

# “Crime has no gender?” – Gender aspects of the crime of rape in the case of Poland

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## I. Introduction

In 2019, Europol launched the “Crime has no gender” campaign as part of the “EU Most Wanted” project.<sup>1</sup> The leitmotiv of the campaign was the question: Are women equally as capable of committing serious crimes as men? The project authors answered this question in the affirmative: “The female fugitives featured on Europe’s Most Wanted website prove that they are”. At the same time, the campaign pointed out that gender-based crime research focuses primarily on the victims of crime, not the perpetrators. It was also argued that in the last few decades the number of women committing serious crimes such as murder, human trafficking, fraud or theft has increased. As explained in the campaign description “(...) one of the possible explanations is that technological progress and social norms have liberated women from the home, increasing their participation in the crime market”. The authors of the project emphasized that women also commit serious crimes and we should not use stereotypes when chasing the crime offenders.

Although the campaign prepared by Europol contributed to the arrest of some of the wanted persons e.g. Polish murderer Dorota Kaźmierska, who hid for nearly 6 years<sup>2</sup>, Dutch murderer Hilde Van Acker, who was wanted

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1 *Europol*, Crime has no gender: meet Europe’s most wanted female fugitives, 2019, <https://www.europol.europa.eu/media-press/newsroom/news/crime-has-no-gender-meet-europe%E2%80%99s-most-wanted-female-fugitives>; *Europol*, Crime has no gender 2019 - EU MOST WANTED, 2019, <https://www.youtube.com/watch?v=VChracR4p5I>.

2 *Czajkowska*, Wielka akcja Europolu. Poszukiwana nr 1 w Europie zabiła męża w Bydgoszczy (Large Europol’s action. Wanted No. 1 in Europe killed her husband in Bydgoszcz), 2019, available at: <https://bydgoszcz.wyborcza.pl/bydgoszcz/7,48722,25331424,wielka-akcja-europolu-poszukiwana-nr-1-w-europie-zabila-meza.html>; *Czuma*, Zatrzymano Dorotę Kaźmierską w Niemczech. Była na liście najbardziej poszukiwanych przestępczyń (Dorota Kaźmierska was detained in Germany. She was on the list of most wanted criminals), 2019, <https://wiadomosci.wp.pl/zatrzymano-dorote>

for 23 years<sup>3</sup>, or Spanish criminal - Viviana Andrea Vallejo Gutiérrez, who is accused of human trafficking for sexual exploitation and money laundering<sup>4</sup>, the project was criticized, and the discussion intensified especially after the statement of the spokesperson of Europol, Claire Georges, who, referring to the project, stated: "We wanted to show that women are just as likely to commit violent crimes as men".<sup>5</sup> In the media discourse, attention was drawn to the fact that the assumption adopted by Europol needs to be modified, and the statement that women are just as likely to commit a serious violent crime as men is at least "disingenuous", although it should rather be pointed out that it is untrue.<sup>6</sup>

The use of stereotypes in everyday life enables faster information processing and facilitates assessment, and stereotypes significantly affect how a person perceives the surrounding reality.<sup>7</sup> At the same time, gender stereotypes, although widespread in human societies, are dangerous because

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-kazmierska-w-niemczech-była-na-liscie-najbardziej-poszukiwanych-przestepczyn-6437843573770369a.

- 3 BBC, Pair held in Ivory Coast for Briton's 1996 murder, 2019, <https://www.bbc.com/news/world-europe-50515406>; Boffey, "Devil's couple" extradited to Belgium 23 years after murder of Briton, 2020, <https://www.theguardian.com/world/2020/feb/19/devils-couple-hilde-van-acker-jean-claude-lacote-extradited-belgium-murder-britonm>.
- 4 Dillon, One of Europe's Most Wanted women arrested in remote South American town, 2022, <https://www.sundayworld.com/crime/world-crime/one-of-europes-most-wanted-women-arrested-in-remote-south-american-town/1601960135.html>; In: *Spain News*, Sex trafficker on most wanted in Spain list arrested in Ecuador, 2022, <https://inspain.news/sex-trafficker-on-most-wanted-in-spain-list-arrested-in-ecuador/>; Muir, Europe's most wanted WOMEN: From Bulgarian 'Crypto Queen', to Romanian don behind criminal gang and the Czech businesswoman who tried to hire a €50,000 hitman to kill her husband, 2022, <https://www.dailymail.co.uk/news/article-11466437/Europes-wanted-women-Crypto-Queen-Romanian-head-organised-crime-gang.html>.
- 5 Stubbley, Most wanted female criminals revealed by Europol, 2019, <https://www.independent.co.uk/news/world/europe/europol-most-wanted-women-serious-crime-gender-a9162716.html>; Stanglin, Europol's 'Crime Has No Gender' campaign lists 'most wanted' women fugitives, 2019, <https://eu.usatoday.com/story/news/world/2019/10/19/women-fugitives-europol-posts-crime-has-no-gender-most-wanted-list/4035979002/>; Nagesh, New Europol campaign reveals 'most wanted' women fugitives, 2019, <https://www.bbc.com/news/world-europe-50098550>.
- 6 Stubbley, <https://www.independent.co.uk/news/world/europe/europol-most-wanted-women-serious-crime-gender-a9162716.html>.
- 7 Phillips/de Roos, Gender Stereotypes and Perceptions of Stranger Violence: Attributions of Blame and Motivation, *International Journal of Offender Therapy and Comparative Criminology* 2022, p. 3.

