the behaviour of those involved in the interaction, to consent assessed contextually on the basis of the overall circumstances of the situation. Each one of these approaches has different implications for what is practised with regard to evidence and for the scope of criminal liability (cf. Michalska-Warias, 2016, pp. 7–23; Schul-

hofer, 2017, pp. 335–352; Tuerkheimer, 2019, pp. 166–183; Tuerkheimer, 2021, pp. 609–636; Tuerkheimer, 2024, pp. 55–105).

Within the self-determination model, two specific cases can also be identified, namely: (a) the model of liberal autonomy, and (b) the model of contextual autonomy. The model of liberal autonomy is based on the individual's formal and full capacity to express their will. In the context of criminal law, this implies that an individual is fully capable of expressing their will regarding whether or not to engage in sexual activity. For consent to sexual activity to be deemed sufficient, two conditions must be met. The first one is the absence of direct coercion, while the other one is that the person participating in the sexual act must possess a minimum capacity for decision-making. Therefore, unless there are circumstances indicating the use of violence, threats, or other forms of coercion, the absence of objection may be interpreted as consent. Just as the victim's behaviour is viewed through the prism of formalistic behaviour within the context of sexual autonomy, so too is the perpetrator's behaviour assessed in this way. Therefore, when assessing the perpetrator's conduct, the perpetrator is not required to take specific steps to ensure that the other person has consented. This kind of formalism allows one to view the perpetrator's conduct through the prism of an error regarding consent, in terms of the legitimising of the guarantee function of criminal law (cf. Tadros, 2006, pp. 515–543; Tuerkheimer, 2019, pp. 166–183). The model of contextual autonomy, on the other hand, is based on the premise that sexual autonomy cannot be assessed solely in terms of the absence of physical coercion, but should be evaluated within a broader relational, social and psychological context. Therefore, consent is not viewed in purely formalistic terms within the framework of sexual autonomy, but rather as the result of a decision-making process that should take place under conditions allowing for genuine self-determination. If these conditions are not met, the consent may be deemed defective or invalid. A high degree of relational context means that the victim's and the perpetrator's behaviour is assessed while taking into account factors such as: a significant age difference, economic dependence, a relationship of professional or institutional subordination, or a state of intense fear or psychological pressure, in which the formal expression of consent does not always signify a decision made under conditions of genuine freedom or autonomy (cf. Schulhofer, 1998; Zeegers, 2002, pp. 447–458; MacKinnon, 2016, pp. 431–477; Schulhofer, 2017, pp. 335–352; Tuerkheimer, 2019, pp. 166–183).

In the case law of the European Court of Human Rights, with regard to sexual violence, an interpretative standard has gradually emerged based on the protection of sexual autonomy and on the specific obligations of the state arising primarily from Articles 3 and 8 of the European Convention on Human Rights. Examples of this standard include, *inter alia*: *M.C. v. Bulgaria* (2003), *I.C. v. Romania* (2016), and *E.B. v. Romania* (2019). In the first of these cases, namely the judgment in *M.C. v. Bulgaria*, the Court noted, amongst other things, that the essence of rape does not solely lie in the use of physical force, but above all in the absence of the victim's voluntary consent. The Court also emphasised the need to conduct the evidentiary proceedings in a manner that takes into account the full context of the incident, particularly in situations where there are conflicting accounts of events, whilst stressing that the absence of injuries or resistance cannot in itself be taken as proof that the allegations are untrue. This standard was cited in subsequent case law, including the case of *I.C. v. Romania*, which concerned the inadequate investigation into the alleged rape of an underage intellectually disabled girl. In the said case, the Court pointed out that the national authorities were in no position to base their assessment of the incident solely on the absence of physical signs of violence, or on the perpetrators' claims that consent was given, but should apply a standard of analysis that takes into account the victim's particular vulnerability and her actual capacity to consent. The Court took a similar stance in the case of *E.B. v. Romania*, in which it criticised the law enforcement authorities' practice of placing undue emphasis on the victim's absence of resistance and the absence of injuries typical of rape (European Court of Human Rights, 2003, 2016, and 2019).

