

Aneta Michalska-Warias*

Marital Rape in Poland from the Legal and Criminological Perspectives

Marital rape is a phenomenon that has come to the attention of scholars fairly recently. This is connected with the fact that historically no responsibility for raping a spouse was possible and it was only in the second half of the 20th century that this approach started to change, mainly in Europe and North America. It seems quite important to notice that in the case of the United States of America and most West European countries, the transition from the marital rape exemption to the full responsibility for marital rape took place relatively late. In Italy the possibility of convicting the husband for raping his wife was first clearly accepted by the Italian Suprema Corte di Cassazione in 1976, in France the first court decision accepting such a possibility was issued in 1984, though it was referring to spouses who were separated, and the first court verdict accepting the criminal responsibility for raping the spouse without the necessity of providing additional conditions of the case was issued in 1990. In Spain, a definite change of law interpretation took place in 1989 and in Germany as late as in 1997, as it was necessary to change the definition of rape by eliminating the adjective “extramarital” from §177 of the German Criminal Code. In the common-law countries, such as England and the United States of America, the resignation from the marital rape exemption formulated by Sir Mathew Hale in the 18th century was not easy and required the change of law interpretation and in some cases also the modifications of existing law provisions. The possibility of condemning a husband for raping his wife was fully accepted in England in 1992 after a House of Lords decision known as *R. v R.* and in the United States of America individual states started abandoning the marital rape exemption in 1970s and the last state to do it was North Carolina in 1993¹.

It should be stressed that in the Western societies the transition from the marital rape exemption to the full criminal responsibility for such acts was often not easy and provoked vivid discussions. In Germany, which was one of the last countries to change its approach to marital rape in Europe, there were many arguments used by both opponents and proponents of law changes in that respect and those who were against introducing the possibility of punishment for marital rape claimed e.g.

* Dr hab. Anna Warias-Michalska Department of Criminal Law and Criminology Faculty of Law and Administration Maria Curie-Skłodowska University in Lublin.

¹ For more details about West European and American law, see: A. Michalska-Warias, *Zgwałcenie w małżeństwie. Studium prawnokarne i kryminologiczne*, Warsaw 2016, pp. 50–84, 99–119.

that it could lead to false accusations of rape and be against the stability of families². The feminist movement from the very beginning of its existence was also an important factor in bringing the problem of marital rape to public attention. The problem of the wife's subordination to her husband and the lack of legal means of protecting her rights and freedoms also in the sphere of sexual life were noticed quite early by people fighting for women's rights in the 19th century³ and their voice became even stronger in the second half of the 20th century when e.g. the research of marital rape by D. E. H. Russel brought the problem of husband's immunity for marital rape to public attention, demonstrating at the same time that this was a real social phenomenon of considerable harmfulness for its victims and for the society as such⁴.

In Poland, the story of the criminalization of marital rape was definitely much more peaceful. When the Criminal Code of 1932 came into force, it was obvious for its authors that a husband could not be prosecuted for raping his own wife. Such an interpretation was in accordance with the traditional approach to the matter in all European countries at that time. It should yet be stressed that the grounds for excluding the victim's husband from the possible perpetrators of rape was based on the title of the chapter of the Criminal Code in which that offence was defined – since chapter XXXII of that code contained offences against morality, its commentators could argue that the sexual relations of spouses could never be considered as opposing the binding morality as they were the only accepted way of having sexual relations at the time when the legal provisions of the code were created⁵. After the second world war there appeared the first voices about the possibility of introducing some exceptions to the principle that a husband cannot rape his wife, yet the very principle was not really questioned at the time⁶. A definite change came with the Criminal Code of 1969 which basically repeated the definition of rape from the Criminal Code of 1932, yet the offence was placed in a chapter devoted to offences against freedom (this approach was typical for the socialist states at that time and it was derived from the

² About the arguments used during the discussions in Germany, see: D. Helmken *Vergewaltigung in der Ehe. Plädoyer für einen strafrechtlichen Schutz der Ehefrau*, Heidelberg 1979, pp. 37–64; B. Pactow, *Vergewaltigung in der Ehe. Eine strafrechtsvergleichende Untersuchung unter besonderer Berücksichtigung des Rechts der Vereinigten Staaten von Amerika*, Freiburg i Br. 1987, pp. 131–179.

³ See: J. E. Hasday, *Contest and Consent: A Legal History of Marital Rape*, California Law Review, Vol. 88, No. 5 (Oct., 2000), pp. 1373–1505. One may also mention the work “Subjection of Women” written by J. S. Mill together with his wife and published in 1869 in which the authors criticised the lack of a married woman's right to make decisions about her sexual life and found her situation worse than that of a slave. As it was pointed out in that book: “Above all, a female slave has (in Christian countries) an admitted right, and is considered under a moral obligation, to refuse to her master the last familiarity. Not so the wife: however brutal a tyrant she may unfortunately be chained to—though she may know that he hates her, though it may be his daily pleasure to torture her, and though she may feel it impossible not to loathe him—he can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations.” (J. S. Mill, *The Subjection of Women*, A Penn State Electronic Classics Series Publication: www2.hn.psu.edu/faculty/jmanis/jsmill/sub_wom.pdf, access date: 20.07.2016).

⁴ See the book by D. E. H. Russel, *Rape in Marriage*, New York 1982.

⁵ As it was stressed by J. Makarewicz, an indecent act should be understood as “any action whose aim was to satisfy the sexual needs in a way different from the way indicated by the society properly organised as far as the purity of custom is concerned, i.e. the matrimonial intercourse (matrimonium est remedium concupiscentiae)” – J. Makarewicz, *Kodeks karny z komentarzem*, Lviv 1938, p. 443.

