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CULTURAL, POLITICAL, AND LEGAL DISCOURSE ON SEXUAL VIOLENCE AGAINST WOMEN IN POLAND. A STUDY BASED ON THE EXAMPLE OF THE OFFENCE OF RAPE

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Abstract:
The material scope of the analysis undertaken in the text focuses on selected problems of sexual violence against women in Poland. Special emphasis is laid on presenting the discourse on the offence of rape, with three perspectives distinguished: cultural, political and legal. The discourse and its various forms are understood as specific performative social practices that not only describe, but also produce meanings and order them. As for the main rationale behind the study, it is to analyse sexual violence in Poland by juxtaposing cultural, political and legal discourses, with a particular focus on the change in the scope of the criminalisation of the offence of rape in 2025, and its relevance for the understanding of the victim's sexual autonomy, consent and subjectivity from the perspective of the post-Foucauldian 'apparatus of sexuality' and the dogmatic interpretation of criminal law. Given the necessity to elaborate the material scope, the following questions have been presented in the text: (1) How do cultural and political discourses in Poland problematise the offence of rape, and what consequences does this problematisation have for the understanding of the sexual autonomy, consent and credibility of the victim's experience within the 'apparatus of sexuality'? (2) How does the legal discourse in Poland problematise the offence of rape, including the 2025 amendment of Article 197 of the Criminal Code, and what consequences does this problematisation have for the understanding of sexual autonomy, consent and evidence criteria within the 'apparatus of sexuality'? The methodology employed is illustrative and combines two approaches: a post-Foucauldian discourse analysis, focused on power-knowledge relation; and an institutional-legal analysis, based on a dogmatic interpretation of legislative changes, taking into account their application practices and doctrinal positions.

Keywords: violence, sexual violence, sexual autonomy, rape, the offence of rape

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Introduction

The material scope of the research problem addressed in the text covers selected issues concerned with sexual violence against women in Poland. The problematics are approached by way of a synthetic analysis of cultural, political and legal discourse with a particular focus on rape and the offence of rape. Here discourse is meant not so much as a structured system of signs *per se*, but as a set of specific social practices. Hence, itself is performative; it produces meaning and orders it. As regards scientific and other specialised discourse, it must be said that speaking and writing not only describe the world, but construct its various versions, which bring specific social consequences. In this sense, according to T. Rapley, discourse analysis is not about establishing what is true, but about analysing how certain versions of truth become socially possible, credible and effective (Rapley, 2013, pp. 22–31). In contrast, in M. Foucault's view, discourse is a historically shaped practice of knowledge-power that – within an 'apparatus' (dispositif) – constitutes objects, produces subjectivities and establishes regimes of truth, enabling and at the same time constraining what can be said, thought and practised (Dean, 1994, pp. 271–296; Bussolini, 2010, pp. 85–106; Dodier & Barbot, 2016, pp. 291–317; Ostrowicka, 2019a, pp. 178–187; Ostrowicka, 2019b, pp. 75–94; Foucault, 2006, pp. 537–544).

The issues of sexual violence, with a particular focus on rape and the offence of rape, are approached in the text within three dimensions: cultural, political and legal. In the first case, how rape is represented in Polish culture (selected prose, reportage and film) are taken into consideration, with a particular focus on the change in problematisation: ranging from the narrative of extreme situations to everyday and relational experiences. In the second case, the offence of rape is regarded as part of normative and ideological disputes involving issues concerned with evidence, consent and victim credibility. With regard to the third dimension, the subject matter addressed is the change in the scope of criminalisation of the offence of rape in Article 197, also in relation to the accompanying provisions, the 2025 Polish Criminal Code, and their consequences for the understanding of sexual freedom and autonomy from the dogmatic and post-Foucauldian perspective (for more on this see: Chapter XXV, Journal of Laws 1997, no. 88, item 553, as amended).

The main purpose of the present paper is to analyse sexual violence in Poland through the juxtaposition of cultural, political and legal discourses,

with a particular focus on the change in the scope of the criminalisation of the offence of rape in 2025, and its relevance for the understanding of the victim's sexual autonomy, consent and subjectivity from the perspective of the post-Foucauldian 'apparatus of sexuality' and the dogmatic interpretation of criminal law. In order to elaborate the material scope of the research problem, the following questions have been presented in the text: (1) *How do cultural and political discourses in Poland problematise the offence of rape, and what consequences does this problematisation have for the understanding of the sexual autonomy, consent and credibility of the victim's experience within the 'apparatus of sexuality'?* (2) *How does the legal discourse in Poland problematise the offence of rape, including the 2025 amendment of Article 197 of the Criminal Code, and what consequences does this problematisation have for the understanding of sexual autonomy, consent and evidence criteria within the 'apparatus of sexuality'?*