2. Characteristics of the structure of the offence of rape

To begin with, it should be noted that the offences criminalised in Chapter XXV of the Criminal Code, including the offence of rape, are the subject of considerable attention from both the legislature and the Ministry of Justice, a situation arising from both the implementation of international obligations and the Ministry's own instrumental criminal policy (Warylewski, 2018a, pp. 27–41; Warylewski, 2018b, pp. 176–191; Giezek, 2021, p. 606; Pietryka, 2023, pp. 19–53). The current wording of Article 197 of the Criminal Code was introduced by the Act of 28 June

2024 *amending the Act – the Criminal Code and certain other acts* (Article 1, Journal of Laws 2024, item 1228).

The text of Article 197 of the Criminal Code *per extractum* is as follows: (§1) A perpetrator is a person who brings another person to a sexual intercourse by violence, unlawful threats, deception or otherwise despite the absence of their consent; (§1a) a perpetrator is a person who brings another person to a sexual intercourse by taking advantage of the latter's inability to recognise the meaning of the act or to direct his or her conduct; (§2) a perpetrator is a person who – in the manner specified in §1 and §1a – causes another person to submit to another sexual act or to perform such an act, (§3) a perpetrator is a person who commits rape: (a) in concert with another person (1), (b) towards an ascendant, descendant, adoptee, adopter, brother or sister (3), (c) using a firearm, a knife or another similarly dangerous object or incapacitating agent, or acting in any other manner that directly endangers life (4), (d) towards a pregnant woman (5), recording images or sound of the act, (§4) a perpetrator is a person who commits rape: (a) towards a minor under the age of 15, (b) as defined in §1–3, acting with particular cruelty, (c) which results in serious bodily harm, (§5) a perpetrator is a person who commits an act constituting one of the forms of rape defined in §1–4, which results in the death of a person (Article 197 §1–5, Journal of Laws 1997, no. 88, item 553, as amended; Article 1, Journal of Laws 2024, item 1228).

The main changes introduced by the most recent amendment to Article 197 of the Criminal Code are concerned with the extension of the scope of the subject matter of the offence of rape by: (1) adding a new form of the offence of rape in §1, namely “otherwise despite the absence of the consent” of the victim, (2) changing the relationship between Articles 197 and 198 of the Criminal Code by introducing into Article 197 a new type of rape offence in §1a, which constitutes a *sui generis* equivalent to part of the previous version of Article 198 of the Criminal Code. According to W. Wróbel, the amendment represents the legislature's response to judicial doctrine practices that not infrequently adopt a narrowing interpretation of the indicium of ‘violence’. Indeed, case law has often linked violence to the need to overcome persistent and resolute resistance, which has led to a situation where the burden of proving the existence of violence – by demonstrating an absence of consent – has fallen on the victim. Hence, instances of specific states of tonic immobility or other forms of passivity have worked to the victim's disadvantage in the context of the judiciary's fulfilment of the guarantee function towards perpetrators (Wróbel, 2025).

As regards the transfer of certain indicia from Article 198 and their use to introduce a new type of rape offence in §1a (in conjunction with the amended version of §2), namely the exploitation of the victim's inability to recognise the significance of the act or to control their own behaviour, it should be regarded as implementation of the contemporary standards and the public perception of rape.

Focusing on the assessment of the new indicium in Article 197 (§1), namely bringing a person to a sexual intercourse "otherwise despite the absence of their consent", it should be noted that, contrary to various political or press commentaries suggesting that it did not abolish the so-called 'presumption of consent' – as this did not really exist in the previous provision, there was, however, a problem regarding the proof of expressed opposition, and the understanding of its forms or manifestations (Krzemiński, 2025). Another problematic issue was concerned with proving the perpetrator's conduct, e.g. their use of violence, unlawful threats and deception, by relying on the victim's behaviour. Undoubtedly, however, this change represents a step towards fulfilling international obligations, such as the European Union directives and the Istanbul Convention (see European Commission, 2022, COM/2022/105 final; Council of Europe Convention..., *Journal of Laws* 2015, item 961).