⁶ Such exceptions to the general principle were to refer to enforcing sexual activity from a separated spouse or forcing a spouse to forms of sexual contact that were generally considered unacceptable (see: H. Rajzman, *Nierząd między małżonkami*, Państwo i Prawo 1948, no. 1, pp. 94–95 and M. Siewierski, *Kodeks karny i prawo o wykroczeniach. Komentarz*, Warsaw 1965, p. 244).

soviet criminal law⁷). The change of the protected value changed the interpretation of the statutory features of rape as it became obvious that also married women retained their sexual freedom, therefore they could be the victims of rape committed by their own husbands. This new interpretation was accepted without any opposition and since January 1, 1970 the sexual freedom of married women has been protected in the same way as the sexual freedom of anybody else⁸. This approach to rape has been retained by the now binding Criminal Code of 1997, though the law-maker has introduced some significant changes in the legal description of the offence of rape and placed it in a chapter devoted expressly to the protection of sexual freedom and morality.

According to the binding Criminal Code, the offence of rape in its basic form is committed when the offender uses force, illegal threat or deceit and thus makes the victim have intercourse (Article 197 §1) or other sexual activities (Article 197 §2). As it was mentioned above, the values protected by the offences grouped in chapter XXV of the Polish Criminal Code are sexual freedom and morality. As the words used to describe rape do not exclude anybody from the possible range of victims or offenders of this offence, therefore, there can be no doubts that also spouses can commit that offence or be its victims. And formally, both women and men can take on these “roles”, though in practice, as it will be discussed later, only women are victims of marital rape and men appear in such cases as the only perpetrators accused of (and then convicted for) that crime. This approach of the Polish law-maker, to treat marital rape as any type of rape seems to be proper, yet it has also resulted in the general lack of interest of criminal law scholars in this type of rape, as it was considered to be unproblematic from the doctrinal point of view.

It seems, however, that some specific interpretation problems may appear in marital rape cases and they certainly deserve some attention. All of these problems stem from the fact that the victim and the offender are a family, two close persons sharing an intimate life. One should remember that according to the regulations of the Polish Family Law Code, a wife and a husband are obliged to start and maintain sexual relations, which are considered to be a crucial component of marriage as such. The lack of such relations constitutes a justified reason for seeking divorce, though it is also stressed by scholars that the refusal to fulfill sexual marital obligations, no matter what its reason is, can never justify enforcing the execution of that duty by the other spouse⁹. This must lead to the conclusion that the obligation

⁷ See: M. Filar, *Przestępstwa w dziedzinie stosunków seksualnych* [in:] Andrejew I., Kubicki L., Waszczyński J. (eds.), *System prawa karnego. O przestępstwach w szczególności, Tom IV, część 2*, Wrocław – Warszawa – Kraków – Gdańsk – Łódź 1989, p. 159.

⁸ Almost all commentators and authors underline the fact that also the victim's spouse can be the perpetrator of rape (see e.g. M. Filar, *Przestępstwo zgwałcenia w polskim prawie karnym*, Warsaw – Poznań 1974, pp. 63–64, M. Siewierski [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny, Komentarz, t. II, Część szczególna*, Warsaw 1987, p. 137–138, I. Andrejew, W. Świda, W. Wolter, *Kodeks karny z komentarzem*, Warsaw 1973, p. 493–494 and – under the binding Criminal Code – M. Mozgawa [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warsaw 2015, p. 539, M. Rodzynkiewicz [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz*, Tom II, Kraków 2006, p. 598–599, M. Bielski [w:] A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz*, Tom II, Warsaw 2008, p. 599, J. Warylewski [in:] A. Wąsek, R. Zawłocki (eds.), *Kodeks karny, Część szczególna. Komentarz*, Tom I, Warsaw 2010, p. 961, M. Budyń-Kulik, M. Kulik [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część szczególna, Tom I. Komentarz*, Warsaw 2013, p. 604, M. Filar [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warsaw 2010, p. 942.

⁹ See e.g.: M. Andrzejewski, *Prawo rodzinne i opiekuńcze*, Warsaw 2011, p. 61, R. Krajewski, *Prawa i obowiązki seksualne małżonków. Studium prawne nad normą i patologią zachowań*, Warsaw 2009, p. 168, J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warsaw 2012, p. 137.

to enter into and maintain sexual relations with the other spouse is in fact a moral one, or a good example of the so called *lege imperfectae*, that is rights that can never be enforced when the obliged party refuses to fulfill his/her obligations¹⁰. And this in turn leads to the conclusion that a married person does not formally lose his/her sexual liberty, i.e. such a person takes on voluntarily some obligations relating to the restriction of his/her sexual sphere (like having sexual relations exclusively with the other spouse), yet the fulfillment of these obligations depends solely on that person's free will, if he/she decides otherwise, the only legal consequence can be the appearance of justified grounds for divorce seeking by the other spouse but there is no legal possibility to force the disloyal spouse to behave according to the marriage contract vows. This seems to be very important from the point of view of analyzing the statutory features of rape – the fact that a married person in fact retains full sexual freedom means that there can be no doubts about the protection of that freedom by Article 197 of the Criminal Code.

Still, the existence of a close and permanent intimate relationship between spouses means that the application of Article 197 of the Criminal Code to some situations may be problematic. The difficulties, as should be stressed, are in fact similar in the case of cohabiting couples as their situation – from the criminal law point of view – is analogous to that of married couples, without only the formal bond of marriage binding the parties. One of such problems typical for marital rape (and the rape of a cohabiting person) is the existence of the presumption that both parties agree to have regular sexual contacts. The *debitum carnale* connected closely with the very institution of marriage does not mean that each of the spouses agrees that in the future he/she will have any sexual contacts the other partner may demand, at any time and in any circumstances¹¹, yet it undoubtedly means that each of the spouses may generally assume that the other spouse is willing to enter into sexual contacts with him/her. This makes marital rape significantly different from the so called “stranger rape” in whose case one may often assume the lack of consent on the victim's part. And this in turn means that the *mens rea* of the offender in marital rape cases should be examined with exceptional discernment as he/she cannot be expected to assume the lack of consent of his/her spouse.

