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PROTECTING OF THE RIGHTS OF VICTIMS OF SEXUAL CRIMES IN POLISH CRIMINAL PROCEDURE*

Szexuális bűncselekmények áldozatainak jogvédelme a lengyel büntető eljárási jogban

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Abstract: The aim of the article is to describe and discuss Polish legal regulation in the field of sexual offences in order to present and briefly evaluate the protection of the victims of such offences. Sexual offences have assumed importance and attracted interest in both Polish criminal policy and public discourse in recent years. New legal regulations have also been implemented. The instruments introduced in recent years are briefly described and discussed.

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Absztrakt: A tanulmány célja a lengyel jogi szabályozás ismertetése és értékelése a szexuális bűncselekmények területén, bemutatva röviden az ilyen jellegű bűncselekményt elszenvedő áldozatok jogainak védemét. A szexuális bűncselekmények az elmúlt években fontossá váltak, és felkeltették az érdeklődést a lengyel büntetőpolitikában és új jogszabályi előírások léptek életbe. Röviden ismertetjük az elmúlt években bevezetett jogi eszközöket.

***Kulcsszavak:** szexuális bűncselekmények, lengyel büntetőjog, áldozatok védelme, fair trial, szexuális elkövetők nyilvántartása*

1. Polish legal regulation

In Polish criminal law, sexual offences are included in Chapter XXV of the Criminal Code: "Crimes against sexual freedom". At present, ten offences may be distinguished: (1) rape[1]; (2) sexual abuse of insane or helpless victim; (3) taking advantage of a position of authority; (4) sexual abuse of a minor: including sexual intercourse or other sexual activity with a minor under the age of 15, presenting pornographic content to a minor, showing sexual activity to a minor for the purpose of the sexual satisfaction of the perpetrator or another person, or advertising pornographic content in a manner that enables a minor to get acquainted with it; (5) making electronic contact with a minor under the age of 15 in order to commit the crime of rape or sexual intercourse or producing or recording pornographic content; (6) promoting abuse of minors; (7) incest; (8) public presentation of pornographic content; (9) forced prostitution; (10) pimping.

2. The scale and the characteristics of sexual crimes in Poland

First of all, it is worth understanding the scale of the problem of sexual crimes. According to official statistics, in 2018 in Poland[2] there were 1,914 convictions for offences against sexual freedom and decency, which was less than 1% of the total number of convictions (0.69%)[3]. Most of the judgments concerned art. 200 § 1 of

[1] The current form of the provision of art. 197 of the Criminal Code is very causal; the basic form of rape is sexual intercourse (art. 197 § 1 of the Criminal Code) or other sexual activity (art. 197 § 2 of the Criminal Code) by force, unlawful threat or deception, but the act also distinguishes rape committed together with another person; rape of a minor under 15 years of age; rape of an ascendant, descendant, adoptee, adoptive parent, brother or sister (art. 197 § 3 points 1–3 of the CC); and rape with particular cruelty (art. 197 § 4 of the CC), which is disapproved in the doctrine. See, e.g., M. BUDYN-KULIK: Zgwałcenie ze szczególnym okrucieństwem (art. 197 § 4 k.k.), *Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia*, 2014, Vol. 61, No. 1, 17.

[2] According to official census the total population of Poland as of 31 December 2018 was 38, 411, 148.

[3] Data from the official statistics of the Ministry of Justice: https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ [accessed: 15. 04. 2022].

the Criminal Code: sexual intercourse or other sexual activity with a minor under the age of 15 (30.5%) and art. 197 § 1 of the Criminal Code, i.e., rape (19.2%). According to police statistics, in 2020 there were 1,034 reported crimes of rape, of which the suspect was identified in 894 (86.3%) cases; in 2019 there were 1,354 crimes of rape, of which the suspect was identified in 1,163 (85.5%) of cases; and in 2018 there were 1,326 crimes of rape, of which the suspect was identified in 1,127 (84.4%) of cases[4]. As we can see, not many sexual crimes were reported in these years, but they are certainly perceived as very serious cases.

However, it should not be overlooked that the nature of these offenses suggests that the number of crimes that go unreported may be high. Unwanted sexual behaviour is taboo, therefore victims are often afraid or ashamed to tell anyone about it. Medical practitioners indicate[5] that sexual crimes are only rarely reported, and when the victim is a child, this is even rarer. The detectability of this type of crime may not reflect the facts at all. Moreover, what K. Krowiranda[6] points out is interesting: rapes, according to police statistics, fluctuated around 2,000 cases a year (the article is from 2012, when the number of these crimes was higher than today), while the internal statistics of the "Blue Line" Helpline indicated about 95,000 a year.