Given the material scope of the analysis in question, as well as its main objective, the methodology used in the text is illustrative. As part of this illustrative perspective, two approaches have been considered. The first one is a post-Foucauldian analysis of discourse, with a particular focus on the concept of 'apparatus' and the 'apparatus of sexuality'. The other is an institutional-legal analysis, in which the dogmatic interpretation of legal developments plays the most important role. An attitude like this justifies citing in the text, in descriptive form, the legal solutions as established by the legislator together with their application practices or doctrinal settlements (Dean, 1994, pp. 271–296; Foucault, 1995, pp. 71–117; Zieliński, 1998, pp. 1–20; Wronkowska, 2005, pp. 76–91; Foucault, 2006, pp. 537–544; Bussolini, 2010, pp. 85–106; Elliott, 2014, pp. 104–106; Nowacki & Tobor, 2016, pp. 293–313; Ostrowicka, 2019a, pp. 178–187; Ostrowicka, 2019b, pp. 75–94; Pohl, 2019, pp. 77–84).

Normative Premises behind the Discourse

Characterisation of the 'Apparatus' in Foucauldian and Post-Foucauldian Terms

The category of 'apparatus' ('governmentality'), introduced into the humanities and social sciences by French philosopher Michel Foucault and later adopted by his followers, has been employed as the main tool for analysing the problematics of sexual violence. In general, the apparatus should be viewed as a set of institutions, procedures, analyses, reflections and tactics that enable

the exercise of a specific and complex form of government aimed primarily at populations, but one that at the very bottom produces a number of specific technologies of governance and forms of knowledge (Agamben, 2010, pp. 82–100; Bussolini, 2010, pp. 85–106; Elliott, 2014, pp. 104–106; Dodier & Barbot, 2016, pp. 291–317; Ostrowicka, 2019b, pp. 75–94). The apparatus can therefore be seen as another incarnation, or counterpart, of Max Weber's concept of legitimacy (Berger & Luckmann, 2010, pp. 136–188). Therefore, 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) (Dean, 1994, pp. 271–296; Agamben, 2010, pp. 82–100; Bussolini, 2010, pp. 85–106; Dodier & Barbot, 2016, pp. 291–317; Ostrowicka, 2019b, pp. 75–94).

Before the special modalities of the 'apparatus' are specified, it is necessary to synthesise the way in which Michel Foucault approaches politics. His position is clearly critical of the classical approaches found in social sciences and humanities. Foucault rejects the idea of the sovereignty of the people as the source of power, pointing out that power is a product of neither individual nor collective will, nor a simple emanation of social interests. The figure of the sovereign people is in this sense an ideological abstraction devoid of real agency. Similarly, the notions of citizenship and democracy act as a discursive screen, masking extra-legal mechanisms of power of a disciplinary nature. Consequently, modern power requires new forms of legitimacy, and a new figure of the governed, who is no longer a subject of rights, but a carrier of extra-legal norms – moral, medical, psychological or sexual ones (Walzer, 1998, pp. 13–28; Zbrzeźniak, 2010, pp. 59–127; Bednarek, 2012, pp. 234–276).

More broadly, the apparatus of power is supported by three types of *dispositifs*, or modalities: law, discipline and security. The first one points to what is allowed and what is not. In itself, it does not have a preventive role; it only sanctions undesirable occurrences, which makes it inflexible and unable to cope with society-wide processes. The second one normalises and shapes the 'normal subject', preventing undesirable phenomena. It is a micro-level power operating most often in the background of everyday practices, internalised by the subject. The third encourages actions considered desirable. All three do not constitute any 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, 2019b, pp. 75–94).

When considering the modality of sexuality, it should be pointed out that it is not a pure modality, in the sense that, unlike the three others already described, it is not generic. It is therefore a concrete and historical thematic *dispositif* focused on the sphere of human sexuality. It is not a force competitive with the other three; rather, it integrates them and directs them towards its own strategies, goals, and effects with regard to the subject, ultimately towards his or her sexual identity. Thus, it forces one to tell the truth about oneself, not relying solely on the subject's regulating function, but his generative function.

Characterisation of the 'Apparatus of Sexuality' in Foucauldian and Post-Foucauldian Terms

M. Foucault's *History of Sexuality* can be described as a continuation of the genealogical perspective, the basis of which he indicated in *Discipline and Punish: The Birth of the Prison*. In this case, however, the focus is on how the subject becomes the bearer of the norms that indicate his or her experience of sexuality. By experience, Foucault means the reciprocal relationship between various fields of knowledge, types of normativity, and forms of subjectivity within culture (Foucault, 1995, pp. 143–144). As mentioned earlier, as part of his conception, M. Foucault reversed the previous perception of power, which he also did in the case of sexuality. Namely, he considered that the repressive hypothesis – whereby authority "silences" sexuality, relegating it to the private sphere and influencing it with a series of prohibitions – is simply false. Sexuality itself is a historical construct, emerging as a result of practices of knowledge and power, control and self-knowledge (Foucault, 1995, pp. 143–233; Zbrzeźniak, 2010, pp. 104–127; Elliott, 2014, pp. 99–104).