In the text of the proposal for the directive on combating violence against women and domestic violence (COM/2022/105 final), it is noted that in many Member States the offence of rape is still based on the categories of use of force, threats or coercion, whilst in others it is based solely on the category of the victim's absence of consent to the sexual act. At the same time, the second approach is the most appropriate and desirable one, as it ensures that the victim's sexual integrity is fully protected. Therefore, the absence of consent should be the primary and statutory indicium of the offence of rape, and thus form the central element in the definition of rape. This is also evident from real-life experience, as this act is often committed without physical violence or other forms of force. Furthermore, it must be accepted that initial consent should be revocable at any stage of the act, in accordance with the victim's sense of autonomy, and should not imply automatic consent to future sexual acts. The Directive provides that the EU Member States shall ensure that the following intentional conduct is punishable as a criminal offence: (1) engaging with a woman in any non-consensual act of vaginal, anal or oral penetration of a sexual nature, with any bodily part or object, (2) causing a woman to engage with another person in any non-consensual act of vaginal, anal or

oral penetration of a sexual nature, with any bodily part or object (European Commission, 2022, COM/2022/105 final). Article 36 of the Istanbul Convention sets out the requirements for the States Parties regarding the criminalisation of specific sexual acts, emphasising the indicium of “non-consent”, whilst adding that consent must be given voluntarily, as an expression of free will (Council of Europe Convention..., Journal of Laws 2015, item 961).

According to W. Wróbel, the new wording of the provision is intended to secure the protection of the victim of the offence of rape in such a way that, in the absence of the traditionally understood verbal indicia related to the perpetrator’s mode of action – violence, unlawful threat or deception – the victim’s consent need not be demonstrated. This is to be understood as the legislator’s intention to encompass, in their amendments, cases where the victim remains passive, paralysed by fear, or is simply unable to resist, even though they do not consent (Wróbel, 2025). It appears that this change will not eliminate the procedural problems relating to the reliable assessment of the relationship between the perpetrator and the victim. Nevertheless, it will preclude the dependence of the offence of rape upon the proof of active resistance on the part of the victim.

It is worth noting that the changes introduced will give rise to a problem of the relationship between the existing alternative verbal indicia of the perpetrator’s mode of action set out in Article 197 (§1) and the new one – “otherwise despite the absence of their consent”. In this context, D. Czerniak and A. Pietryka point out that the new wording of the provision does not necessarily mean that the absence of consent is sufficient to establish the perpetrator’s guilt (Czerniak, Pietryka, 2025). For W. Wróbel, the new indicium operates on the principle of subsidiarity, which means that one must first determine whether the perpetrator used one of the three ways of influencing the victim; if none of these are found to have been used, it becomes necessary to establish whether sexual acts took place despite the lack of consent (Wróbel, 2025). D. Czerniak and A. Pietryka reach a similar conclusion, stating that the new definitional scope of the offence of rape does not implement an international standard based on the “no consent equals rape” model; consequently, it still requires the establishment of specific ways of bringing a person to engage in sexual acts (Czerniak, Pietryka, 2025). According to M. Małecki, the new indicia, particularly within the functional interpretation, allow for a broader interpretation, in which factual situations involving the perpetrator’s actions that are not based on violence, unlawful threats or deception, but

which nevertheless constitute a violation of sexual autonomy, become legally relevant (for more on this see: Małecki, 2025, pp. 145–182).

M. Mozgawa is rather sceptical about the penal implications of the changes; in his view, they will not lead to a radical shift in law enforcement practice with regard to combating sexual offences, since even prior to the changes, the scope for potential criminal law action was, in reality, broader than the measures actually taken (Mozgawa, 2026, p. 791). However, focusing on the main problem concerning the future application of these new legal solutions, it should be noted that they do not address how the term ‘consent’ should be understood and defined. Therefore, it is difficult to unambiguously tell which direction case law will take: whether it will follow the ‘passive model’ or the ‘active model’. To put it in yet another way, it is difficult to say with certainty whether the case law practice will move towards what might be described as implied consent based on the premise of “no objection”, or on an assessment grounded in the victim’s unequivocally affirmative behaviour (cf. Małecki, 2025, pp. 145–182).