they can cause discrimination based on gender.<sup>8</sup> On the other hand, they are also so deeply ingrained that although “those who self-identify as feminist or egalitarian have spontaneous associations that echo the culturally learned stereotypes for women and men”.<sup>9</sup>

It should be emphasized, however, that referring to stereotypes is not always inappropriate, especially when – statistically – the stereotype seems to be true. And this is exactly what is happening with stereotypes about crime; according to data for European countries, women constitute on average no more than 15 % of crime perpetrators.<sup>10</sup> The slogan of the Europol campaign seems to be extremely inaccurate with regard to sexual crimes: Only 2.4 % of those accused of rape are women.<sup>11</sup> Such conclusions follow clearly from the data provided by Eurostat (only for EU Member States): More than 9 in 10 rape victims were girls and women, while nearly all those imprisoned for such crimes were male (99 %).<sup>12</sup>

Referring to statistics on crime as such is of course risky due to the concept of a dark figure of crimes widely described in criminology.<sup>13</sup> Statistical data show only a fragment of the social phenomenon of crime, referring to revealed (registered) crime. Therefore, handling them requires great caution, especially in relation to sexual crime, including sexual violence, which is often, for various reasons, not disclosed and, consequently, not reported.<sup>14</sup> However, it is difficult to assume that official crime statistics have no informative value, dramatically falsify the sex ratio of perpetrators and victims, because, e.g., only men – or women – are not willing to disclose the fact of being victimized. Even if official statistics do

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8 *Eagly/Mladinic*, Gender Stereotypes and Attitudes Toward Women and Men, *Personality and Social Psychology Bulletin* 1989, pp. 543–558.

9 *Azad/Goedderz/Hahn*, Self-Awareness and Stereotypes: Accurate Prediction of Implicit Gender Stereotyping, *Personality and Social Psychology Bulletin* 2022, p. 1.

10 *Aebi/Caneppele/Hashimoto/Jehle/Khan/Kühn/Lewis/Molnar/Smit/Þórisdóttir*, *European Sourcebook of Crime and Criminal Justice Statistics – 2021*, 6<sup>th</sup> Edition, Göttingen 2021, p. 78.

11 *Aebi/Caneppele/Hashimoto/Jehle/Khan/Kühn/Lewis/Molnar/Smit/Þórisdóttir*, p. 85.

12 *Eurostat*, Violent sexual crimes recorded in the EU, 2017, <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20171123-1>.

13 *Biderman/Reiss*, On Exploring the “Dark Figure” of Crime, *The Annals of the American Academy of Political and Social Science* 1967, pp. 1-15.

14 *Daly/Bouhours*, Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries, *Crime and Justice* 2010, 568-573.; *Wittebrood/Jungerp*, Trends in Violent Crime: A Comparison between Police Statistics and Victimization Surveys, *Social Indicators Research* 2002, pp. 155-156.

not fully illustrate the phenomenon of crime, they tell us quite a lot about its statistical structure and trends.

## II. The statistical portrait of the crime of rape in Poland

In this section, our focus will be on the statistics of convictions. This is because, firstly, these data are highly reliable and leave very little room for doubt, thereby confirming the occurrence of a crime. Secondly, data from the courts provide detailed data regarding the sex of victims and perpetrators (which is not always available for earlier stages of the proceedings). The number of people convicted of rape in Poland is not significant, with an average ranging between 350 and 450 per year, which accounts for less than 0.2 % of all convicts per year.<sup>15</sup> This number has also remained at a similar level for many years and it should be combined with the low percentage share of sexual offenses in the structure of Polish crime. In the years 1990-2018, sexual crimes accounted for less than 1 % of all confirmed offences<sup>16</sup>, in 2020, this share was 1.1 %. This is an interesting observation, considering the fact that the Polish legislator has been changing the Polish criminal law for many years, regularly expanding the scope of criminalization and tightening penalties for sexual offences. As for the crime of rape, in the years 2008-2017, this act accounted for between 1/4 and (almost) 1/3 of all sexual crimes in Poland, and in the following years, this value was systematically decreasing (12 % in 2020).<sup>17</sup>

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15 Own calculations based on (1) statistical data from the statistical report titled “Pracownocne skazani dorośli z oskarżenia publicznego według rodzajów przestępstw i wymiaru kary – czyn główny w latach 2008–2020” (“Adults validly convicted - by type of crime and punishment – in 2008–2020 (the main offence)”) available at: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,43.html>, (2) statistical data for 2021 - non-final data provided by the Polish Ministry of Justice in response to the authors' request.