In respect of crimes against minors, it is worth paying attention to research carried out in 2009[7]: young people aged 15–18 were randomly sent questionnaires via the internet; the 1,000 respondents who consented answered questions anonymously about the victimization of children and adolescents, including sexual abuse. The sample consisted of 49% girls and 51% boys. Respondents were 18 years old (35%), 17 years old (26%), 16 years old (20%), and 15 years old (19%); 45% were general secondary school students, 23% were technological secondary school students, 22% were middle school students, 5% were vocational school students, and 2% did not attend school. Respondents were asked three questions on broadly understood abuse of minors: (1) Has an adult ever touched your private parts and/or forced you to touch their private parts before you were 15? (2) Did you ever have

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4 Data from official Police statistics: https://statystyka.policja.pl/st/przestepstwa-ogolem/przestepstwa-kryminalne/zgwalcenie/122293,Zgwalcenie.html [accessed: 15. 04. 2022].

5 J. Gromska – J. MASŁOWSKI – I. SMOKTUNOWICZ, *Badanie przyczyn kazirodztwa na podstawie analizy opinii sądowych*, "Psychiatria w Praktyce Ogólnolekarskiej, 2002, Vol. 2, No. 4, 269. The Authors refer also to: VAN MONTFOORT, Adri: *Kindermishandeling, resultaten van multidisciplinar onderzoek*. Bruna, Utrecht 1992, which emphasizes that the problem occurs not only in Poland, and the low detection rate of sexual crimes is also noticed in other countries.

6 *Przemoc seksualna. Przemoc seksualna – z dr. Sławomirem Jakimą rozmawia Krzysztofa Krowiranda*, "Niebieska Linia" 2012, vol. 6, http://www.niebieskalinia.pl/ pismo/wydania/dostepne-artykuly/4925-przemoc-seksualna-proba [accessed: 4. 05. 2019].

7 M. SAJKOWSKA: *Doświadczenia wiktymizacyjne młodych Polaków – raport z badań*, "Dziecko krzywdzone. Teoria, Badania, Praktyka" 2011, Vol. 10, No. 2, 91–93; see also: M. BOCHEŃSKI, Ile pedofilii w "pedofilach"? Wybrane problemy wykorzystywania seksualnego małoletnich w Polsce – perspektywa kryminologiczna, *Dziecko krzywdzone. Teoria, badania, praktyka*, 2015, vol. 14, No. 3., 108.

sexual intercourse with an adult before your 15th birthday? (3) Did someone ever take pictures of you or video-record you while you were naked before your 15th birthday? When asked such questions, 8% of respondents indicated that their private parts had been touched at least once before the age of 15; 4% of respondents indicated that they had had sexual intercourse with an adult before the age of 15. The perpetrators in both cases were mostly adults known to the minor or a family member, and contact was most common when the respondents were between 13 and 15 years old (51%), but many declared that it was earlier (23%).

Sexual crimes against minors are most often believed to be associated with the psychopathological state of the perpetrators; however, as research in the field of psychiatry shows, that criminal offences often show no connection with sexual psychopathological state of the offender[8]. It is important to examine every perpetrator from the perspective of planning the most effective therapy[9]. Interesting research in this area was carried out by J. Heitzman, M. Lew-Starowicz, M. Pacholski and Z. Lew-Starowicz[10]. These researchers analysed a sample of 257 persons convicted of sexual offenses against minors, of which 99.6% of the perpetrators were men and 0.4% were women. Most of the respondents were over 21 (91%), with primary or vocational education (76%), employed (62.7%), with an average economic situation (43.7%), single (36.2%) or married (39.8%), and more than half of them had children (56.2%). The majority of the perpetrators had never worked with children[11] (91.2%). These people were examined in terms of displaying paedophilia disorders in medical terms. Interestingly, less than 30% of the respondents met the criteria for paedophilia diagnosis: the dominant factors were the need to perform substitute sexual activity or a significant influence of alcohol intoxication (personality disorders were found in 16.3% of cases, of which 4.5% received psychiatric treatment; alcohol or psychotropic substance abuse was found in 36.8%

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8 See eg. L. J. COHEN –I. I. GALYNKER: Clinical features of pedophilia and implication for treatment, *Journal of Psychiatry* No 37, Vol. 10, 687693; CAMILLERI, Joseph A. – QUINSEY, Vernon L., Pedophilia. Assessment and Treatment, in: Laws, D. Richard (ed.): O'Donohue William T. (ed.): *Sexual deviance*. 2008, 184–185.

9 The therapy is one of the security (preventive) measures in Polish Criminal Code (apart from addiction therapy, electronic monitoring and stay in a psychiatric institution). According to an art. 93f § 1 of CC *an* offender with regard to whom a therapy has been ordered is required to report to the institution designated by the court within the time frame set by the psychiatrist, sexologist or therapist and to undergo pharmacological therapy aimed at weakening his or her sexual drive, psychotherapy or psychoeducation in order to improve his functioning in society.

10 J. HEITZMAN – M. LEW-STAROWICZ – M. PACHOLSKI – Z. LEW-STAROWICZ: Wykorzystywanie seksualne dzieci w Polsce – analiza badań 257 sprawców, którzy popełnili przestępstwa seksualne wobec małoletnich, *Psychiatria Polska* 2014, vol. 48, No. 1, 105–120.