It is also worth noting the category of ‘violence’, which in itself constitutes an indicium of the means used to coerce a victim into unwanted sexual acts under Article 197 of the Criminal Code, but which also serves as a reference to the category of ‘consent’. For on the one hand, the category of violence constitutes a specific indicium, whilst on the other, it serves as an abstract comparative symbol within the discourse on shifts in the understanding of sexual autonomy.

From the lexicographical perspective, the term ‘violence’ does not have a single *definiens*. It may denote excessive use of force, taking advantage of one’s physical superiority over another to achieve certain ends, or violation, coercion, or pressure (Dunaj, 1996, p. 884). But also “using physical force in one’s actions or some other form of advantage to impose one’s will on someone, or to compel them to perform specific actions” (WSJP [Great Dictionary of the Polish Language], 2026). It is therefore worth bearing the above in mind, especially when the legislator uses various categories of violence: ranging from violence itself, through violence against a person, other forms of violence, the threat of imminent violence, acts committed with particular cruelty, (physical or psychological) abuse, rape, coercion, compulsion, assault, striking, and violation of bodily integrity, to rape. Some of the indicia listed here were used by the legislator to gradate the severity of the perpetrator’s negative physical impact in order to determine their relevance under criminal law.

In the wording of Article 197 (§1), the legislator used the phrase ‘brings another person by violence’, which does not literally mean that such violence must be directed specifically at a person (the victim). Violence is therefore interpreted quite broadly as physical force directed against a person or their surroundings (other persons or objects), the aim of which is to break or restrict the victim’s will. One can therefore think of a situation in which the perpetrator directs violence towards the victim’s loved one or beloved pet, and from the legal perspective, their actions would thus constitute a criminal offence. The perpetrator’s behaviour may also take various forms, such as pushing, holding down, overpowering or restraining the victim, etc. Furthermore, the perpetrator’s actions may be carried out using objects that enhance their effectiveness, including dangerous tools or weapons (Judgement of the Supreme Court of 14 June 2006, WA 19/06; Judgement of the Supreme Court of 28 May 2024, ref. no. II KK 540/23; also see: Giezek, 2021, pp. 616–617; Grześkowiak, Wiak, 2024, p. 1355; Wala, 2025, p. 492; Mozgawa, 2026, pp. 792–793). In the previous amendments, the legislature even introduced specific types of rape offences linked to particular modes of action and consequences: (1) the use of a firearm, a knife or another similarly dangerous object or incapacitating agent, or any other act directly endangering life (Article 197 §3 (4)), (2) death resulting from rape (Article 197 §5) (Article 197 §1-5, Journal of Laws 1997, no. 88, item 553, as amended; Warylewski, 2018a, pp. 27–41; Warylewski, 2018b, pp. 176–191; Pietryka, 2023, pp. 19–29; Najman, 2024, pp. 38–54).

When analysing the category of violence in the context of the offence of rape, one must not forget that its essence lies not in the intensity of the force used, but in its function of overcoming the victim’s resistance or preventing them from effectively expressing it, thus constituting a violation of sexual autonomy (Judgement of the Supreme Court of 14 June 2006, WA 19/06; Ruling of the Supreme Court of 14 October 2021, ref. no. V KK 449/21; also see: Hanausek, 1966, p. 113; Giezek, 2021, pp. 616–617; Grześkowiak, Wiak, 2024, p. 1355). This view is reflected in an extract from a judgement by an appellate court: “Accepting the reality of resistance does not depend on the intensity of that resistance, nor does it require that it persists throughout the entire act constituting an infringement on sexual liberty. It is enough for the resistance to be overcome just once after the victim has voiced their objection, leading the victim to adopt a passive attitude. In such cases, the victim’s negative attitude towards the sexual act will be sufficient to establish the continuity