16 According to the rules of crime registration adopted in Poland, a confirmed crime is a prohibited act, the occurrence of which was confirmed in preparatory proceedings – see: Police statistics. Notes and definitions, available at: <https://statystyka.policja.pl/download/20/232288/Uwagiidefinicje.docx>.

17 Błońska/Gruszczynska/Witkowska-Rozpara, Policy towards adult and juvenile perpetrators violating sexual freedom: Selected problems, Polish Bulletin of Criminology 2022, pp. 72-74.

Table 1. Adults validly sentenced for rape (the main offence) compared to the total number of adults validly sentenced (for the main offence) in Poland in 2010-2020 (2021\* non-final data).<sup>18</sup>

Year	Adults validly sentenced (for the main offence)	Adults validly sentenced for rape (for the main offence)	Percentage share of convictions for rape in all convictions
2010	432891	502	0,12 %
2011	423464	462	0,11 %
2012	408107	437	0,11 %
2013	353208	421	0,12 %
2014	295 353	401	0,14 %
2015	260034	385	0,15 %
2016	289512	400	0,14 %
2017	241436	393	0,16 %
2018	275768	368	0,13 %
2019	287978	430	0,15 %
2020	243673	346	0,14 %
2021	279444	361	0,13 %

Cases in which a woman is convicted of rape in Poland are extremely rare, and at the same time women dominate among rape victims in Poland.

18 Own study based on (1) statistical data from the statistical report titled “Prawomocne skazani dorośli z oskarżenia publicznego według rodzajów przestępstw i wymiaru kary – czyn główny w latach 2008–2020” (“Adults validly convicted - by type of crime and punishment – in 2008–2020 (the main offence)”) available at: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,43.html>, (2) statistical data for 2021 - non-final data provided by the Polish Ministry of Justice in response to the authors' request.

Table 2. *Adults validly sentenced for rape (for the main offence) in 2010-2020 – by sex (gender).*<sup>19</sup>

Year	Adults validly sentenced for rape (for the main offence)		
	Total	Male	Female
2010	502	501	1
2011	462	456	6
2012	437	435	2
2013	421	418	3
2014	401	400	1
2015	385	384	1
2016	400	400	0
2017	393	391	2
2018	368	366	2
2019	430	430	0
2020* (gender information not available)	346	n/a	n/a

Table 3. *Victims of rape – by sex (gender).*<sup>20</sup>

Year	Victims of rape (adults)		
	Total	Male	Female
2010	n/a	n/a	263
2011	332	19	313
2012	406	27	379
2013	348	18	330
2014	409	20	389
2015	450	26	424
2016	404	30	374
2017	434	35	399
2018	408	45	363
2019	443	29	414
2020	403	61	342

19 Own study based on statistical data provided by the Polish Ministry of Justice in response to the authors' request.

20 Own study based on statistical data provided by the Polish Ministry of Justice in response to the authors' request.

The analysis of statistical data provided by the Polish Ministry of Justice also leads to the conclusion that rapes against men in Poland are as well committed by men<sup>21</sup>.

However, when comparing two factors at the general level – the offender and the victim – it is hard not to notice that rape has a gender: male in relation to the perpetrator and female in relation to the victim.

### *III. The Istanbul Convention: A gendered understanding of crime*

Thus, for some crimes, the gender issue turns out to be crucial – this is the case with violence against women, especially sexual violence. According to Article 3(d) of the 2014 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), "gender-based violence against women" refers to violence that is directed against a woman specifically because she is a woman, or that affects women disproportionately. A similar "quantitative" approach is also employed in the definition of "violence against women" outlined in the proposal for a Directive of the European Parliament and the Council on combating violence against women and domestic violence (COM(2022)105 final). In the preamble of the proposal it was emphasized that one of the most serious offences that disproportionately affects women is rape.

The proposal for a directive is currently undergoing processing, and it is crucial to acknowledge that the Istanbul Convention serves as a significant point of reference for this proposal. Furthermore, at present, the Istanbul Convention stands as the most influential document shaping the criminal policy regarding the crime of rape in European countries. The Convention has been signed by 45 and ratified by 38 European countries; on May 10, 2023, the European Parliament voted to approve the European Union's accession to the Convention<sup>22</sup>, it was ratified by EU on 28 June 2023, entered

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21 Such conclusions are based on the analysis of data provided by the Polish Ministry of Justice in response to the authors' request.

22 Although not all EU member states have agreed to this; the EU Court of Justice's opinion of 6 October 2021 confirmed that the European Union can ratify the Istanbul Convention without having these agreements - - European Parliament, Press release (2023), Combating violence against women: MEPs back EU accession to Istanbul Convention, <https://www.europarl.europa.eu/news/en/press-room/20230505IPR85009/combating-violence-against-women-meps-back-eu-accession-to-istanbul-convention>.

into force on 1 October 2023. In Poland, the Convention entered into force on 1 August 2015.<sup>23</sup>

However, the ratification of the Convention by Poland was not without problems: In contrast to the aforementioned Europol campaign, the Convention is based on the premise that gender is relevant – at least for certain types of crime. And „gender” is explained as „the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”. It is precisely this notion of “socially constructed gender” that is a central message of the Convention: As stipulated in Article 12, parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.