11 It is emphasised because the Polish Criminal Code provides the punitive measure of prohibition of working with children for individuals who have been sentenced by paedophilia-related crimes.

and 5% of the respondents, respectively). In the authors' opinion, the above should be reflected in the provisions of criminal law, where obligatory treatment should not be limited to perpetrators diagnosed with sexual preference disorders (paraphilias) and should go beyond only reducing disturbed sex drive. Treatment should also aim to achieve better control over sexual behaviour, increased empathy, improved social functioning, and the ability to create emotional and sexual relationships with adults[12].

3. Criminal policy

3.1. The Register of Sexual Offenders

Previously, correction and resocialization were the key ideas, but recently a strong shift towards the "community protection" approach and the influence of penal populism are visible[13]. Apart from increasing penalties, legislators have introduced other new regulations aimed at suppressing sexual criminality. The first of them is The Registry of Sexual Offenders (introduced by the Act of May 13, 2016 on counteracting the threat of sexual crime[14]). This register collects the personal data not only of perpetrators convicted of sexual offenses but also of individuals against whom proceedings were conditionally discontinued; individuals against whom proceedings were discontinued and preventive measures were imposed; and other individuals under the Act on juvenile delinquency proceedings (Act of October 26, 1982 on juvenile delinquency proceedings[15]. In its current form, The Registry raises many doubts in the literature and the judicature[16].

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[12] HEITZMAN, Janusz et al., op.cit. 117.

[13] For theoretical models of criminal law's response to sexual offenders, see: K. LEWANDOWSKA: Karać czy leczyć? – strategie postępowania ze sprawcami przestępstw seksualnych wobec dzieci na przykładzie wybranych krajów. *Dziecko krzywdzone* 2007, Vol 6, No. 1, 1–14.

[14] *Journal of Laws* 2018, item 405.

[15] *Journal of Laws* 1982, No. 35, item 228.

[16] See: A. SAKOWICZ: Opinia prawna na temat projektu ustawy o przeciwdziałaniu zagrożeniom przestępczością na tle seksualnym i o zmianie niektórych innych ustaw. *Zeszyty Prawnicze* 2015, Vol. 3, 149–161; F. SZUMSKI – K. KASPAREK: Polski projekt rejestru sprawców przestępstw na tle seksualnym – perspektywa specjalistów ds. zdrowia psychicznego. *Psychiatria Polska* 2016, vol. 50, No. 3, 487–496; J. MIERZWIŃSKA-LORENCKA: Rejestr sprawców przestępstw seksualnych. Uwagi na tle ustawy z dnia 13 maja 2016 r. o przeciwdziałaniu zagrożeniom przestępczością na tle seksualnym. *Studia Prawnicze* 2016, vol. 4, No. 208, 155–15; M. ŻBIKOWSKA: *Kilka refleksji w przedmiocie działalności państwowej komisji do spraw wyjaśniania przypadków czynności skierowanych przeciwko wolności seksualnej i obyczajności wobec małoletniego poniżej lat 15*, in: Olszewski, Radosław – Małolepszy, Amadeusz (eds.): *Quo vadit processus criminalis? Rzeczywistość i wyzwania*, Warsaw-Łódź 2021, 524–531; E. MICHAŁKIEWICZ: Rejestr Sprawców Przestępstw na Tle Seksualnym w aspekcie praw człowieka i obywatela, Prawo Mediów *Elektronicznych* 2016, Vol. 2, 61.

It is indicated that the purpose of the register is to protect minors who are under 15 years of age, therefore it includes data on perpetrators of all sexual crimes committed against this age group. The register consists of three databases, the first of which includes a photo, first and last names, date and place of birth, citizenship of the perpetrator, and details of the judgement on the basis of which the perpetrator was added to the register; this part is publicly available on the website of the Ministry of Justice. The second database can only be viewed by public authorities and local government bodies; however, what is most interesting is that employers who are considering employing a person with tasks related to the upbringing, care, education, recreation or treatment of minors also have access to this part of the register. These employers are required to verify that the applicant does not appear in the register. This part of the register contains more data about the individual, such as the names of the parents, information about the victim, the current address of residence or stay of the convicted person, as well as general data on his/her previous criminal record[17]. The third database concerns individuals who have been entered into the register by the State Commission for the investigation of actions against sexual freedom and decency against a minor under the age of 15; like the first part of the register, this part is fully public.

The idea of the register is similar to that of other legal systems: similar regulations can be found, for example, in the Sexual Offences Act 2003 of Great Britain[18]; in Article 706-53-1, *et. seq.* of the Code of Criminal Procedure of France[19], and in The Sex Offender Registration and Notification Act (also known as SORNA) of the United States of America[20]. Moreover, the European Court of Human Rights[21] ruled that the existence of a register of sexual offenders does not violate the European Convention for the Protection of Human Rights. However, ECHR's view relates only to the restricted part of the register, not to the part that is publicly accessible. The public availability of personal data raises many doubts. First of all, it is a *sui generis* violation with regard to respect for personal data and the constitu-

[17] More: TOKARCZYK Damian: *Komentarz do niektórych przepisów ustawy o przeciwdziałaniu zagrożeniom przestępczością na tle seksualnym*, [in:] *Przestępstwa i wykroczenia związane z zatrudnieniem. Komentarz*, WKP 2021, [accessed: LEX, 15.04.2022 r.].