The above discussed issue is connected with yet another problem – the required degree of resistance on the victim's part. If a given marriage functioned more or less properly, no violence was being used by the husband (so the wife did not have any bad experience which would make her fear the husband) and then the husband initiated sexual activities to which the wife reacted with verbal protests but the

¹⁰ See: M. Andrzejewski, *Prawo rodzinne...*, p. 61. Also on the grounds of the Canon Code, there exists the obligation to start sexual relations with a spouse, and the entering into such relations after marriage is a condition of that marriage's full legal validity – marriages according to the Canon Code can be divided into “contracted and not fulfilled” (*matrimonium ratum*) and “contracted and fulfilled” (*matrimonium ratum et consummatum*). Only the first one can be dissolved, since according to canon 1142, a non-consummated marriage between baptized persons or between a baptized party and an unbaptized party can be dissolved by the Roman Pontiff for a just reason, at the request of both parties or of either party, even if the other is unwilling. The marriage which is both ratified and consummated cannot be dissolved by any human power or by any cause other than death (canon 1141). See: W. Góralski, *Małżeństwo kanoniczne*, Warsaw 2011, p. 49–50.

¹¹ See: J. Warylewski [in:] A. Wąsek, R. Zawłocki (eds.), *Kodeks karny. Komentarz*, vol. I., Warsaw 2010, p. 960.

husband ignored it and continued what he was doing, the wife just tolerating it then – no rape was committed according to the binding law since the husband did not have to use any of the forbidden means crucial for the fulfillment of the statutory features of rape (no physical force and no illegal threat were needed to achieve his aim). And the wife's weak verbal resistance could easily be treated as not real if she did nothing more to stop her husband.

The assessment of a similar situation in the case of a relationship characterized by continuous use of violence could, of course, be different since it might be possible to prove that the wife was so intimidated by her husband that she did not dare oppose him in a stronger way, knowing that this could only lead to the use of violence against her. Then charging the husband with the use of implied illegal threat seems to be a possible solution and this would suffice for the fulfillment of all the required statutory features of rape (of course, if the offender's *mens rea* could also be proved, but in the described circumstances, especially if the violence is used on a daily basis to subdue the wife in everything, proving this element should be possible).

The wife in the example presented above did dare to protest verbally, and this manifestation of resistance could "save" the possibility of proving the fulfillment of *actus reus* and *mens rea* requirements of rape. Still, the greatest problems with stating the fulfillment of the statutory features of rape could arise in the case of a relationship that is extremely pathological and the woman is so frightened of her violent partner that she does whatever he demands and does not even protest verbally. In such a situational context, it could be, paradoxically, more difficult to prove that implied threat was being expressed (though it may be possible) and as a result, if the offender uses none of the means described in Article 197 §1 of the Criminal Code, then formally no rape is committed. One of the possibilities to be checked in such circumstances is whether the sexual subjection of the wife (or cohabiting person) was not a part of her general maltreatment and then this component should also influence the severity of the punishment for that offence (it has been observed that in practice, when the courts decide that not all statutory features of rape have been fulfilled in a case also comprising the maltreatment of the woman, they omit the information about her sexual subjection and do not try to look at it as part of the general violence process, a part of the maltreatment the offender is found guilty of)¹².

Generally, it seems that one of the specific problems of marital rape is the issue of the required use of force and the required strength of resistance, which are often not very intense between spouses. In the context of a married couple not characterized by violence, the mere verbal protest of the wife and her subsequent toleration of her husband's activity undertaken in spite of that protest do not seem to be enough for the fulfillment of the statutory features of rape – it should be however remembered that the husband could be charged with violating the bodily integrity of the wife by touching her without her consent (of course, this offence can be prosecuted only on private indictment and there always may appear doubts

¹² For more, see: A. Michalska-Warias, *Zgwałcenie w małżeństwie – wybrane problemy* [in:] L. Mazowiecka (ed.), *Zgwałcenie. Definicja, reakcja, wsparcie dla ofiar*, Warsaw 2012, pp. 34–36.

about the seriousness of the protest or the belief about its seriousness on the part of the offender if the victim did not try to present more resistance).

If one analyses illegal threat as the means of achieving enforced sexual obedience, some problems also may appear, though they seem to be specific for all types of rape. The main problem connected with this type of rape refers to the fact that the existence of the legal definition of illegal threat means that any other type of threat, however strongly it may influence the victim, does not meet the statutory requirements. This is visible in the example of an offender who tells the victim that, unless she agrees to have sex with him, he will harm another person who – in the light of the legal definition of Article 115 §11 of the Criminal Code – is not closely related to the victim (an illegal threat has to refer to the victim him/herself or to a person closely related to the victim). One could imagine a situation in which a husband threatens to harm the niece of his wife if she does not consent to his sexual demands (a niece or a nephew, no matter how strong the emotional ties, are not closely related persons according to the legal definition of such a person¹³). Similarly, if a husband breaks his wife's will by threatening to tell her parents some shameful piece of information about her, no illegal threat and therefore no rape take place (again, the statutory definition of illegal threat considers it to be committed when the offender threatens to spread shameful information about the victim and this is understood as making the information known to a greater number of persons).

Some of the most interesting problems, though only theoretical (no such cases seem to appear in practice) are connected with deceit as the means of committing marital rape. This type of rape is special because the victim is mistaken as a result of the deceit employed by the offender and at the time of the sexual contact the victim is not aware of the harm done to him/her. J. Warylewski expressed the opinion that rape by deceit between spouses is doubtful¹⁴, yet this view can be questioned on the basis of the definition of rape itself expressed in Article 197 §1 of the Criminal Code. That provision mentions three different ways in which the offence of rape can be committed and in all three cases (i.e. the use of physical force, illegal threat and deceit) there are no statutory restrictions about the possible range of victims or offenders. Therefore, marital rape by deceit is absolutely possible in the light of the binding criminal law since there are no reasons justifying the use of such a *modus operandi* by one spouse against another. The problem seems to lie elsewhere, however, i.e. in the social harmfulness of some of the possible acts of such a nature. If spouses have a consensual sexual life and one of them deceitfully administers some drug to the other and then has sex with him/her (and the sexual act is of the type generally accepted in that relationship) then certainly, one might question the presence of the required level of social harmfulness of such an act and the need to punish the spouse from the example, even if his behavior is morally not correct. On the other hand, one might imagine the use of deceit, mainly in the form of drug administration, in order to force the spouse into sexual contacts he/she refused to consent to before. In such a case, the sexual freedom of the victim was definitely infringed and the act requires proper punishment.