of the resistance” (Judgement of the Court of Appeal in Katowice of 28 December 2021, ref. no. II AKa 335/21). It should also be noted that the legal doctrine seeks to assess the significance of the intensity of the force used by applying an individual-objective criterion, taking into account the victim’s psycho-physical traits (cf. Judgement of the Court of Appeal in Wrocław of 24 September 2021, ref. no. II Aka 54/21; Judgement of the Supreme Court of 28 May 2024, ref. no. II KK 540/23). Despite subsequent changes in the approach to the relationship between violence and resistance, it should be noted that a common feature of both will remain the need to make them visible and recognisable. For this reason, both categories have become constituent elements of the traditional definition of the offence of rape. The proviso being, however, that neither resistance nor consent are explicitly listed as *indicia* in the text of the provision. The visibility of violence and resistance is also the characteristic that constitutes the traditional narrowing approach in historical practice, harmonising with evidential practice in the forensic context (cf. Judgement of the Supreme Court of 21 December 2023, ref. no. I KK 280/23; Wróbel, 2025). After all, there is nothing more tangible than visible signs of violence against the victim and the victim’s resistance – signs that are genuine rather than feigned; they are persistent and sufficiently expressed. These characteristics of both categories are most frequently cited by those who advocate the classical model of sexual autonomy in the context of rape (the ‘force-based’ model).

Ending and conclusions

The main purpose of the analysis in the present text has been to characterise the criminal policy on sexual offences, with particular emphasis on legal solutions concerning rape, together with their doctrinal practice of interpretation, from the post-Foucauldian and institutional-legal perspective. This objective thus specified determined the particular elements of the analysis: (1) a description of the study’s normative assumptions, including a presentation of the categories of: the ‘apparatus’, the ‘apparatus of sexuality’ and sexual autonomy, (2) the characterisation of the structure of the offence, chiefly with regard to the new elements introduced into Article 197 of the Criminal Code in 2024, as well as the relationship between the categories of violence and resistance in the offence of rape. Given the need to elaborate on the material scope of the analysis

performed, two research questions have been put forth in relation to the following conclusions:

- (1) How can the legal solutions altering the scope of the definition of the offence of rape in Polish criminal law following the 2024 amendment be assessed from the post-Foucauldian perspective?

From the post-Foucauldian perspective, the changes to Article 197 of the Criminal Code can be seen as attempted modifications with regard to the previously established ‘apparatus of sexuality’, i.e., the system of practices, discourses, institutions and techniques of power that not only describe sexuality, but also standardise, classify and make it a subject of legal intervention. Undoubtedly, in this approach, criminal law is not a neutral tool for describing reality, but a tool for generating the truth about sexual violence. Therefore, the definition of rape is not merely a normative legal provision, but part of a broader order of knowledge and power within which the categories of victim, perpetrator, consent and resistance are constructed. As well as credibility and lack of credibility. Consequently, the traditional approach to the indicia of rape – based on specific forms of violence or coercion – served not only as the guarantee function, but also the disciplinary one, as it reinforced the model of recognising sexual violence in which “real” rape was mainly that which possessed external, visible and evidentially verifiable indications of resistance being overcome. Thus, the focus was not on the violation of the victim’s sexual autonomy, but on the way in which they expressed their absence of consent. The ‘apparatus of sexuality’ was thus responsible for producing a narrative of rape that emphasised visibility – credible was that which could be identified as external marks of physical violence, e.g., injuries, or even the victim’s rational behaviour.

From the post-Foucauldian perspective, the assessment of the changes to the scope of the offence of rape cannot be entirely positive. This is because the ‘apparatus of sexuality’ has not, strictly speaking, abolished the very mechanism by which truths about sexuality are generated. It remains to be seen how the institutions will interpret the absence of consent, what behaviour they will deem sufficient to cast doubt on the voluntary nature of the act, and whether, in practice, the old patterns of judging the victim will simply be reproduced through new legislative measures. Therefore, it is not certain whether the disciplinary practice regarding the victim will change in light of the evidence and credibility. Furthermore, it is difficult to say with certainty how law enforcement agencies and the courts will

apply the previous mechanisms for determining the cost-effectiveness of prosecution, in which cases involving visible injuries or signs of resistance were particularly significant. In this context, the indicium of “otherwise despite the absence of the consent”, even if included in the provision, may not override the existing limitations.

- (2) How can the legal solutions altering the scope of the definition of the offence of rape in Polish criminal law following the 2024 amendment be assessed from the institutional-legal perspective?