These provisions provoked fierce opposition to the ratification of the Convention by Poland: Right-wing politicians and activists alleged that this international treaty is a tool for social engineering, designed to fight against traditional values, in particular against the traditional family. The convention has also been found to promote the so-called gender ideology and ignore the real causes of violence: „The Convention does not include provisions on (...) combating alcohol, drug or other addictions (e.g., pornography), sexualisation of women, or demands to strengthen family ties”.<sup>24</sup> According to critics, it is not traditional values but their decline that is the real source of violence.

Finally, the Convention was ratified in 2015, but shortly after, politicians began to discuss its denunciation. The most serious attempt to undermine the validity of the Istanbul Convention was the application of the former Prime Minister Mateusz Morawiecki to the Constitutional Tribunal in pursuit of a declaration that the Convention is incompatible with the Polish Constitution (case no K 11/20 – still pending).<sup>25</sup>

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23 Journal of Laws, item 961, <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20150000961>.

24 *Pawłowska*, Attempts to protect against violence, without ideology - a comment concerning Poland's Report on the implementation of the Istanbul Convention, 2020, [https://en.ordoiuris.pl/family-and-marriage/attempts-protect-against-violence-without-ideology-comment-concerning-polands#\\_ftn5](https://en.ordoiuris.pl/family-and-marriage/attempts-protect-against-violence-without-ideology-comment-concerning-polands#_ftn5).

25 Polish Constitutional Tribunal, Case no K 11/20 (pending), available at: <https://tribunal.gov.pl/s/k-11-20>.

The Polish debate was not unique; in 2018, the Bulgarian constitutional court ruled that the treaty was unconstitutional; in 2020, the Hungarian and Slovak parliaments refused to ratify the Convention; and in 2021, Turkey denounced the Convention.<sup>26</sup> All over Europe, right-wing parties decide to use the idea of the „harmful Convention” for political gain. However, as it is often the case in Poland, once the election campaigns come to an end, the discussion surrounding the convention tends to fade away, and the former right-wing government have partly implemented the provisions of the Convention, aligning Polish law with international standards. This is happening because the convention encompasses numerous non-controversial, non-ideological practical measures aimed at supporting victims of violence.

In this short study, we will present how the Istanbul Convention influenced Polish criminal policy, focusing on prosecuting the crime of rape – which constitutes, in light of the statistics, the most „gendered” crime.

#### IV. Ex officio proceedings

Under Article 55 (1) of the Convention, parties shall ensure that investigations into or prosecution of (among others) rape shall not be wholly dependent upon a report or complaint filed by a victim, and that the proceedings may continue even if the victim withdraws her or his statement or complaint. In the Explanatory Report to the Convention<sup>27</sup> it is stated that offences covered by the Convention are often perpetrated by family members, intimate partners or persons in the immediate social environment of the victim; the resulting feelings of shame, fear and helplessness lead to low numbers of reporting and, subsequently, convictions. Therefore, law enforcement authorities should investigate in a proactive way in order to gather evidence, such as substantial evidence, in order to make sure that the proceedings may be carried out even if the victim withdraws her or his statement or complaint.

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26 *de La Baume*, How the Istanbul Convention became a symbol of Europe’s cultural wars, 2021, <https://www.politico.eu/article/istanbul-convention-europe-violence-against-women/>.

27 *Council of Europe*, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, § 280, <https://rm.coe.int/1680a48903>.

The Polish legislator introduced the obligation to prosecute rape *ex officio* as early as January 2014, in the period between the signing and ratification of the Istanbul Convention. But has this actually led to an increase in the numbers of reporting and, subsequently, convictions for the crime of rape?

*Table 4. The prosecuting of rape: from the police report to the conviction.*<sup>28</sup>

Year	Number of initiated proceedings	Number of confirmed offences	Adults validly sentenced for rape (for the main offence)
2010	1 759	1 567	502
2011	1 784	1 497	462
2012	1 786	1 432	437
2013	1 885	1 362	421
2014	2 444	1 249	401
2015	2 418	1 144	385
2016	2 426	1 383	400
2017	2 486	1 262	393
2018	2 502	1 326	368
2019	2 527	1 354	430
2020	2 181	1 034	346

As we can see, the number of initiated proceedings actually increased – in the first year of the new procedure by almost 30 % (from 1885 in 2013 to 2444 in 2014), but this did not lead to an increase in the number of confirmed crimes. Their number, temporarily, even decreased, despite the fact that the number of initiated proceedings was increasing. The number of convictions remained equally stable.