¹³ For more on the definition of illegal threat and closely related persons, see e.g.: K. Nazar-Gutowska, *Grożba bezprawną w polskim prawie karnym*, Warsaw 2012, p. 61–93.

¹⁴ See: J. Warylewski [in:] A. Wąsek, R. Zawłocki (eds.), *Kodeks karny...*, p. 961.

The offence of rape is committed when the alternative means described above are used to make the victim have sexual intercourse or engage in or tolerate another sexual activity. These terms in the case of marital rape do not seem to present any special interpretation problems. One should only note that in the case of “another sexual activity”, which refers to less serious but still quite grave attacks on the sexual freedom of the victim, the victim’s perception of the offender’s behavior may play a very special part in its assessment. This is connected with the fact that the *debitum carnale* characteristic for a marriage means that acts which between strangers would undoubtedly mean the violation of sexual freedom, may not be treated as such between spouses¹⁵.

There are now four aggravated types of rape in Polish criminal law. A more severe punishment is connected with rape committed with another person, rape of a minor under 15, rape of a close relative (the so called incestuous rape) and rape with extreme cruelty. In the case of marital rape only the first and the last aggravated type seem possible in practice. In such cases the fact that the offender is the spouse of the victim should, in most cases, be connected with a higher degree of social harmfulness since the offence is committed in an aggravated way by a person who should especially protect the victim. Therefore, a husband who rapes his wife together with another person/persons or who rapes her in an extremely cruel way should as a rule expect an even higher punishment than an offender not related to the victim committing a similar act. The same refers to cases in which one of the spouses would act as the instigator or abettor of rape. There again, the offender should be punished with all the severity since his behavior is especially blameworthy.

As far as the punishment for rape is considered, the principles of its imposition are identical for all types of rape and there are no special regulations referring to marital rape, as is the case e.g. in French or Italian law, yet, the fact that the offender is the victim’s spouse may (and often should) in practice influence the court’s sentence. Looking from the point of view of the punishment imposition directives, it becomes obvious that the existence of the marital bond between the offender and the victim should be an important factor influencing the court’s decision about the severity or leniency of the punishment. And this bond, depending on the circumstances of individual cases, can work both ways. It seems that in some cases of marital rape the very fact that the perpetrator is the victim’s spouse could act in his/her favor – this may be so in those cases in which the couple did remain together after the rape, the rape itself was not characterized by an excessive use of violence and did not cause any obvious injuries (neither physical nor mental) and therefore the court might come to the conclusion that the violation of the victim’s sexual freedom was not so serious as to e.g. require the imposition of the most severe punishment of imprisonment for no less than two years. Especially the fact that the couple stays together after the rape and the wife has forgiven the husband and they intend to continue their family life may signify that the rape was not excessively traumatic for the victim and therefore the social harmfulness of it was also lowered (the very fact that the offender has come to an agreement with the victim is one of the reasons to apply the extraordinary mitigation of

¹⁵ See: A. Michalska-Warias, *Zgwałcenie w małżeństwie. Studium...*, pp. 190–191.

punishment). A similar approach could be the right one in some cases of marital rape by deceit, when the sexual act happened without the victim's consent, yet it did not go beyond the regular sexual activities of the couple.

On the other hand, as it has been mentioned before, if the rape between spouses features some aggravating elements, the fact that it was committed by a person who is morally obliged to protect the victim, should be treated as a factor speaking in favor of the imposition of a more severe punishment.

If one analyses the punishment options for rape, it should be stressed that the changes introduced to the Criminal Code in 2015 have had significant influence on the possibilities of imposing punishment for this type of offence. The law-maker decided to substantially reduce the possibility of imposing the punishment of imprisonment with the conditional suspension of its execution. Earlier this solution could be used when the imposed imprisonment did not exceed two years, now it is possible if it does not exceed one year. The practice of the courts before the changes was such that the option of conditional suspension of imprisonment for rape was used fairly often (e.g. in 2009 such punishments were characteristic for 32.7% of all the punishments for rape in its basic form from Article 197 §1 of the Criminal Code)¹⁶. For marital rape, as will be further discussed in the empirical part of the paper, the percentage was even higher – in almost half of the sentences the courts imposed the minimal imprisonment of two years and conditionally suspended its execution.

As this option is no longer possible, one may assume that – in accordance with the law-maker's intention – the punishment for rape in those cases that previously would have qualified for the conditional suspension of imprisonment will now be shaped by the solution introduced by Article 37b of the Criminal Code, i.e. the so called mixed punishment. According to this provision, in the case of all misdemeanors the court may impose on the offender the combination of a short-time imprisonment and the punishment of restriction of liberty (the core of which is the obligation to perform some work for social needs). In the case of the rape described by Article 197 §1 of the Criminal Code the imposed imprisonment cannot exceed 6 months and the punishment of restriction of liberty that follows can last from 1 month to 2 years. If one looks at this solution from the point of view of those marital rape cases in which the couple stays together after the rape or in which the couple separates after reaching an agreement about the maintenance the offender is to pay for his children, this new solution may turn out to be less satisfactory for the victim than the conditional suspension of imprisonment. The fact that the offender has to spend some (even short) time in prison may have negative consequences for his family and may reduce his abilities to fulfill his obligations towards the children (if he spends 6 months in prison it will mean the loss of employment in most cases and no income to pay maintenance)¹⁷. The only

¹⁶ The data comes from official Ministry of Justice statistics from the site: <http://isws.ms.gov.pl/baza-statystyczna/opracowania-wieloletnie>; access date: 29.08.2016.