[18] See article 80 and following of this act, available on website: https://www.legislation.gov.uk/ukpga/2003/42/part/2/crossheading/notification-requirements.

[19] Provisions available on webisite: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006577704.

[20] https://www.govinfo.gov/content/pkg/USCODE-2018-title34/html/USCODE-2018-title34-subtitleII-chap209-subchapI.htm 15. 04. 2022; See also: MAROŃ, Grzegorz: Instytucja rejestru przestępców seksualnych w porządku prawnym Stanów Zjednoczonych. *Prokuratura i Prawo* 2019, vol. 4, 20–53.

[21] Judgement of European Court of Human Rights of 17 March 2010, Gardel v. France, application No. 16428/05.

tional dignity of the perpetrator[22]. We may say that perpetrators are punished again by the addition of their data to the public register. Furthermore, there is a huge risk that a perpetrator who has been put on this register may be victimised because society may decide to "solve the problem" by just lynching him. This problem was pointed out by the Court of Appeal in Katowice[23], which indicated that the existence of a public register raises doubts of a constitutional nature because a perpetrator disclosed by it might be stigmatised, which would make it difficult for him to adapt to life in society after serving his sentence. A perpetrator may also be harassed by fellow inmates. Moreover, the Court of Appeal emphasised that no other countries (except some states in the USA) have regulations that would allow unlimited public access to such a register.

In the current regulations, the only way of avoiding data about a person being published in the first part of the register is the occurrence of an exceptional case in which it is justified by the interest of a victim who is a minor: In this case the court may decide to exclude the person's data from the public register, as provided for in art. 9 sec. 4 of the Act on Counteracting the Threats of Sexual Crime. In this scenario, the Court of Appeal takes into account the high risk of the secondary victimisation of a minor victim who is related to the perpetrator, has the same surname, and lives in the town to which the perpetrator intends to return after serving the sentence. However, this mechanism may only be used in exceptional circumstances after considering all the circumstances of a case and the interest of the minor.[24] The position of the Court of Appeal was also supported by the Ombudsman, who pointed out that the provisions of the Act on Counteracting the Threats of Sexual Crime do not sufficiently protect crime victims, especially children who are close to perpetrators.[25]

Interestingly, if a record of a conviction is expunged from the penal register, the person's data is removed from the sex offenders register in accordance with art. 18 sec. 1 of the Act[26]. However, according to art. 106a of the Criminal Code, if the victim was a minor under the age of 15, there is no expungement of an unsuspended sentence of imprisonment for a crime against sexual freedom and decency. There is no doubt that such judgments constitute the majority of all convictions for such crimes, so the indicated provision (about the removal of data) cannot often be used for certain perpetrators.

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[22] Similarly, but about juvenile delinquents: A. WOLSKA-BAGIŃSKA: Ochrona praw i wolności nieletniego a Rejestr Sprawców Przestępstw na Tle Seksualnym. *Palestra* 2018, Vol. 9, 63–69.

[23] Decision of the Court of Appeal in Katowice of February 20, 2018, II AKzw 73/18, LEX No. 2461356.

[24] A. PARTYK: *Upublicznienie danych skazanego za przestępstwo seksualne może negatywnie odbić się na ofierze*. 2018, [access LEX: 15. 04. 2022].

[25] Ibidem.

[26] See also: Decision of the Supreme Court of August 25, 2020, V KK 79/19.

Undoubtedly, an important problem is the distorted social perception of such a public register. It is commonly believed that it has a positive impact in the field of the prevention of sexual crimes, especially those against minors. Public opinion is driven by the messages communicated by politicians in public media, therefore citizens remain convinced that the registry can reduce the scale of the problem and thus "protect" children from criminal behaviour.

Moreover, as society commonly has negative emotions regarding dangerous criminals, nowadays an increasingly common phenomena related to the functioning of the register may be seen: the emergence of so-called "paedophile hunters". These "hunters" make contact with a potential "paedophile", pretend to be a child, and arrange a meeting, which boils down to "catching the perpetrator red-handed" and handing them over to the police[27]. Often such actions are related to the broadcasting of recordings on the internet and harassment against a potential "paedophile". Such behaviour is usually characterised by many negative emotions and certainly does not have a positive effect on the apprehended person. Leaving aside the considerations of criminal law, namely whether a person "caught" in this way may be treated as a perpetrator, it should be noted that this phenomenon raises numerous other concerns. The apprehended person usually becomes a victim of lynching, harassment, or even threats against them; at the same time, this "solution" does not achieve any positive effects in relation to the minor victim.