What could be the reason? A certain indication may be the findings from the research conducted on the basis of in-depth interviews with prosecutors

28 Own study based on (1) data from the Police statistical report: Crime of rape in 1999-2020, available at: <https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-6/63496,Zgwalcenie-art-197.html>, (2) statistical data from the statistical report titled “Prawomocne skazani dorośli z oskarżenia publicznego według rodzajów przestępstw i wymiaru kary – czyn główny w latach 2008–2020” (“Adults validly convicted - by type of crime and punishment – in 2008–2020 (the main offence)”) available at: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,43.html>.

involved in cases concerning rape crimes.<sup>29</sup> Prosecutors hold that basically nothing has changed in the proceedings: If the victim does not want to cooperate, there is nothing the prosecutor can do. The testimony given by the victim and his or her medical tests are the primary source of evidence in the proceedings. Even if the prosecutor finds out about the rape from other sources – which will be enough to initiate proceedings – the case will “fall apart” because of the lack of evidence. Further, one of the interviewed prosecutors argued that he should exercise caution when probing for specific details of the crime, as doing so might exacerbate the trauma experienced by the victim. Among the prosecutors, only one highlighted that initiating rape prosecution *ex officio* alleviates the victim from bearing the burden of initiating legal proceedings. In some cases, it has been observed that family pressure may dissuade the victim from pursuing charges against the perpetrator. It seems that a real change can be achieved over a longer period of time, when there is actually a cultural change – in line with the spirit of the Convention – which will completely relieve the victim of responsibility for the (social, intrafamilial) consequences of sexual violence. When the victims feel assured that they will not be subjected to blame for what has happened and receive comprehensive support from the community as survivors of a serious crime, they are more likely to be inclined to cooperate with law enforcement.

Thus, the implementation of *ex officio* prosecution of rape has not resulted in an increase in convictions, but rather in a rise in the number of initiated proceedings that ultimately do not lead to a conviction. However, this statistical phenomenon may be caused by the mentioned ongoing cultural change. Since 2017, the “Mee too” campaign has been strongly present in the public debate, encouraging victims of sexual violence to assert their rights. Perhaps the victims of this violence inspired by the campaign are more likely to report crimes, but these cases are more difficult to prove (e.g. due to the long time since the event).<sup>30</sup>

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29 *Błońska*, Ocena nowego trybu ścigania przestępstwa zgwałcenia w świetle wywiadów pogłębionych z prokuratorami (Evaluation of the new procedure for prosecuting the crime of rape in the light of in-depth interviews with prosecutors) in: *Grabowska/Grzybek* (Eds.), *Przełamać tabu. Raport o przemoc seksualnej* (Break taboos. Sexual Violence Report), Fundacja Ster, Warszawa 2016, pp. 165-192 (cited as: *Błońska*, in: *Grabowska/Grzybek* (Eds.)).

30 For the idea of this explanation, and for other inspiring debates, the authors would like to thank Agnieszka Grzybek, PhD student at the University of Warsaw.

## V. The policy of punishing rape offender in Poland

The Istanbul Convention obliges the parties to effective prosecution (Article 49) and punishing (Article 45-46) violence against women. As stated in Article 45 (1), parties are obliged to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness. These sanctions shall include – where appropriate – sentences involving the deprivation of liberty which can give rise to extradition. Article 46 lists certain circumstances that should be considered as a reason for increasing the sentence (aggravating circumstances e.g., when the offence was committed against a former or current spouse or partner).

Therefore, the provisions of the Convention as such do not require *severe* punishment (such as long-term imprisonment) of the perpetrators – the sanction is to be *effective, proportionate and dissuasive*. In particular, the decision on the type of offence that merits a prison sentence is left to the parties. However, it is worth considering whether the differentiation of gender-based violence against women from other forms of violence, its recognition as a violation of human rights (Article 3) and the observed link with structural discrimination against women (Article 4) have created a new approach in criminal policy. Has this new approach had any impact on how perpetrators are punished – are the sanctions imposed more effective, proportionate and dissuasive?

In general, Polish law (Article 197 of Polish Penal Code) provides for the possibility of punishing the perpetrator of rape with the penalty of at least 2 years of imprisonment. The upper limit of the penalty is 15<sup>31</sup> years of imprisonment and, exceptionally, it is possible to impose a non-custodial sentence. However, in Poland for many years the courts most often imposed two penalties: suspended imprisonment and absolute imprisonment.<sup>32</sup>

Since 2015, the number of convictions for absolute imprisonment has been gradually increasing – mainly due to the change in Polish law that took place in 2015.<sup>33</sup> The possibility of sentencing to suspended sentences was limited at

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31 Before the 1<sup>st</sup> October 2023, the upper limit was 12 years of imprisonment.

32 Such conclusions are based on the analysis of data provided by the Polish Ministry of Justice in response to the authors' request.