From an institutional-legal perspective, the essential point is that the amendment was intended to align with the direction set by international standards, in particular the Istanbul Convention and the case law of the European Court of Human Rights. However, the amendments to the scope of Article 197 of the Criminal Code made by the Polish legislature do not directly meet these assumptions, as they do not introduce the offence of rape based solely on the absence of consent. Besides, the changes introduced have at least three limitations: (1) the lack of an unambiguous definition of what constitutes consent and what form it should take – consent is a new indicium in Article 197 of the Criminal Code, (2) the lack of an unambiguous interpretation of the relationship between this new indicium and the existing alternative modes of operation adopted by the perpetrator (e.g., violence, threats or deception), (3) the failure to resolve existing procedural difficulties specific to offences against sexual liberty.

The legislator has not resolved the issues concerning the various models of consent-giving, thereby leaving considerable scope for doctrinal interpretation. It is therefore difficult to determine which direction the legal practice will take: whether it will follow the model of implied consent arising from an absence of objection (‘the passivity model’), or perhaps the model of affirmative behaviour that clearly indicates an absence of objection or consent to sexual acts (‘the activity model’). As for the relationship between the indicium of “otherwise despite the absence of the consent” and the indicia defining alternative modes of operation by the perpetrator, it should be noted that if this relationship is based solely on subsidiarity, such an interpretation will not alter the essence of the existing doctrinal practice. However, in the procedural sphere, one might distance oneself from the changes introduced. This is because significant evidence-related problems – particularly in private relationships where there are no witnesses, biological evidence or physical signs of violence – have not been resolved. A normative change does not, in itself, guaran-

tee a change in the practices of law enforcement agencies and the courts unless it is supported by an appropriate interpretation, since the problem was not the previous wording of Article 197 of the Criminal Code but the way it was interpreted and applied.

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Polityka karna w zakresie przestęstw przeciwko wolności seksualnej wobec kobiet w Polsce. Analiza w ujęciu post-foucaultowskim i instytucjonalno-prawnym

Abstrakt: Problem badawczy artykułu dotyczy polityki karnej państwa w zakresie przestęstw przeciwko wolności seksualnej wobec kobiet w Polsce, ujmowanej w perspektywie post-foucaultowskiej oraz instytucjonalno-prawnej. Przedmiot analizy koncentruje się na przestępcstwie zgwałcenia, ze szczególnym uwzględnieniem zmian wprowadzonych ustawą z dnia 28 czerwca 2024 roku o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, dotyczących redefinicji znamion czynu zabronionego w art. 197 k.k. Głównym celem analizy jest dokonanie charakterystyki polityki karnej dotyczącej przestępcstw seksualnych, ze szczególnym uwzględnieniem rozwiązań prawnych dotyczących przestępcstw zgwałcenia, wraz z ich doktrynalną praktyką interpretacji, za pomocą perspektywy post-foucaultowskiej i instytucjonalno-prawnej. W tekście przedstawiono następujące pytania badawcze: (1) Jak można ocenić w perspektywie post-foucaultowskiej rozwiązania prawne zmieniające zakres

definicyjny przestępstwa zgwałcenia w polskim prawie karnym w wyniku nowelizacji w 2024 roku?, (2) Jak można ocenić w perspektywie instytucjonalno-prawnej rozwiązania prawne zmieniające zakres definicyjny przestępstwa zgwałcenia w polskim prawie karnym w wyniku nowelizacji w 2024 roku? Tak wyznaczony zakres analizy i cel determinują poszczególne części tekstu, którymi są: (1) charakterystyka normatywnych założeń badania, uwzględniająca prezentację, takich kategorii jak: 'urządzenie', 'urządzenie seksualności' i autonomia seksualna, (2) charakterystyka struktury przestępstwa, głównie w zakresie nowych elementów wprowadzonych w 2024 roku oraz relacji między kategoriami przemocy i oporu w przestępstwie zgwałcenia.

Słowa kluczowe: polityka prawa, polityka karna, wolność seksualna, autonomia seksualna, przestępstwa przeciwko wolności seksualnej, przestępstwo zgwałcenia.

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Autor(-zy) oświadczył(-li), że nie istnieje konflikt interesów.

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