¹⁷ It is to be seen whether the mixed punishment will work properly in practice. Certainly the idea of a "shock therapy" based on a short time actually spent in prison and then controlling the process of the offender's rehabilitation during the execution of the punishment of restriction of liberty is an interesting one (about the new punishment, see e.g.: A. Grześkowiak (w.): A. Grześkowiak, K. Wiak (eds.), *Kodeks karny. Komentarz*, Warsaw 2015, pp. 326–332, M. Królikowski, R. Zawłocki, *Prawo karne*, Warsaw 2015, pp. 345–346,

way the offender could now avoid going to prison for marital rape is the use of the institution of extraordinary mitigation of punishment described in Article 60 of the Criminal Code. And among the grounds for the application of this solution expressly mentioned in Article 60 §2 is the fact that the offender and the victim have reached an agreement about how the victim can be compensated or the victim has pardoned the offender. It is to be seen how courts will deal with such cases and how often they will seek alternatives to the mixed punishment in those cases in which the regular imprisonment for marital rape will seem – because of the circumstance of a given case – definitely too severe.

As far as the practice of prosecution bodies and courts in marital rape cases is concerned, it has become the object of scientific interest fairly recently. One paper presenting mainly the statistical picture of marital rape was published in 2012 by P. Kozłowska-Kalisz and M. Mozgawa. It covered data referring to cases registered in the prosecutor's offices all around Poland in 2007 and 2008¹⁸. This research was continued and extensively broadened in a book by the author of this paper published in 2016, the aim of which was to present a complex analysis of the marital rape phenomenon¹⁹. The main findings of the empirical research from the book shall be presented below.

The research covered all marital and life-partner rape cases registered in the prosecutor's office in Poland between 2006 and 2009²⁰. At the time the research was conducted all these cases had terminated and it was possible to obtain information about the sentence (if the case was directed to court). The analyzed material comprised 670 cases, yet, as should be stressed, most of them were never sent to court and the most popular procedural decision was the one to discontinue criminal proceedings. In the analyzed period the decision not to even initiate criminal proceedings when the information about an incident that could be treated as a marital or life-partner rape reached the police or prosecutor was taken in 138 cases, the decision to discontinue the criminal proceedings referred to 351 cases and in 4 cases the criminal proceedings were suspended due to the suspect's mental or serious physical illness. Only 177 cases were directed to courts with acts of indictment. What is also quite interesting, 141 offenders were convicted for marital or life-partner rape while in the remaining 33 cases the accused were either declared innocent of rape or convicted for other offences or the court proceedings ended otherwise without conviction for rape (e.g. the decision to discontinue court proceedings was taken and no verdict was issued).

The analysis of the prosecutor's and court files makes it possible to observe some characteristic features of the cases referring to the rape of a spouse or cohabiting person. As could easily be expected, in practice men are the only offenders accused of this offence and women are the only victims. There were though three cases in

M. Małecki [w:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz*, Kraków 2015, p. 294–305.

¹⁸ See: P. Kozłowska-Kalisz, M. Mozgawa, *Zgwałcenie w małżeństwie (w świetle badań empirycznych)* [in:] M. Mozgawa (red.), *Przestępstwo zgwałcenia*, Warsaw 2012, p. 217–237.

¹⁹ See: A. Michalska-Warias, *Zgwałcenie w małżeństwie. Studium prawnokarne i kryminologiczne*, Warsaw 2016.

²⁰ It is worth noting a visible downward trend in the number of rapes in general officially reported to the Police in the last decade (see: A. Siemaszko, B. Gruszczyńska, M. Marczewski, *Atlas przestępczości w Polsce 5*, Warsaw 2015, p. 25–26), so it seems worth mentioning that during the analyzed part of the same period the number of reported marital rapes was growing.

which men reported being marital rape victims but on closer examination their claims turned out to be groundless²¹.

As far as the reasons for refusing to initiate criminal proceedings are concerned, the most important basis for such a decision was the lack of the victim's motion to prosecute the offender (at the time covered by the research rape was prosecuted on the victim's motion) – 71 cases. In some of these cases the offence was reported by the intoxicated victim or by somebody from the victim's family or neighborhood and the victim was later not interested in prosecuting the offender. In some cases, the victim reported the rape in order to "warn" the offender by having a formal testimony taken by the police but then the victim would refuse to file the motion, thus making criminal proceedings impossible. In some cases, information about the rape appeared during proceedings referring to the maltreatment of the victim and when that material had been separated to investigate the rape story, the victim decided that she did not want to have the rape case examined by the criminal court so she refused to file the required motion.

The second most popular basis for the decision to refuse to initiate criminal proceedings was the lack of data sufficiently justifying the suspicion that the offence was committed – there were 48 cases in which this reason was indicated. This basis of the procedural decision was most often used in those cases in which the victim, as a person closely related to the offender, refused to testify at some point of the proceedings or the information about the alleged rape came from a different source and was not confirmed by the victim or when the rape reported by the victim was to take place in the past and there was no evidence to support her claims, or when the couple was in a deep conflict and both parties told different stories and accused each other of different crimes and no additional evidence was to be found.

The indicated bases for the discontinuance of criminal proceedings were mainly the same as the ones for the refusal to initiate criminal proceedings, yet their proportions were different. The lack of data sufficiently justifying the suspicion that an offence was committed was indicated in over 60% of these cases and the lack of the victim's motion to prosecute the offender – in 15% of cases. Almost 25% of the decisions to discontinue criminal proceedings were based on different grounds, such as: no offence was committed, the act did not fulfill the statutory features of an offence, the accused died during the proceedings, etc.).

If one looks closer at the group of cases which were terminated without directing them to court, it turns out that many of them share some characteristic features. Similarly to the group of cases in which prosecuting organs refused even to initiate criminal proceedings, also in the discussed group the victim would quite often, after reporting the rape, refuse to testify which practically automatically resulted in the decision to discontinue criminal proceedings. Such a decision was taken by the total of 112 victims or almost 32% of all cases in the discussed group. Of course, these cases were varied – from situations when a third person (e.g. the woman's mother)

²¹ Two cases referred to the same male victim who "felt raped" when his wife first had consensual sex with him and then told him she would seek divorce – the man reported two such incidents and twice the prosecution bodies refused to initiate criminal proceedings. In the third male-victim case proceedings were started but then discontinued. The victim claimed that his wife had forced him to have sex by pushing away his hands covering his genitalia. The prosecutor decided that the victim could have resisted if he really had wanted to, therefore the statutory features of rape were not fulfilled.

had informed the police about marital or life-partner rape and the victim, when asked to testify, would say that she did not wish to do it and did not even know why the third person had come to the police with such a story, to situations when the victim would report a veritable sounding story of many years of sexual and physical abuse but then decide she could not handle further proceedings and refuse to testify in the future.