While entry in the first or the second part of the register requires a criminal conviction, the entity which decides about entering data in the third part of the register is the State Commission for the investigation of actions against sexual freedom and decency against a minor under the age of 15, established by the Act of August 30, 2019. The Commission may start the procedure of including somebody in the register, even if it is too late for a criminal investigation. This solution raises doubts on many levels. Firstly, the Commission's decision is a kind of prejudgement that the perpetrator has committed a crime, therefore the Commission may actually label somebody as a "paedophile", even if he/she is still legally innocent. Secondly, the decision of the Commission in such cases is in contradiction with the principle of the presumption of innocence, which protects the accused party until the final conviction. Thirdly, the Commission consists of lawyers, doctors, psychologists or educators, academic teachers, assistant professors or professors and other people, but not judges. However, it may decide that a person should be added to the register, therefore labelling this individual as somebody who has committed a serious crime, such as sexual abuse of a minor. Another role of this Commission is to check if state authorities and entities as well as private persons react when there are possible cases of sexual abuse, so they can investigate cases of passivity

[27] For more, see: M. MAŁECKI: *Łowienie pedofilów może być przestępstwem. Analiza odpowiedzialności karnej złowionego i łowcy*, 2021, text is available on the website: https://www.dogmatykarnisty.pl/2021/05/lowienie-pedofilow-moze-byc-przestepstwem/?fbclid=IwAR3aY1lbsJPKw47VYG1pD13onIqi7NI82B5kBGYC2YFVNpejmQSR2Lu7xXA, [accessed: 15. 04. 2022].

of the responsible authorities if they arise. The Commission also identifies problems that arise in the practice of prosecuting cases of sexual abuse and punishing perpetrators of crimes against sexual freedom and decency against a minor under the age of 15.[28] Significant, at least for the interpretation of law, is not only the full name of this Commission (the State Commission for the investigation of actions against sexual freedom and decency against a minor under the age of 15), but also the preamble to the act, in which the legislator refers to "the welfare of persons, who, as children, suffered as a result of activities directed against sexual freedom and decency, bearing in mind their pain, sense of loneliness and traumatic experiences, which also affect their adult life, taking into account the obligation to satisfy the social sense of justice, as an expression of the conviction that no activities aimed against the sexual freedom and decency of children, despite the passage of time, may not be protected by secrecy or be forgotten – for the protection of honour, rights and dignity of the aggrieved parties". We should ask whether, in view of the problems already mentioned, an entry in such a register may help the victims in any way? Will it give them any satisfaction? Will victims really want to see the faces and data of their perpetrators and recall the traumatic situations they have been through?

3.2. Sexual Crime Threat Maps

Another interesting concept related to sexual crime against minors is sexual crime threat maps. According to art. 21o of the Act of April 6, 1990 on the police[29] and the related Regulation of the Minister of Internal Affairs and Administration of September 29, 2017 on the manner and procedure for updating police maps of threats of sexual crimes[30], there is an obligation to create such maps. These maps should contain up-to-date information on crimes against sexual freedom committed over the last 2 years and the places where these crimes were committed. Each map contains a list of places that are at particular risk of crimes against sexual freedom. These maps are available in the Public Information Bulletin of the General Police Headquarters[31]; they show these risk assessments by numerically indicating and colour grading the occurrence of sexual crimes in particular localities and the whole country. These include not only investigations concluded by indictment, but also all other cases in which no further action was taken or conditional discharge occurred, so-called "umorzenie rejestrowe".

At this point, it should be asked whether the indicated institutions really fulfil their preventive functions or are only a manifestation of penal populism. Is a victim in any way gratified by the fact that their perpetrator has been included in the "pae-

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[28] For more about the many doubts related to the Commission's activities, see: M. ŻBIKOWSKA: op. cit., 519–531.

[29] *Journal of Laws* 2019.161.

[30] *Journal of Laws* 2017, item 1817.

[31] See: http://bip.kgp.policja.gov.pl/kgp/policyjna-mapa-zagrozen/26122,Policyjna-mapa-zagrozen-przestepstwami-na-tle-seksualnym.html [accessed: 15. 04. 2022].

dophile register" or that the committed crime has been added to a sex crimes threat map? Can these methods constitute any compensation or provide protection in the future, especially when the perpetrator is a person from the vicinity of the victim? In addition, should we punish a perpetrator twice for a crime? Is not a criminal trial sufficient to convict the guilty person and impose an adequate penalty which fulfils both retributive and preventive purposes? Should punishment be the task of authorities like the Commission? Does an individual who has been on a public register have a chance of a peaceful and safe life, or will he suffer the negative consequences of his actions for many years, even after serving his sentence? Do sex crime threat maps help prevent crimes of this kind in future? The answer to all these questions is probably negative.

3.3. "Ex officio" public prosecution procedures

All kinds of sexual abuse of minors have always been prosecuted ex officio. However, one of the core doctrinal topics in Polish substantive and procedural criminal law has recently been the dispute over the rationality of prosecuting rape *ex officio* under a public prosecution procedure. This crime was previously publicly prosecuted, but this did not happen automatically as a request was needed from the victim; however, since January 2014 rape has been prosecuted *ex officio*. This change was caused by the requirement of art. 55 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, drawn up in Istanbul on May 11, 2011, ratified by Poland on July 8, 2015, which requires that preparatory proceedings regarding sexual offenses should not depend on the victim's request at either the initiation stage or during the proceedings (as a result of withdrawal of the request). Critics of this regulation argue that an offence under art. 197 of the Criminal Code (rape) is directed against the most intimate sphere of private life; therefore, the decision to request the prosecution of the perpetrator should belong to the victim. It is emphasised that this is closely related to the constitutional right to privacy and the possibility of deciding to prosecute or not prosecute the perpetrator[32]. Another argument is the possibility of re-victimization by exposing rape victims to suffering and unpleasantness because of criminal proceedings against the perpetrator. In turn, supporters of mandatory prosecution emphasise that the state is not fulfilling its role if it cannot prosecute such dangerous and socially harmful crimes. Moreover, the impossibility of prosecuting the perpetrator may also cause a feeling of impunity and that the legal system is ineffective. Those who support such a view agree that criminal proceedings may indeed be unpleasant for the aggrieved party; however, due to procedural guarantees and the necessity to