It can therefore be assumed that the starting point is the historical process of problematisation of sexuality, within which it becomes a distinct area of knowledge. Something previously natural, neutral, obvious and invisible is being demarcated as an object of intervention. What matters is not whether the problem objectively exists, but that it needs to be addressed, described and regulated. When something becomes a problem, the need to talk about it in a certain way quickly arises, which involves a proliferation of various discourses, including appropriately specialised ones, e.g., medical, psychiatric, pedagogical and demographic ones. Discourse – understood as a system

of statements, concepts, classifications and explanations – does not work on its own and must therefore be supported by specific techniques of power. For these translate specific knowledge into action. By practising techniques, a differentiation is made between what is in accordance with the norm and what is not, what is acceptable and what is not, etc. The result is a situation in which one begins to consider oneself through the prism of ongoing discourses, to judge oneself according to moulded norms, and to apply control techniques to oneself (for more see: Foucault, 1995).

When analysing the workings of the 'apparatus of sexuality', M. Foucault distinguishes some particular cases: (1) the sexualisation of children, (2) the "hysterisation" of women's bodies, and (3) the transformation of sexual practices into identities, mainly through the psychiatrisation of perverse pleasures (Foucault, 1995, pp. 71–117). All these groups in the analysis were treated like the criminals in *Discipline and Punish*..., i.e., as subjects to be controlled by a range of disciplinary techniques and the art of good training: from hierarchical supervision to normalising sanctions (Gutting, 2005, pp. 113–123). And just as with criminals, who could not be completely disciplined in society, so with stigmatised groups, given their physicality or sexual identity, only efforts had to be made to discipline them. Just as in the case of the concept of power and the one of justification for changing the repressiveness of penal measures, where M. Foucault turned the way of seeing these problems upside down, he did the same in the case of repressiveness with regard to human sexuality. Thus, he did not recognise that repression was the main process in the development of the apparatus of sexuality, which at the same time did not mean that repressive techniques were not applied to particular groups or individuals (Dean, 1994, pp. 271–296; Gutting, 2005, pp. 114–124; Elliott, 2014, pp. 99–104).

An interesting aspect not examined in detail by M. Foucault was the question of the criminalisation of sexual violence against women through the prism of the various modalities of *dispositifs*: law, discipline and security, as well as the very apparatus of sexuality. This seems to have been vividly conveyed by Georges Vigarello in his book *A History of Rape*. The author analyses rape – the major act against sexual freedom – from the long perspective of social and legal changes in France between the 16th and the 20th centuries. In the first stage, i.e., in the 16th-17th centuries, the emphasis was mainly on the shameful aspect of this type of act, which was one of the factors hindering its prosecution, even leading to double victimisation of the victim. One

important factor was also concerned with limitations in medical knowledge, e.g., the physical symptoms of violence. In the 18th century, a change in the perception of sexual acts targeting women slowly emerged, which also had a class context due to the unequal treatment of those who fell victim to representatives of the elites.

Nevertheless, it is worth noting that during that period the role of expert opinion and evidence in this type of crime was beginning to grow. Undoubtedly, a certain dynamic was evident in the late 18th and early 19th centuries, when, along with socio-political changes, there was some modernisation of the law on sexual offences. However, it does not mean that those changes came about unhindered in police and law court practice, as well as in what subjects practised (for more on this see: Vigarello, 2010).

Referring to the findings of G. Vigarello, while making a broader interpretation in the post-Foucauldian spirit, it can be pointed out that, in line with the process of problematisation of sexual offences against women, especially rape crimes, they were subject to integration into the network of knowledge, norms and institutional practices. Therefore, the apparatus of sexuality defines what can be called a rape at a given historical moment, who can be seen as a victim, and who as a perpetrator. It creates a social need for individual sexual offences to be subject to different types of regulation. For this reason, the offence of rape is not "naturally self-evident", but a product of the peculiar rationality of sexuality governance. Sexual violence and its individual exemplifications exist socially insofar as they lend themselves to expert opinion, classification and interpretation. Undoubtedly, discourses of knowledge, in spheres such as penal law, forensic medicine, psychiatry and psychology, play an important role in the whole process. It is they that create the interpretation and, in effect, the practice with regard to the offence, while shifting over time the focus from the act to the victim's body and their autonomy. Ultimately, from the perspective of the subject, who is the victim, the evidence is forced upon them, as well as the necessity to talk about their experience, while the perpetrator gets placed within a particular mode of dysfunction. It should be noted, however, that M. Foucault took into account that despite the problematisation of discourse and certain techniques of influence, the subject themself need not at all take the specific positions assigned to them. This is because the identity of the subject is an object of constant struggle for meaning, and the *dispositifs* themselves may compete with one another, e.g., law, morality, customs, etc. (cf. Foucault, 1995, pp. 52–70; Foucault, 2006, pp. 537–544). This

can be clearly seen in the context of the psychological difficulties that women face when it comes to reporting rape offences for prosecution. Another important process, as part of the struggle for meaning, is the continuous shift from problematisation, through discourses, techniques and power-knowledge norms, to the identity of the subject – the essential content of the definition of rape, i.e., the absence of victim consent.