There were also cases in which a very strong conflict between the spouses or co-habitants became obvious and therefore the testimony of the victim could not be fully trusted. This would sometimes be stated by an expert in psychology present during the victim's hearing and in some cases the procedural bodies, when the conflict in the background was discovered (often referring to child custody) and when no additional evidence was available, decided the testimony of the victim could not be verified and therefore the offender's guilt could not be proven beyond reasonable doubt.

In the discussed group of cases there were also some in which evidently false testimony was presented. For example, one of the victims confessed during one of her hearings that her mother had persuaded her to blame her husband in order to obtain a better position during the divorce proceedings. In a few cases a consensual sexual act was photographed or filmed and the women were afraid of its publication, therefore they accused their partners of rape to get the material taken over by the police (in one of such cases the prosecutor stated that the photos evidently were showing a consensual sexual act). And there were also a few cases of open false accusation in order to get revenge on an ex-partner. A "record" was set by one woman who – in the analyzed period – caused the initiation of three different criminal proceedings against her ex-husband and who would go as far as to hurt herself in order to make her claims more credible (it was unfortunately impossible to find out from the analyzed files whether the woman herself was accused of falsely accusing an innocent person).

The cases which allowed the public prosecutor to prepare an act of indictment for the criminal court are of the greatest interest here, and especially those cases which ended with a valid conviction for a marital or life-partner rape. The first thing to be observed is the relatively high percentage of cases in which the defendant was declared innocent of rape. There were 19 such cases out of 177 cases sent to courts, therefore such a decision was made in the case of 1 out of 10 defendants accused of marital rape. If one looks at the court statistics covering roughly the same period, one may see that about 6% of all persons accused of rape were then declared innocent²². The higher rate of acquittals in marital rape cases could mean that they are often connected with greater doubts which leads to such an outcome of the criminal court proceedings. On the basis of the data obtained from file analysis and from general statistics it can be also estimated that marital or life-partner convictions represent about 7% of the convictions for the type of rape described in Article 197 §1 of the Criminal Code and only about 2% of the convictions for the rape described in Article 197 §2 of the Criminal Code.

²² It is not possible to precisely compare the data obtained from the file analysis and the available data from the Ministry of Justice statistics since the files were chosen for analysis on the basis of the year in which the case was started and the court statistics show the verdicts for each year. The 6% rate of acquittals was taken from the year 2010 as many of the analyzed cases were terminated that year, so this seemed a good point of general reference (the data from the Ministry of Justice was taken from the address: <http://isws.ms.gov.pl/baza-statystyczna/opracowania-wieloletnie>; access date: 29.08.2016.)

The exact relationship between the victim and the offender at the time when the rape was committed in all the analyzed cases is presented in table 1.

| Offender: | husband | ex-husband | cohabitant | ex-cohabitant | wife |
|--|----------------|-------------------|-------------------|----------------------|-------------|
| refusal to initiate criminal proceedings | 94 | 10 | 30 | 2 | 2 |
| discontinuance of criminal proceedings | 235 | 34 | 69 | 12 | 1 |
| act of indictment directed to court | 131 | 12 | 30 | 4 | 0 |
| conviction for rape | 102 | 12 | 24 | 3 | 0 |

As could be expected, husbands are in the greatest number among the offenders convicted for marital or life-partner rape. Over 72% of the offenders convicted of rape were the husbands (married with the victim at the time of the rape) and 17% of the offenders were the cohabitants of the victim at the time of the offence. Yet, one should set these proportions against the statistical data coming from the last national census conducted in Poland in 2011²³. Then, it turns out that at that time married couples were 96% and cohabiting couples – 4% of all couples living together. This proportion shows that in fact partner rapes happen relatively more often in cohabiting relationships than in marriages.

The conducted file analysis also showed that the person who reports marital or life-partner rape is most often the victim herself (over 95% of cases) and the most common place of the offence is the offender and victim's home – over 86% of cases, though some less typical places also appeared, like the offender's car, a cellar or a field.

The analysis of the time that passed between the rape and reporting it showed that most rapes were reported on the same day or the day after their commission. Yet, it needs to be stressed that, contrary to what might be expected, no strict correlation was found between the time of the offence reporting and the final outcome of a given case. For rapes reported on the same day 37% of cases ended in directing an act of indictment to the court, while 40% of cases reported 3- 5 years after the commission of the rape were also directed to courts, therefore it could not be justly assumed that the longer the time span between the offence and its reporting, the lesser the chances of sending the case to trial are²⁴.

The analysis of the means of committing rapes also gave some interesting results. According to Article 197 §1 of the Criminal Code, the offender can use physical force, illegal threat or deceit to achieve his/her aim. In practice, as probably could be expected, the use of physical force was dominant (almost 71% of offenders convicted of marital or life-partner rape used only force)²⁵. The combination of both physical force and illegal threat was also quite popular (almost 28% of all

²³ *Gospodarstwa domowe i rodziny. Charakterystyka demograficzna*. Narodowy spis powszechny ludności i mieszkań 2011, Warsaw 2014, p. 45.

²⁴ For further information, see: A. Michalska-Warias, *Zgwałcenie w małżeństwie. Studium...*, pp. 389–394

²⁵ This is different than in a research conducted by K. Tellis, who states that in the case of most of the partner rapes she was studying, the offender was using threats to subdue the victim (see: K. Tellis, *Rape As a Part of Domestic Violence: A Qualitative Analysis of Case Narratives and Official Reports*, El Paso, TX, 2010, p. 70).

convicted offenders), while the use of illegal threat not accompanied by force was very rare (about 1.5% of convicted offenders). What seems quite interesting, no offender in the analyzed material was accused of committing marital or life-partner rape by deceit.