[32] W. JASIŃSKI: Uwagi o trybie ścigania przestępstwa zgwałcenia. *Prokuratura i Prawo* 2014, No. 1, 68 ff.

hold the perpetrator responsible, such victims' discomfort constitutes "inevitable social cost of the justice system."[33]

4. Protection of victims of sexual crimes

4.1. Police and medical facility procedures with rape victims

It is reported that victims of sexual crimes usually struggle with many negative effects of such crimes, including rape trauma syndrome, which is a natural consequence of the stress of being a crime victim[34]. Long-term post-traumatic nervous disorders are also commonly associated with an increase in a sense of helplessness, self-criticism and guilt, intensification of conflicts, as well as the disturbance of interpersonal relationships. Often, a victim has nightmares, anxiety attacks, frequent fits of crying, and remembers the event to such an extent that he or she feels as if the perpetrator were "everywhere". The victim often blames herself/himself, suffers from concentration problems, and is afraid of being left alone at home or leaving it.[35] Broadly understood sexual abuse of children may also have many negative consequences, both short- and long-term. These include, in particular, interpersonal and emotional disorders, low self-esteem and troubles with social functioning, and sexual, somatic and dissociative anomalies. Moreover, the empirical data suggest that people who are victims of sexual crime in childhood may be more likely to engage in risky sexual behaviour or even prostitution, and they often become victims of sexual criminality as adults.[36] It is important to emphasize the importance of education: this means promoting knowledge about the possibility of preventing and protecting against sexual crime and pointing out that sexual abuse is not a good thing, but it cannot be a taboo. This is a huge problem that needs to be talked about loudly[37].

The necessity for special and very delicate treatment of sexual crime victims was reflected in the adoption on November 25, 2010 of the "Procedure for the conduct of the Police and Medical Facilities with victims of rape" (or under the name "Procedure for a medical facility with a person who has experienced sexual vio-

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[33] See: G. SIDOR: Przestępstwo zgwałcenia – ścigane z urzędu czy na wniosek? *Studia Iuridica Lublinensia* 2013, Vol. 20, 188 ff; See also: J. N. FERENZ: *Sytuacja ofiar przestępstwa zgwałcenia po nowelizacji Kodeksu karnego z dnia 13 czerwca 2013 roku*. *Zeszyty prawnicze* 2016, Vol. 16, No. 1, 171 ff.

[34] A. W. BURGESS: Rape Trauma Syndrome. *Behavioral Sciences & The Law* 1983, Vol. 1, No. 3, 99.

[35] Ibidem, 100 ff.

[36] J. WŁODARCZYK: *Wykorzystywanie seksualne w dzieciństwie a konsekwencje w życiu dorosłym. Raport z badań*. Warszawa 2016, 31–32.

[37] J. WARYLEWSKI: *Problematyka właściwej reakcji karnej na zachowania związane z godzeniem w wolność seksualną lub obyczajność*. Lecture delivered at the 4th Polish Penitentiary Congress, available on the website: https://docplayer.pl/8982643-Problematyka-wlasciwej-reakcji-karnej-na-zachowania-zwiazane-z-godzeniem-w-wolnosc-seksualna-lub-obyczajnosc.html [accessed: 15. 04. 2022].

lence"). This was developed on the initiative of the Government Plenipotentiary for Equal Treatment, which describes in detail how to deal with rape victims: where to refer them; how to secure evidence so that the examination is carried out only once by a gynaecologist; how to secure the victim's clothing and allow them to clean up after the examination; how provide an early abortion measure at the request of the victim; and how to provide documents and evidence to the Police. However, the research presented in the quoted article shows that the practice is far from perfect as medical personnel have little knowledge of this subject.[38] It should also be pointed out that this Procedure has become obsolete to some extent because the procedure for prosecuting the offence of rape has been changed from a public prosecution with the request of the victim to unconditional public prosecution. Therefore, now it is not true that the doctor has to ask for consent to notify the Police and submit an application for prosecution if the victim first goes to a medical facility. Formerly, the doctor could decide whether or not to inform the authorities of a crime, but now it is a doctor's legal duty to do so[39].