Cultural and Political Discourse on Sexual Violence

Discourse in the Cultural Sphere

For a long time, in the Polish cultural discourse (e.g., prose, reportage and film), the issue of sexual violence, including rape, was most often addressed when it could be explained by an extreme situation: warfare, occupation and various other types of social unrest. It can therefore be pointed out that such occurrences made it possible to neutralise the nature of rapes as effects of special circumstances. An example of this is the film *Rose*, directed by W. Smarzowski, which tells, apart from the individual fates of the characters, of the broader context of the lives of Masurians, particularly women in wartime and post-war Poland (Smarzowski, 2012). This problem is also addressed by T. Słomczyński in his reportage entitled *Kaszëbë*, and concerning Kashubians living on Polish territory, published by the Czarne publishing house in 2021 (Słomczyński, 2017; 2021). In her analysis, A. C. Puerta presents sexual violence against women based on two texts about the Holocaust: a short story *Aryan Papers* by Ida Fink, and a drama *Our Class* by Tadeusz Słobodzianek. According to the author, in Słobodzianek's drama the act of rape has a largely symbolic function: the female body becomes a carrier of meanings connected with the Polish-Jewish relations, with the symmetry of wrongs and injuries between men belonging to the two communities. Sexual violence against women gets exposed, but at the same time relativised, and partly justified by appealing to "higher reasons" (saving lives, love, deliverance) and by reproducing patriarchal rape myths. The image of women itself tends to be passive. As for *Aryan Papers* by Fink, sexual violence is presented from the perspective of the individual victim, with no attempt at symbolic mitigation. Sexual violence against women is presented as coercion in unequal power relations, as an experience of trauma, fear, humiliation and forced silence. According to Puerta, Fink does not mythologise sexual violence, nor does she place it

within a national or heroic narrative, but reveals its patriarchal and structural determinants. Thus, storytelling becomes an alternative to the male narrative of history, and exposes the mechanisms of secondary victimisation of women (Fink, 2002, pp. 69–74; Słobodzianek, 2009; Puerta, 2015, pp. 203–214).

Undoubtedly, over the last two decades, the discourse has been shifting towards narratives of everyday life, which can be clearly seen in the context of the problematics of violence itself, as well as sexual violence against women, which have become embedded in family, professional, educational or religious relationships. A good example of this perspective is provided by Z. Nawrocka's book entitled *Rape. Women's Voices on a Social Taboo*, in which the author presents the situations of women who have experienced rape. This female perspective presents the reactions of the police and judicial institutions that, instead of supporting the victim, often subscribe to a patriarchal, sexist and stigmatising model of action (Nawrocka, 2013). From the perspective of post-Foucauldian analysis, this marks a shift in problematisation: rape ceases to be exclusively an "excess" and begins to function as an effect of inequality, dependency and sexual norms. A similar observation was made by A. Howe, who at the same time stated that before the more pronounced influence of feminism, sexual violence was systematically depoliticised. This resulted in rape being seen as an individual "incident", a domestic conflict or sexual deviance, rather than as a structural power mechanism embedded in gender relations (Howe, 2008, pp. 148–179).

Discourse in the Political Sphere

In the post-Foucauldian view, political discourse is part of an apparatus, and so it is not a neutral reaction to the mere fact of sexual crime. The problematisation of particular sexual crimes against women within the political discourse takes at least three forms: (1) the organisation of the evidence system, (2) the definition of the standard of consent, and (3) the hierarchy of victim credibility. In the first and second cases, the discourse concerned a dispute over the boundaries and understanding of such categories as violence against the victim and victim resistance. In this view, the evidence of the criminal act is supposed to be found in the victim's body, i.e., his/her injuries, physical marks, etc. As a result, more emphasis is placed on the victim themself, which can be seen as a mechanism for disciplining the victim rather than the perpetrator. The same applies to the manner of actively expressing opposition to the offender's

act. In the third case, the discourse is based on the assessment of women in terms of morality and their appropriate reactions, regarded as correct ones. This mode of political manifestation stems from the link between legal solutions and discipline, which results in the assessment of both the perpetrator and the victim. In this practice, the most recognisable acts of rape are those that are extreme in nature, while those based on explicit violence are avoided.