As far as the type of enforced sexual activity is considered, the most common type of rape referred to vaginal intercourse only (72.3% of cases). In 18.4% of cases the offender forced the victim to have not only vaginal but also another type of sexual contact with him (oral, anal or other sexual activities). It was rare for the offenders to enforce only oral or anal intercourse (6 convicted offenders in that group – 4.3%) or to enforce only some other sexual activity (9 convicted offenders – 6.7%).²⁶

One of the typical features of marital rape, as has also been shown by the so far conducted empirical research of the phenomenon, is the fact that the attacks on the victim's sexual freedom are often repeated²⁷. This was also true for many of the analyzed cases. 60 offenders were convicted for only one attack on the sexual freedom of their partner (42.5%), while 81 offenders (57.5%) were convicted for multiple (from "two" to "many") attacks on their wife's or life-partner's sexual freedom.

As could be expected²⁸, there is a clear correlation between marital rape and the presence of violence in the relationship. In the analyzed material as many as 109 offenders (77.3%) were found guilty of both rape and maltreatment of their wives of life-partners²⁹.

Similarly, the correlation between the occurrence of marital or life-partner rape and the abuse of alcohol by the offender can be observed. In the analyzed material 84.4% of the offenders convicted for marital or life-partner rape were under the influence of alcohol (or some drug, though these cases were very rare) during the commission of the offence. Besides, many of the offenders were diagnosed as serious alcohol addicts suffering from many side-effects of alcohol abuse. It could also be observed that in those cases in which only the victim was under the influence of alcohol during the alleged rape, no act of indictment was prepared by prosecuting bodies and a similar practice could be observed in those cases in which both partners were not sober during the alleged rape (only 4 acts of indictment and 2 convictions, while there were altogether 59 such cases reported)³⁰.

The conducted analysis also made it possible to observe some interesting patterns in the legal qualification of the various marital and life-partner rape cases. The most common basis of conviction was Article 197 §1 of the Criminal Code. Most of the rapes assigned to the convicted offenders were completed and only 11 persons were convicted for attempted rapes. Only 9 offenders were found guilty

²⁶ For more detailed information on this issue, see: A. Michalska-Warias, *Zgwałcenie w małżeństwie. Studium...*, pp. 394–422.

²⁷ See, e.g.: D.E.H. Russell, *Rape in Marriage*, New York 1982, p. 359, K. Painter, *Wife Rape in the United Kingdom*, Paper presented at the American Society of Criminology 50th Anniversary Meeting, November 20th–23rd 1991, San Francisco (www.crim.cam.ac.uk/people/visitors/kate_painter/wiferape.pdf; access date: 29.08.2016).

²⁸ The correlation between marital rape and the presence of violence in a relationship was demonstrated among others in the following publications: D. E. H. Russell, *Rape...*, pp. 90–91, I. H. Frieze, *Investigating the Causes and Consequences of Marital Rape*, *Signs*, vol. 8, no. 3, Women and Violence 1983, s. 532–553, K. Tellis, *Rape...*, pp. 119–139.

²⁹ For more information, see: A. Michalska-Warias, *Zgwałcenie...*, s. 454–455.

³⁰ See: *ibidem*, pp. 425–427.

of the rape described in Article 197 §2 of the Criminal Code, i.e. of enforcing other (than intercourse) sexual activities. There were yet some other cases in which the offenders were found guilty of both a completed rape and an attempted one or of both forcing the victim to have intercourse and of forcing her to perform or endure another sexual activity.

One of the most interesting things from the practical point of view is the proper legal qualification of multiple rapes. There are theoretically three possible solutions in such cases: 1) treating each rape as a separate offence, punishing the offender for each of them and then imposing the joint punishment according to Article 85 et seq. of the Criminal Code; 2) treating each rape as a separate offence being part of the so called “chain of offences” in the meaning of Article 91 of the Criminal Code (when the offender committed them using the same opportunity and in time proximity), then one punishment for all the offences can be imposed, but the court may also apply the extraordinary aggravation of punishment; 3) all the attacks on the victim’s sexual freedom can be treated as components of one offence on the basis of Article 12 of the Criminal Code which describes the institution of the so called continuous offence. This is possible when there is time proximity between the individual acts and when they are undertaken as a result of the same intention of the offender formed before the commission of the first act.

The last solution seems to be most popular in practice although its application seems doubtful in many cases – the more attacks on the sexual freedom of the victim there were, the greater the chances are that they will be treated as one “continuous rape” (and often punished with the lowest possible punishment). This seems to be a way out of the problem of precisely describing each individual behavior of the offender, which is practically impossible in those cases which comprise many years of physical and sexual abuse – the use of the construction of continuous offence makes it sufficient to describe the general time framework of the sexual abuses and the methods used by the offender without the necessity to describe each of the numerous individual acts in detail. Yet, the side-effect of this is the imposition of quite mild punishments in many of such cases since the offender is formally found guilty of only one offence (and no aggravation of punishment is possible at all in the cases of conviction for continuous offence).

Generally, the punishment for marital and life-partner rape in the analyzed period was, as has already been mentioned, visibly milder than punishment for stranger rapes. Yet, it should be also stressed that most of these rapes were not characterized by any excessive use of force, the occurrence of physical injuries was rare and only one offender was found guilty of committing an aggravated type of rape, i.e. rape with extreme cruelty. During the analyzed period (cases initiated in 2006- 2009) the most typical punishment for rape was imprisonment for 2 years in the case of offenders found guilty of the basic type of rape from Article 197 §1 of the Criminal Code. It must be emphasized that such a punishment (or even lower, when e.g. extraordinary mitigation of punishment was applied for some reason) was imposed on 95 offenders out of the 131 convicted on the basis of that provision (72.5%). Furthermore, in 64 cases the execution of the punishment was conditionally suspended, which means that almost half (exactly 48.8%) of these offenders did not have to go to prison unless they disobeyed the suspension conditions.