Generally, the procedure should take the following order. First of all, the police are obliged to establish whether the victim needs medical help, in which case they should provide it. The victim should be invited to a private room, thereby guaranteeing the possibility of free expression without the interference of any third parties. The victim should be provided with a sense of security so that he or she is not afraid to report a crime committed against them. The officer performing the activities should show empathy to the aggrieved party and is obliged to refrain from making negative comments about the incident; the officer also may not show an ambivalent or even negative attitude to the case and should take into account the emotional state of the victim and be gentle towards them. The officer must accept the report and prepare a protocol from this activity. In accordance with art. 185c § 1 of the CCP, the interrogation should be limited to indicating the most important facts and evidence. The officer, however, does not interrogate the victim because, according to art. 185c § 2 of the CCP, this is the exclusive competence of the judge and specific conditions must be guaranteed[40]. The prosecutor is the only one who can decide if an application to the court is required for interrogation. The police are also obliged to inform the victim about their rights in the proceedings and about further steps that will be taken in the proceedings: the need to collect and secure evidence and the conducting of a medical examination. The police should also

[38] T. LEWANDOWSKA-ABUCEWICZ – K. KĘCKA – J. BRODOWSKI: *Wiedza personelu medycznego dotycząca "Procedury postępowania z osobą zgwałconą" w jednostkach medycznych*. *Seksuologia Polska* 2015, Vol. 13, No. 1, 15.

[39] So as the rape of a minor is one of the ex officio prosecuted offenses enumerated in art. 240 § 4 Criminal Code. This means that failure to report this crime is punishable by imprisonment of up to 3 years.

[40] This interview takes place at court, but in a special room; a psychologist must be present; a video recording (image and sound) is made which will be replayed during the main hearing.

provide transport to the medical facility where assistance will be provided, and the biological material of the victim should be secured for the purpose of identifying the perpetrator. After the medical examination, the victim should be allowed to shower and change clothes; if necessary, the police should provide replacement clothes (they should be available in the police station). The police should also provide the victim with a list of specialised legal, psychological, and family protection institutions and should help the aggrieved party to contact the nearest unit of the Victim Assistance Fund and Post-penitentiary Assistance Fund, or another similar institution, if needed. If it is necessary to take a photograph of the victim, this should be done by forensic technicians (of the same sex if possible). They should behave with special sensitivity with the victim. In the hospital, the victim should also be informed about their patient rights, in particular the informed and voluntary consent that is required to perform the examination (which should be carried out within a maximum of 72 hours after the crime). The hospital should be equipped with forensic packages in which the material is taken for testing; the medical staff should show maximum sensitivity and empathy; after the test is performed, staff should allow the victim to take a bath, change clothes, and have a meal.

4.2. How to interview victims of sexual crimes?

The Code of Criminal Procedure in art. 185a provides a special formula for interviewing minor victims of sexual crimes (as well as crimes against freedom and crimes against family and guardianship): a victim who is under 15 at the time of the interview (and, exceptionally, also in cases in which there is a fear that that interrogation in other conditions could have an undesirable influence on the mental state of victims who are over the age of 15) is questioned only when his or her testimony is significant for the resolution of the case and, as a rule, only once. During this interrogation, a psychologist should be present. This norm is also repeated in art. 185c § 1a of the CCP, which indicates the method of interrogation when proceedings against sexual offences are conducted.

The above means that, in each case, it is up to the procedural authority to decide if the interrogation of the minor victim is necessary or whether this evidence will be collected at all. Originally, this regulation referred only to victims who were below the age of 15 at the time of victimization, but now it is 15 years at the time of interrogation.[41] This interview is to be conducted by a court and, as a rule, should not be repeated; it should be limited to indicating the most important facts and evidence. Importantly, such hearings should take place in appropriately designed rooms in the court building or outside it; these are called "blue rooms" and

[41] See: A. ŁAKOMY: Przesłuchanie małoletniego w świetle nowelizacji Kodeksu postępowania karnego. *Ius Novum* 2016, Vol 1, 42–43; see also: J. ŻYLIŃSKA: Karnoprocesowa ochrona małoletniego pokrzywdzonego w sprawach o przestępstwa przeciwko wolności seksualnej i obyczajności — kilka uwag na tle nowelizacji wprowadzonej ustawą z dnia 13 czerwca 2013 r. o zmianie ustawy — Kodeks karny oraz ustawy — Kodeks postępowania karnego. *Nowa Kodyfikacja Prawa Karnego* 2016, Vol. XXXIX, No. 39, 88.

provide maximum comfort and a sense of security. The Polish legislator introduced this important guarantee in response to European and international regulations[42], and it should undoubtedly be assessed as the correct solution.

An important element that is intended to ensure that the post-event interview will not be repeated is § 2 of this provision, which stipulates that if the accused does not have a counsel of his/her own choice during this interview, he or she should be granted a free defence counsel at the state's expense. This is important because it prevents the minor from being questioned again, which is possible only in two exceptional situations: if some new important circumstances arise, the clarification of which requires another questioning; or when the accused, who did not have a defence counsel at the time of the first questioning of the victim, demands it[43]. This regulation allows the number of cases in which the court will be forced to question a minor victim again to be reduced; at the same time, it safeguards the right to defence, which is also a rudimentary principle of criminal procedure. In conclusion, the questioning takes place only at the pre-trial stage; pursuant to art. 185a § 3 of the CCP, during the main hearing only the recorded video of this interrogation is played, and the protocol is read out. Interestingly, the interview may be attended by the minor's statutory representative, or the person under whose permanent care the victim remains (art. 51 § 2 of the Code of Criminal Procedure), or an adult indicated by the minor victim as long as this person does not obstruct or interrupt the interrogation. It seems that this decision rests with the minor, who submits an independent declaration of will in this matter[44] (although, as a rule, pursuant to the aforementioned provision of art. 51 § 2 of the Code of Criminal Procedure, the