Undoubtedly, political discourse in Poland, due to its references to various types of values and polarisations around them, is strongly ideological in nature. This is evident in the sphere of women's bodily autonomy with regard to both abortion issues and violence, as well as crimes against secular freedom and morality (Act of 7.01.1993, Journal of Laws 1993, no. 17, item 78; Announcement by the President of the Constitutional Tribunal of 18.12.1997; Helsinki Foundation for Human Rights, 2015; Płatek, 2010, pp. 345–377; Spurek, 2015; Grabowska & Grzybek, 2016; Judgment of the Constitutional Tribunal of 22.10.2020, Journal of Laws 2021, item 175; Skorulska, 2024). While synthesising the political discourse, which most often becomes dynamic in times when attempts are made to amend the law, one can point out that it is characterised by the following features: (1) contentiousness due to its entanglement with the 'gender' discourse, (2) contentiousness due to its undermining of the legitimacy of the special protection of women from violence (e.g., by questioning the legitimacy of the Istanbul Convention), (3) contentiousness due to its raising of the issue of false accusations of rape (especially in the context of changing the scope of the definition of the offence of rape) (cf. Amnesty International, 2021; Ordo Iuris, 2024).

Legal Discourse on Sexual Violence

In the analysis of the discourse on the legal aspects of sexual violence against women, the focus will remain on the change in the scope of the indicia of the offence of rape in 2025. It is noteworthy that the offence of rape itself is criminalised under Article 197 of the Polish Criminal Code, which has undergone – since the Criminal Code came into force in 1998 – amendments. Besides, the act has been criminalised in the chapter entitled: Offences against Sexual Liberty and Decency. It is therefore to be concluded that offences against sexual freedom are similar to offences against liberty, but the specificity of the former will be the specific forms of violence and the specific objective scope of liberty. It is also worth noting that the Polish legislator used the term

'zgwałcenie' [violation] in the text of Article 197. This is relevant because the term 'gwałt' [rape] is often used in the press and less specialised language, but in Polish law it is equivalent to the term and indicium of 'violence'. The act of violation is often identified with behaviour involving breaking of the victim's resistance and infringing on their good, such as the aforementioned sexual liberty, which is distinguished from decency (Art. 197 §1–5, Journal of Laws 1997, no. 88, item 553, as amended).

Most commonly, sexual liberty is understood as the right to self-determination in deciding one's own behaviour and making decisions about one's own sexual behaviour (cf. Szczucki, 2011, pp. 31–58; Giezek, 2021, pp. 604–606; Grześkowiak & Wiak, 2024, p. 1351). Warylewski J. states that "sexual liberty is concretised as the right to dispose of one's body in the sphere of sexual intercourses, the right to choose one's sexual partners, and their number as well as the time, place and form of sexual contacts, which should be free from actual coercion, threat or deception [...] At the same time, the framework of sexual freedom and liberty in the positive sense is outlined" (Warylewski, 2001, p. 25). The same direction has been taken by one court of law, stating in a judgment passed that: sexual freedom manifests itself in the right to dispose of one's body in the sphere of sexual intercourses, in 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 (Judgment of the Circuit Court in Wrocław of 23.12.2013, ref. no. III K 198/13). It can therefore be concluded that sexual freedom involves sexual autonomy, which is freely decided by the victim, irrespective of what purpose the perpetrator had in violating it, i.e., what motives he or she had – sexual or otherwise (cf. Judgment of the Appeals Court in Gdańsk of 9.01.2018, II AKa 411/17). This position was also expressed by the Supreme Court, which indicated that a characteristic feature of the offence of rape is not the perpetrator's striving to satisfy his or her sexual desire. Therefore, an attack on sexual freedom occurs not only when the victim does not accept the act of sexual intercourse, but also when their absence of acceptance relates to the manner in which the perpetrator carries out the act (Decision of the Supreme Court of 9.04.2001, ref. no. II KKN 349/98).

The previous wording of Article 197 §1 of the Criminal Code specified that the perpetrator of the basic type of the offence was one who, by violence, unlawful threat or deception, brings another person to sexual intercourse. The main forms of action indicated in this provision also constituted other types

of prohibited acts in this article. Following the amendments to the wording of Article 197 §1 in 2025, it has become a criminal offence for an offender to bring another person to sexual intercourse by violence, unlawful threat, deception or otherwise despite the absence of their consent. Thus, the legislator added an indicium with the following content: "or otherwise despite the absence of their consent". The effect of this amendment and the introduction of another mitigated type in Article 197 §1a is a disruption of the previously established hierarchy in the gradation of violations of the victim's sexual freedom, between Articles 197 and 200 of the Criminal Code (Art. 197 §1–5, Art. 198, Art. 199 §1–3, Art. 200 §1–6, Journal of Laws 1997, no. 88, item 553, as amended).