If one looks at the punishments to be executed, the median length of such a punishment was 32.4 months. Yet, if one eliminates from the data two verdicts in which the provision describing rape was in real concurrence with other provisions describing more serious offences (serious body injury or attempted murder) and the length of the imposed punishment was clearly connected with the other provision, then the median length of punishment in the discussed cases goes down to 30.3 months. If one compares these data with the general statistical data from the Ministry of Justice in roughly the same period, it becomes clear that punishment for marital or life-partner rape is milder than punishment for other types of rape. For example, in 2007 the median length of imprisonment (imposed without conditional suspension of its execution) for the rape described in Article 197 §1 of the Criminal Code was 38.5 months and in 2009 it was 39.2 months³¹.

The relative mildness of the punishment for marital or life-partner rape is further enhanced by the fact that the individual low punishments are often imposed for multiple acts treated as one continuous offence and it can be easily assumed that it would be practically impossible to impose such low punishments on an offender who raped many times the same victim or many different victims not related to him in any way.

Also, the use of the option of imprisonment with conditional suspension of its execution was definitely more often in the case of marital or life-partner rape. While for rape from Article 197 §1 of the Criminal Code the general proportion of such sentences was 38.2% in 2006, 35.6% in 2007, 30.2 in 2008 and 32.7 in 2009, almost half of the offenders convicted for that offence committed against their wives of life-partners had the execution of the imposed imprisonment conditionally suspended.

The last thing worth mentioning in the paper is the statistical picture of the offender found guilty of marital or life-partner rape, based on the data obtained from the analyzed files. The median age of the offender at the time when the offence was committed (or when the last act of a series of acts was committed) was 41. Generally, over half (55%) of the offenders were between 31 and 40 at the time when they committed the rape, though it might be mentioned that the oldest offender was 78. The median age of the victim was slightly lower – 37 (the youngest victim was 17 and the oldest 74).

Over half (53%) of the offenders had previously been punished for other offences, though typically not sexual ones (most often it was maltreatment of the wife/life-partner and/or the children, offences against property or driving under the influence of alcohol).

The educational level of the offenders was rather low – basic or vocational basic education was characteristic for 115 offenders (81.6%). Only 4 persons found guilty of marital rape had higher education (2.8%). Most of the offenders had a permanent or sporadic job at the time when they committed the offence (71.6%). Most offenders, not surprisingly, were married at the time of the offence

³¹ See Ministry of Justice statistics: http://www.bip.ms.gov.pl/Data/Files/_public/bip/statystyki/0350_002_2007_sredni_wymiar_kary.pdf and http://www.bip.ms.gov.pl/Data/Files/_public/bip/statystyki/0350_002_20_sredni_wymiar_kary.pdf, (access date: 29.08.2016).

(73% of all convicted offenders) while the perpetrators of life-partner rape were either single (bachelors) or divorced at the time of the offence. The majority of the offenders had children, usually together with the victim and statistically each offender was the father of 2.4 children (three of the offenders had as many as 10 children with the victim).

Most of the offenders lived in towns, and the comparison of the number of convictions for marital/life-partner rape with the percentage of population living in towns or villages leads to the conclusion that this offence is more often committed in towns – while 34% of the offenders lived in villages, about 38–39% of all the people living as couples lived in villages at that time³² (of course, this data should be interpreted carefully, for it may as well signify that the inhabitants of villages are less willing to report the crime).

Generally, the analysis of the court files referring to marital/intimate-partner rape shows that Polish courts do not have major problems approaching such cases and the existence of a close intimate relationship between the offender and the victim is not perceived as an obstacle to finding the offender guilty of rape, though – judging by the relatively mild punishments for such rapes – it is probably treated as a factor reducing the level of the victim's trauma (and, as a result, the level of the social harmfulness of the offence). The main problems in practice seem to be connected with the proper legal qualification of multiple attacks on the sexual freedom of the victim and with the proper legal description of a rape committed by an offender who is also guilty of maltreating his wife or life-partner. Such acts are sometimes treated as separate offences (which seems to be the optimal solution from the criminal policy point of view), sometimes as one offence with the statutory features of the two provisions of Articles 197 and 207 being fulfilled simultaneously. This last solution seems proper in those cases in which rape is evidently a part of the general violence cycle and is treated by the offender as one more way of harming the victim and showing his dominance and the victim's subordination. The analyzed files demonstrated, however, that the choice of one of these solutions is often not based on some universal principles – similar cases are treated in a different way and this practice should be changed so as to ensure greater consistency.

Nonetheless, the present substantial criminal law regulation of marital rape seems to be fairly sufficient and on the basis of the analyzed files it would be impossible to justify e.g. a proposition to follow the example of some countries like France and Italy to treat marital and life-partner rape as an aggravated type of that offence. In practice, as it has already been mentioned, these rapes are most often not characterized by the use of too much force; moreover, it was not rare for the victim and offender to come to an agreement after the rape and to continue their life together, which seems to support further the statement that the evaluation of each individual case should be left to the court within the present legal framework and no radical change is needed in the field of substantial criminal law referring to this social and legal problem.

³² See statistical data from the census of 2002 and 2011: *Gospodarstwa domowe...*, p. 45.

Słowa kluczowe: przestępstwa seksualne, zgwałcenie, zgwałcenie w małżeństwie, przemoc w rodzinie.

Streszczenie

Aneta Michalska-Warias – Marital Rape in Poland from the Legal and Criminological Perspectives

The paper is devoted to the legal and criminological aspects of marital rape. The author analyses the statutory features of the offence of rape from the point of view of the specific interpretation problems connected with the fact that there exists a close relationship between the offender and the victim. The paper presents also detailed results of file analysis referring to prosecutor's and court cases initiated from 2006 to 2009. It turns out, among others, that the perpetrators of marital rape (or life-partner rape) are generally treated with less severity than other rape perpetrators by the courts. The research has also revealed the presence of considerable inconsistencies in the practical treatment of the concurrence of marital rape and maltreatment, as well as has allowed to present the characteristic features of a typical offender, such as his age, education level, civil status and earlier convictions.

Keywords: sexual offences, rape, marital rape, family violence, criminal law.