33 *Witkowska-Rozpara*, Polish penal policy - twenty years after enactment of the Criminal Code Act 6 June 1997, *Prawo w Działaniu* 2020, pp. 103-105; *Witkowska-Rozpara*, *Warunkowe zawieszenie wykonania kary - uwagi na tle obowiązującej regulacji, praktyki orzeczniczej sądów polskich oraz nowelizacji Kodeksu karnego (z mocą*

that time and this change applies not only to offenders of rape, but to all offenders of crime.<sup>34</sup> So probably the tougher punishment of rape perpetrators in recent years (more incarceration) is not a policy “tailored” to this crime in particular, but rather the effect of a general reduction in the use of probation.

When considering the gender aspect of the crime of rape, it is worth paying attention to the penalties imposed on the perpetrators of this crime. Data showing the types of penalties imposed by Polish courts, taking into account the gender aspect, are presented in the table 5 and chart 1.

Table 5. Adults validly sentenced for rape (for the main offence) in 2010-2020 – by type of punishment & sex (gender).<sup>35</sup>

Year	Adults validly sentenced for rape (total)	Adults validly sentenced to:				"Mixed penalty" (a short-term imprisonment & restriction of freedom)
		Fine	Restriction of freedom	Suspended imprisonment	Absolute imprisonment	
2010	502	0	0	175	327 (incl. 1 female)	0
2011	462	1	0	163 (incl. 2 females)	298 (incl. 4 females)	0
2012	437	1	1	150 (incl. 1 female)	285 (incl. 1 female)	0
2013	418	0	0	153 (incl. 2 females)	265 (incl. 1 female)	0
2014	401	0	0	169	232 (incl. 1 female)	0
2015	385	1	0	155 (incl. 1 female)	224	5
2016	400	1	1	127	249	22
2017	393	1	0	69 (incl. 1 female)	282 (incl. 1 female)	41
2018	368	1	1	55 (incl. 2 females)	277	34
2019	430	1	2	39	341	47
2020*	346	1	2	33	266	44

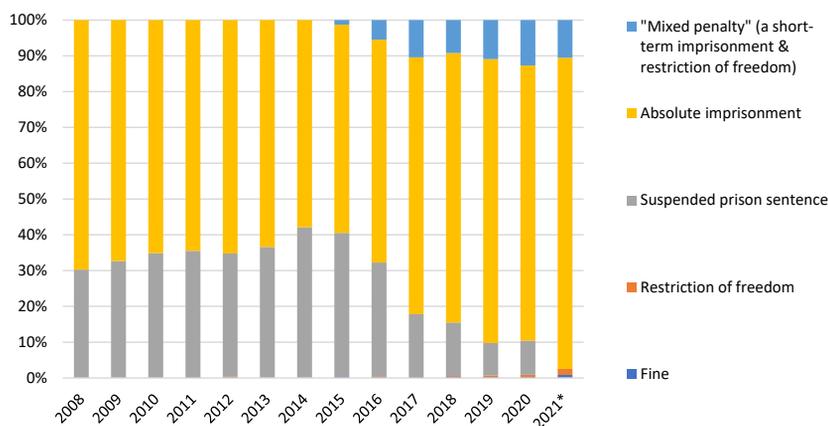
\*gender information not available

obowiązującą od 1.07.2015 r.) (The conditional suspension of the execution of the penalty – comments relating to the current regulation, court rulings in Poland and amendment to the Criminal Code of the Republic of Poland entering into force on 1 July 2015), *Probacja* 2015, pp. 5-44.

34 “The court may conditionally suspend the enforcement of the imposed penalty of deprivation of liberty not exceeding one year if the perpetrator has not been sentenced to the penalty of deprivation of liberty while committing a crime and it is sufficient to meet the aims of the punishment with regard to the perpetrator, especially to prevent his relapse to crime” (Art. 69 of Polish Penal Code).

35 Own study based on statistical data provided by the Polish Ministry of Justice in response to the authors' request.

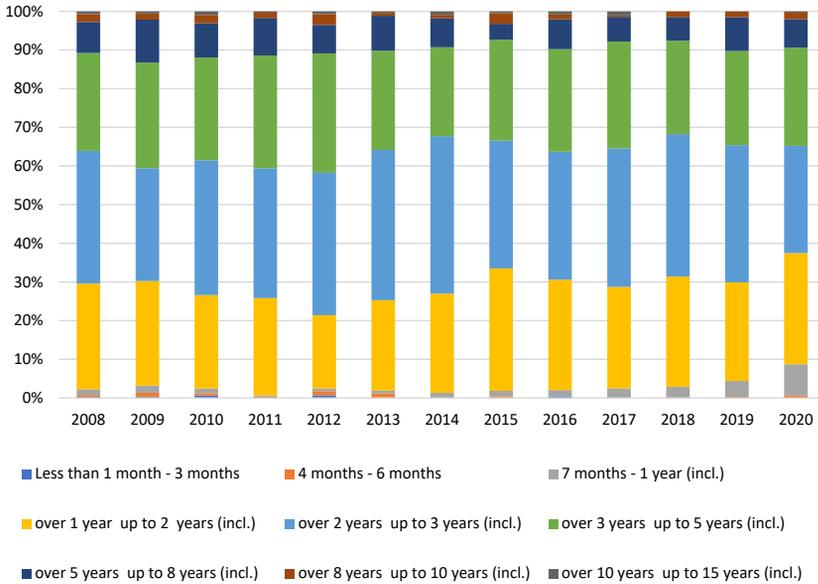
Chart 1. The structure of penalties adjudicated for rape (Article 197 (1) of Polish Criminal Code) in 2008-2020 (2021\* non-final data).<sup>36</sup>