However, focusing on the indicium of "or otherwise despite the absence of their consent", it must be concluded that this amendment does not sufficiently implement the guidelines indicated by GREVIO (Group of Experts on Action against Violence against Women and Domestic Violence), and the recommendations of the Istanbul Convention. Let us remember that Article 36 of the Istanbul Convention stipulates that the indicated sexual acts should be criminalised with a clear indication that they were carried out without the victim's consent, and that this consent must be given voluntarily, as an expression of free will (The Council of Europe Convention..., Journal of Laws 2015, item 961; Gardocki, 2023, p. 285). D. Czerniak and A. Pietryka (2025) argue that the current provision does not prejudge the fact that the absence of consent is sufficient to find the perpetrator guilty. For this, it is still necessary to demonstrate one of the listed ways of breaking the victim's will. M. Małecki, on the other hand, points out in his thematic commentary that the construction of the new provision as such does not change its meaning. A similar thesis is presented by A. Malinowska-Bizon, who adds that the indicium of "consent" has not been introduced by the legislator as an independent one. This in turn means that – as before – the basic (main) type of the offence of rape is based on the verbal indicium "brings", and further on in the provision there is an enumeration of the perpetrator's modes of action. The change, however, lies in the legislator's use of the open clause of "or otherwise", and in combining it with the condition of "despite the absence of their consent" (Malinowska-Bizon, 2025, pp. 11–39; Małecki, 2025, pp. 18–21, 145–182).

A literal reading of the change that took place in the wording of Article 197 §1 of the Criminal Code leads one to conclude that the legislator did not introduce a new model of the offence of rape based only on "the absence of consent", but only expanded the catalogue of forms of causative actions. Hence,

the new provision does not implement international standards, including the jurisprudence of the ECHR (the European Court of Human Rights). This provision, however, opens up the possibility for a broader interpretation, including a functional one, so that the phrase "or otherwise despite the absence of their consent" should also cover those actual states in which the perpetrator brings the victim to sexual intercourse without physical violence, unlawful threat, or deception, but against their sexual autonomy. When viewed like this, while the term "or otherwise" is capacious enough to cover pressure, being taken by surprise, exploitation of helplessness or of situational advantage, its interpretation is limited by "the absence of consent". Therefore, the absence of sexual autonomy should be the focal point in the interpretation of the offender's act. Still, it is noteworthy that with the new wording of the provision, a doctrinal problem will arise regarding the interpretation of "how to understand consent". It is difficult to foretell the direction jurisprudence will take: whether towards implied consent based on the starting point of "no objection" (the passive perspective), or towards implied consent based on the starting point of assessment founded on active, unambiguous affirmative behaviour of the victim (the active perspective) (cf. Małecki, 2025, pp. 145–182).

Following W. Wróbel, it should be assumed that the amendment concerning the change in the content of Article 197 of the Criminal Code was a reaction to the long-standing practice of narrowing the interpretation of "violence" by the legal doctrine (Wróbel, 2025). The jurisprudence associated violence with the overcoming of the victim's real and ceaseless resistance, which in essence shifted the obligation to "communicate" the absence of consent to the victim, while cases of passivity, paralysis by fear or inability to protest fell outside the definition of rape. The same way of "overwriting" the interpretation of the indicium of "violence" in the offence of rape did not occur, even if only in the case of the offence of armed robbery. 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 – as traditionally understood – violence, unlawful threat or deception, when a sexual act occurs and is initiated by the perpetrator, the victim's consent need not be demonstrated (cf. Judgment of the Supreme Court of 14.06.2006, WA 19/06; Judgment of the Appeals Court in Katowice of 8.04.2009, II AKa 72/09; Judgment of the Appeals Court in Poznań of 22.06.2023, II AKa 276/22; Judgment of the Supreme Court of 12.06.2024, V KK 346/23; and: Szczucki, 2011, pp. 31–58;

Michalska-Warias, 2012, pp. 31–58; Giezek, 2021, pp. 616–619; Gardocki, 2023, p. 285; RPO, 2025; Wala, 2025, pp. 490–509; Wróbel, 2025).

It is noteworthy that Article 197 of the Criminal Code was extended to include §1a, where the material scope of the offence of rape encompasses a situation in which the perpetrator brings another person to sexual intercourse by taking advantage of the latter's inability to recognise the meaning of the act or to direct his or her conduct. Thus, the legislator "transferred" some of the indicia from Article 198 to Article 197, thereby constituting a new mitigated type of the offence of rape. For example, in the previous legislation, a situation in which a person put themself into a state of drug or alcohol intoxication, which the perpetrator would take advantage of to lead to a sexual act, was not classified as rape under Article 197, but as an act of taking advantage of a certain state of the victim under Article 198 of the Criminal Code. It should be borne in mind that, as the law currently stands, Article 198, in principle, addresses cases of limited but not disabled autonomy. This way of interpretation is supported by the legislator's use of such phrases as "absence of capacity" (Article 197 §1a) and "substantial limitation of capacity" (Article 198). Despite the change in the relationship between articles 197, 198, and 199 of the Criminal Code, it should be noted that at least the assessment of the victim's state of drug or alcohol intoxication can lead to interpretative problems, and intricate casuistry in the practice of the doctrine (cf. Małecki, 2025, pp. 183–208; RPO, 2025; Wróbel, 2025).