[42] Directives of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims of 5 April 2011 (*Journal of Laws* UE L 335, 17 December 2011, called "Directive 2011/36"), Directives of the Parliament Of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography of 13 December 2011 (*Journal of Laws* UE L 101, 15 April 2011, referred to as "Directive 2011/93") and the Directive Of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (*Journal of Laws* UE L 315, November 14, 2012, referred to as "Directive 2012/29"), [following:] ŻYLIŃSKA, Justyna: op. cit. 86.

[43] See: the judgement of the Supreme Court of 5 October 2010, IV KK 61/10, Lex No. 606313; the decision of the Supreme Court of 7 judges of 24 November 2010, I KZP 21/10, Lex No. 621169; the judgement of the Supreme Court of 24 November 2009, III KK 176/09, Lex No. 553885, in which the Supreme Court indicates that the provisions in question are procedural guarantees, but due to the possibility of the accused requesting another questioning of the minor in the event that during the first his defence counsel was not present, it is recommended that questioning pursuant to Art. 185a of the Code of Criminal Procedure should take place after the charges are formally presented to the accused. [following:] ŁAKOMY, Arkadiusz, op.cit., 45–46.

[44] See: J. ŻYLIŃSKA: op.cit., 96. See also: D. KARCZMARSKA: Przesłuchanie małoletniego pokrzywdzonego w świetle nowelizacji Kodeksu postępowania karnego. *Prokuratura i Prawo* 2014, Vol. 1, 27.

minor victim is generally represented by a statutory representative or an actual guardian in the criminal procedure).

This regulation in a real way protects victims from at least some of the burdensome consequences of becoming victims of sexual crimes. The trauma such people have to struggle with is already so great that the judicial authorities should do everything possible to prevent re-victimization during the criminal trial and reduce the participation of such people in the proceedings as much as possible so that they do not have to go through it again and be reminded of the crime which has been committed against them. At the same time, the obligatory assistance of the defence counsel during the interrogation ensures the accused's rights, thus minimising the risk of the necessity of repeating the interrogation later.

Summary

In view of the above, it should be pointed out that although the Polish legislator has greatly expanded the mechanisms of protecting the rights of sexual crime victims, it is difficult to conclude that this protection is always rational and necessary. The Polish regulations are felt to have a great influence on society by referring to emotions, not facts. Of course, victims of sexual crimes should receive special care and it is necessary to provide them with assistance (preferably specialist, both somatic and therapeutic), which is especially important during the first meeting with the victim at the police station or a medical care facility. At this point, strong approval should be given to the "Procedures for the conduct of the police and medical facility with victims of rape"; however, in view of the doubts about medical personnel's limited awareness of these procedures, it seems appropriate to introduce obligatory training in hospitals or other places of care in the sphere of providing assistance to individuals who have become victims of sexual crimes.

Undoubtedly, children victimised by sexual crime should also be given special attention as they require care, education and love, and they should not become secondarily victimised, which may be particularly traumatising for them. However, it should be said that creating a publicly available register that is inadequately perceived as a "register of paedophiles" is not a perfect solution as it may lead to "paedophile hunting" by individuals who particularly condemn this type of behaviour, thus resulting a self-perpetuating cycle of crime, as potential hunters may lose self-control and victimise the captured person. Certainly, the inclusion of a perpetrator's data in such a register is a kind of additional punishment for this person, who has already served their sentence. Doubts are also raised as to whether the entry of the perpetrator's data in the register may give any sense of satisfaction or security for the victim.

In the authors' opinion, prevention should occur primarily at school from an early age so that children should be made aware that certain behaviours towards them are undesirable and that they should not be afraid to speak about them. Education, however, should be directed not only to the youngest but to all of society, instead of only simplified condemnation of such behaviour. The possibilities of

using the assistance of specialists should be extended in order to prevent deviant behaviour in the sexual sphere. Obviously – both for the child and his caregivers, who will have to deal with the treatment of trauma – the care of psychologists, psychiatrists, sexologists and any other necessary care should be provided if a child falls victim to a sexual offense.

It should be stressed that the special protected mode of interrogating minors as victims of sexual crimes is a very good solution which at the same time allows the evidence that is necessary for proceedings to be gathered because (apart from the perpetrator) it is the victim who is most often the only witness of the criminal behaviour. At the same time, this regulation protects victims from excessive stress and discomfort related to the need to testify more than once or in the direct presence of the accused. Being interviewed by a judge in a "blue room" is, of course, always an unpleasant and stressful experience for the victim; however, if this is necessary for the proceedings, it is definitely better that it occurs only once and in the best possible conditions of confidence, comfort and care for the victim.

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