As mentioned earlier, women are rarely convicted of rape in Poland, but such cases have been reported in the period covered by the analysis. This makes it possible to assess whether the sentences imposed on women differed from those imposed on men, although due to the small number of convicted women, such an assessment must be very careful and does not allow drawing general conclusions. However, based on the data compiled by the Polish Ministry of Justice, one would hazard a guess that “the gender of rape” is hardly revealed in penalties imposed.

36 Own study based on (1) statistical data from the statistical report titled “Prawomocne skazani dorośli z oskarżenia publicznego według rodzajów przestępstw i wymiaru kary – czyn główny w latach 2008–2020” (“Adults validly convicted - by type of crime and punishment – in 2008–2020 (the main offence)”) available at: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,43.html>, (2) statistical data provided by the Polish Ministry of Justice in response to the authors’ request.

Chart 2. Convictions for rape – the term of absolute imprisonment (Article 197 (1) of Polish Criminal Code).<sup>37</sup>



When analysing the penalties imposed in Poland for rape, it can be seen that Polish courts most often adjudicate the following prison sentences: over 1 to 2 years (incl.) – about 25-30 % of all punishments, over 2 years up to 3 years (incl.) – more than 1/3 of all punishments and over 3 years up to 5 years (incl.) – about 25-30 % of all punishments. The term of 9 prison sentences imposed on women in 2010-2015 & 2017-2018 were as follows: 2 years of imprisonment (2010, 2011, 2012, 2014), 3 years of imprisonment (2013) and over 3 years up to 5 years (incl.) of imprisonment (2011, 2017). Thus, the terms of imprisonment imposed on women mirrored those usually imposed on men.

The Istanbul Convention represents a victim-centred approach to combating gender-based violence: Priority consideration is given to the needs

37 Own study based on statistical data from the statistical report titled “Prawomocne skazani dorośli z oskarżenia publicznego według rodzajów przestępstw i wymiaru kary – czyn główny w latach 2008–2020” (“Adults validly convicted - by type of crime and punishment – in 2008–2020 (the main offence)”) available at: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,43.html>.

and safety of victims. Measures guaranteed by the Convention to ensure the safety of victims include emergency barring orders (Article 52) and restraining or protection orders (Article 53). In a real threat situation, the relevant authorities may prohibit the perpetrator from approaching the victim or, more broadly, from contacting the victim. According to Article 53 (2), breaches of restraining or protection orders shall be subject to effective, proportionate and dissuasive criminal or other legal sanctions.

Although, as previously mentioned, the most common punishment for rape in Poland is imprisonment, for many years, especially before 2015, Polish courts also imposed suspended sentences on the perpetrators of this crime. This practice caused controversy, but – paradoxically – the use of a probation measure allows also for the imposition of obligations that will protect the victims. One of them is the obligation to refrain from contacting the victim (restraining order). What is also important, a violation of these obligations may result in a referral to the execution of a penalty of imprisonment. In this sense, effective punishment for the breaches of restraining or protection orders referred to in Article 53 (2) is ensured. The analysis of the judiciary practice shows that an obligation to refrain from contacting the victim is one of the most frequently imposed obligation. Interestingly, the courts take into account the problems so emphasized by opponents of the Convention – alcoholism and other addictions. An obligation to abstain from abusing alcohol and an obligation to submit to addiction therapy are ordered even more frequently than restraining orders. These obligations are aimed at protecting the victim, so their imposition by the courts should be assessed positively. Considering the statistical data, which show that the vast majority of rapes are committed by men, and the victims are mostly women, in practice, the measures adjudicated primarily protect women. This is another aspect that reveals the gender of the rape.

Table 6. The imposition of probation obligations during suspended imprisonment in 2010–2019 (details for 2020 are not yet available).<sup>38</sup>