On the other hand, sticking to the functional interpretation, i.e., the goal that actuated the legislator in creating the aforementioned distinction between Articles 197 §1a and 198 of the Criminal Code, it should be pointed out that the legislator wanted at least part of the facts to be covered by the content of Article 197. At the same time, he made changes to the content of Article 198 itself, with the result that the criminalisation is also extended to an offender taking advantage of a state of "other disturbance of mental functions", which in turn results from a significant limitation of the ability to recognise the meaning of the act or to direct one's own conduct. In the legislator's intention, the new wording of Article 198 eliminates the need to take a specific position as to the aetiology – pathological or non-pathological – of the victim's impairment of decision-making competence (Art. 197 §1–5, Art. 198, Journal of Laws 1997, no. 88, item 553, as amended).

From a broader post-Foucauldian perspective, the legal discourse on rape and the offence of rape can be regarded as an integral part of an apparatus

(as well as individual *dispositifs*), rather than as a neutral tool for responding to sexual violence. The 2025 amendment does not only criminalise certain acts, but in a specific way "sets up" sexual violence, the definitions of the indicia, evidentiary proceedings and interpretative practices, which all set the boundaries of what can be recognised as rape. Both the previous model of the offence and the current one indicate a strong link between the *dispositif* of law and the *dispositif* of discipline, where the victim's body and reactions are the key *loci* of truth generation. While it is true that the introduction of the indicium of "or otherwise despite the absence of their consent" seems to shift the apparatus towards sexual autonomy and consent as the central category of victim protection, it must nevertheless be concluded that the failure to make "consent" an independent indicium maintains the well-established logic operating on old disciplinary techniques. This state of affairs may result in the maintenance of old ways of assessing the credibility of the victim. The introduction of new indicia, and thereby creating new relationships between Articles 197, 198, and 199 of the Criminal Code, will only strengthen the process of managing sexuality in the power-knowledge relationship. All these elements will require no less than before: expert opinions, behaviour assessments, gradations of autonomy, etc. And the legal discourse itself will become an even more significant element of the apparatus of sexuality, producing norms of consent, hierarchies of credibility, and models of subjectivity, but without guaranteeing their full internalisation.

Ending and Conclusions

The material scope of the research problem addressed in the text focuses on the problem of sexual violence against women, with a particular focus on rape and the offence of rape, which is presented in three dimensions: cultural, political and legal. Given the need to elaborate the material scope of the analysis performed in the text, two research questions have been put forth in relation to the following conclusions:

(1) How do cultural and political discourses in Poland problematise the offence of rape, and what consequences does this problematisation have for the understanding of the sexual autonomy, consent and credibility of the victim's experience within the 'apparatus of sexuality'?

It can be assumed that in the cultural and political spheres, rape offences have for years been problematised mainly as extraordinary events (e.g., under wartime circumstances), which has to some extent led to their neutralisation, symbolisation and stereotyping, thereby weakening the perception of sexual violence as a structural phenomenon grounded in power relations and gender inequalities. It seems that the shift of cultural discourse towards everyday narratives and women's perspectives reveals, over time, sexual violence as a relational experience embedded in familial, professional and institutional dependencies, while at the same time exposing mechanisms of secondary victimisation and institutional constraints. Political discourse, as part of the apparatus and the apparatus of sexuality, problematises the offence of rape through disputes about: modes of evidence establishment, understanding consent, and assessing the credibility of the victim. This process has fostered the perpetuation of the disciplinary model, in which a woman's body and behaviour, rather than sexual autonomy itself, become the focal point, while strongly entangling the aforementioned disputes in ideological conflicts.

(2) How does the legal discourse in Poland problematise the offence of rape, including the 2025 amendment of Article 197 of the Criminal Code, and what consequences does this problematisation have for the understanding of sexual autonomy, consent and evidence criteria within the 'apparatus of sexuality'?

For a long time, the Polish legal doctrine was dominated by a model of the offence of rape based on the indicium of violence understood as the overcoming of the victim's real and active resistance, which in fact shifted the obligation to demonstrate the absence of consent to the victim, and led to the exclusion from protection of cases of passivity, paralysis by fear or actual inability to express objection. The 2025 amendment to Article 197 of the Criminal Code, by introducing the formula "or otherwise despite the absence of their consent", is an attempt to shift the problematisation of the offence of rape towards sexual autonomy, and at the same time to secure the protection in terms of facts that do not fit into the existing understanding of violence. At the same time, however, the legislator has not introduced a model for the offence of rape based solely on the absence of consent, but merely expanded the catalogue of modes of the perpetrator's action by coupling the clause "or otherwise" with the condition "despite the absence of consent". In consequence, consent has

not become an independent indicium of the type of the prohibited act, and the construction based on the indicium of "brings" was preserved.

The effect of this problematisation is to shift the fundamental doctrinal and jurisprudential dispute to the interpretation of the concept of consent and its relation to the evidentiary criteria. Indeed, it remains an open question whether the absence of consent is to be reconstructed based on the mere absence of opposition (the passive perspective), or whether it will require the establishment of the victim's explicit affirmative behaviour (the active perspective). At the same time, the amendment transformed the relationship between Articles 197, 198, and 199 of the Criminal Code by introducing §1a to Article 197, and by modifying the scope of Article 198, which leads to a gradation of the victim's sexual autonomy and reinforces the role of expert opinion and casuistic assessment of facts such as intoxication or other mental capacity impairment. Although a shift towards sexual autonomy and consent is formally evident, the maintenance of the existing normative construction favours the reproduction of earlier disciplinary techniques, where the victim's body, behaviour and reactions remain the key *loci* of truth generation. In effect, the legal discourse continues to produce norms of consent, hierarchies of credibility and models of victim subjectivity, intensifying the process of managing sexuality in a power-knowledge relationship, with no guarantee of full adaptation of the new paradigm for the protection of sexual autonomy.

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DYSKURS KULTUROWY, POLITYCZNY I PRAWNY NA TEMAT PRZEMOCY SEKSUALNEJ WOBEC KOBIET W POLSCE. STUDIUM NA PRZYKŁADZIE PRZESTĘPSTWA ZGWAŁCENIA

Streszczenie

Zakres przedmiotowy analizy podjętej w tekście skupia się na wybranych problemach przemocy seksualnej wobec kobiet w Polsce. Szczególny nacisk położono w niej na prezentację dyskursu na temat przestępstwa zgwałcenia, w ramach którego wyodrębniono trzy perspektywy: kulturową, polityczną i prawną. Przez dyskurs i jego różne formy rozumie się określone praktyki społeczne o charakterze performatywnym, które nie tylko opisują, lecz także wytwarzają znaczenia i je porządkują. Z kolei głównym celem badania jest analiza przemocy seksualnej w Polsce poprzez zestawienie dyskursów: kulturowego, politycznego i prawnego, ze szczególnym uwzględnieniem zmiany zakresu kryminalizacji przestępstwa zgwałcenia w 2025 roku oraz jej znaczenia dla rozumienia autonomii seksualnej, zgody i podmiotowości ofiary w perspektywie postfoucaultowskiego 'urządzenia seksualności' i dogmatycznej wykładni prawa karnego. Ze względu na konieczność uszczegółowienia zakresu przedmiotowego w tekście przedstawiono następujące pytania: (1) *W jaki sposób dyskursy kulturowy i polityczny w Polsce problema-*

tyzują przestępstwo zgwałcenia oraz jakie konsekwencje ma ta problematyzacja dla rozumienia autonomii seksualnej, zgody i wiarygodności doświadczenia ofiary w ramach 'urządzenia seksualności'? (2) *W jaki sposób dyskurs prawny w Polsce problematyzuje przestępstwo zgwałcenia, w tym poprzez nowelizację art. 197 k.k. z 2025 roku, oraz jakie konsekwencje ma ta problematyzacja dla rozumienia autonomii seksualnej, zgody i kryteriów dowodowych w ramach 'urządzenia seksualności'?* Metodyka pracy ma charakter poglądowy i łączy ze sobą dwa podejścia: postfoucaultowską analizę dyskursu, skoncentrowaną na relacjach wiedzy i władzy, oraz analizę instytucjonalno-prawną, opartą na dogmatycznej interpretacji zmian legislacyjnych, z uwzględnieniem praktyk ich stosowania oraz stanowisk doktryny.

Słowa kluczowe: przemoc, przemoc seksualna, autonomia seksualna, zgwałcenie, przestępstwo zgwałcenia

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Remigiusz Rosicki, dr hab., jest profesorem uczelni na Uniwersytecie im. Adama Mickiewicza w Poznaniu. Posiada stopień doktora nauk politycznych oraz stopień doktora nauk prawnych. W celu poszerzenia swoich kompetencji akademickich ukończył również studia podyplomowe, m.in. z zakresu prawa karnego i procedury karnej ze szczególnym uwzględnieniem nowych technologii (Uniwersytet Jagielloński), prawa gospodarczego (Uniwersytet Ekonomiczny w Poznaniu) oraz prawa karnego skarbowego i gospodarczego (Uniwersytet Jagielloński). Jego zainteresowania badawcze obejmują ocenę prawną technologii, politykę i prawo karne, politykę i prawo energetyczne, a także metodologię nauki oraz metodologię badań porównawczych.