Year	OBLIGATION TO:														
	Adults validly sentenced to suspended imprisonment	Number of adults with probation obligations	inform the court or the probation officer about the progress of the test period	apologise to the victim	carry out the incumbent obligation to provide maintenance for another person	perform remunerated work, acquire education or preparation for a profession	abstain from alcohol or using other stupeficient substances	submit to additional psychotherapy or psychoeducation	submit to special psychotherapy, especially psychotherapy or psychoeducation	participate in correctional, educational or professional activities	refrain from associating with specific social groups or appearing in specific locations	refrain from contacting the victim or other persons in a specific manner, or from approaching the victim or other persons	leave the premises damaged by a work community for intended by a crime victim		
2010	172	62	3	4	3	0	34	16	n/a	n/a	1	14	2	6	0
2011	163	67	1	3	3	2	42	18	n/a	n/a	0	12	1	5	0
2012	150	73	3	3	0	1	44	15	n/a	n/a	0	22	1	7	0
2013	153	63	1	1	2	1	27	12	n/a	n/a	0	23	2	9	0
2014	169	76	3	6	0	1	45	21	n/a	n/a	0	17	4	10	0
2015	155	53	1	1	0	4	30	7	0	5	1	22	3	2	0
2016	127	59	1	2	0	0	34	9	1	3	1	18	8	1	0
2017	69	40	7	3	1	2	28	5	1	2	1	11	4	0	0
2018	55	31	9	3	0	2	12	6	1	2	1	10	3	0	0
2019	39	21	10	2	0	0	6	2	1	1	0	2	0	0	0

38 Own study based on statistical data provided by the Polish Ministry of Justice in response to the authors' request.

## VI. Measures to avoid secondary victimization

As defined in Article 1(4) of Recommendation CM/Rec(2023)2 of the Committee of Ministers to member States on rights, services and support for victims of crime “secondary victimization” is victimization that occurs not as a direct result of the criminal offence but as a result of the response of public or private institutions and other individuals to the victim.<sup>39</sup> The secondary victimization may be caused in particular through poor treatment at the hands of criminal justice system itself, e.g. by repeated exposure of the victim to the perpetrator, repeated interrogation about the same facts, the use of inappropriate or insensitive language. The need to avoid secondary victimization recurs repeatedly in the text of the Istanbul Convention: A general obligation to protect victims from this phenomenon is provided for in the Article 18(3), specific measures of protection required by the Convention (Article 56) guarantee victims:

- that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible,
- the right to testify in the courtroom without being present or at least without the presence of the alleged perpetrator.

The Polish legislator introduced these principles to the criminal process. In the light of the provisions introduced in January 2014 (Article 185c of the Polish Code of Criminal Procedure) the victim can only be interrogated once and the accused cannot be present during the interrogation (however, her/his lawyer may be present). The victim is questioned during the investigation by the court (not by the police officer) and the hearing is recorded.

Unfortunately, research has shown that this solution does not work in practice.<sup>40</sup> The principle that the victim can only be questioned by a court means that there are very long waiting times for appointments. There are cases where the victim has been waiting for a questioning for more than 3 months.<sup>41</sup> Until the victim is interrogated, it is basically impossible to arrest the accused, because there is no basic evidence consisting of the victim’s

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39 Article 1(4) of Recommendation CM/Rec(2023)2 of the Committee of Ministers.

40 Błońska, in: Grabowska/Grzybek.

41 Jędrzejczyk, RPO i sprawa procedur w sprawie przestępstw seksualnych. Dlaczego prawo nie działa? (The Ombudsman and the issue of sexual crimes procedures. Why the law doesn't work?), 2016, <https://bip.brpo.gov.pl/pl/content/rpo-i-sprawa-procedur-w-sprawie-przestepstw-seksualnych-dlaczego-prawo-nie-dziala>.

testimony. As a result, the victim is exposed to lengthy proceedings and the perpetrator remains free.

After a few years, the situation became so difficult that in 2019, the legislator amended the law and introduced a regulation on a time frame for date of the hearing: It must take place within 14 days at most from the prosecutor’s request.<sup>42</sup> Unfortunately, no research is available on how this provision works in practice.

Another problem regarding secondary victimization is that, in practice, it happens that the victim is interrogated many times.<sup>43</sup> As mentioned, there is a rule that the defence lawyer of the accused person should be present during the interrogation of the victim. He/she may ask the victim questions and attempt to undermine her/his testimony. However, if the accused appoints a defence lawyer only after the questioning, the rape victim is questioned again - this time in the presence of a defence lawyer.

Of course, it is important to ensure that the rights of the accused are respected. At the same time, it is of paramount importance that such measures do not aggravate any harm experienced by victims. It seems that the only solution to balance the rights of the accused and the victim would be to provide a public defender at the first interrogation of the accused. The interrogation could then not take place without her/his presence (so the accused benefits from the assistance of a professional defence lawyer appointed by the court), and the victim could not be interrogated again. Unfortunately, Polish law does not provide for such a solution.

## VII. Lack of consent as a prerequisite for rape

One of the landmark provisions of the Istanbul Convention is the principle that any non-consensual sexual act should be considered a crime (Article 36). The explanatory report refers to the case-law of the European Court of Human Rights, more precisely, to the *M.C. v. Bulgaria* judgment of 4 December 2003<sup>44</sup>, in which the Court stated that contemporary standards resulting from the prohibition of torture and the protection of privacy. Positive obligations of the state - must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the

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42 Article 185c § 2 Polish Code of Criminal Procedure.

43 *Błońska*, in: Grabowska/Grzybek (Eds.), 182-184.

44 ECtHR 4.12.2003 – 3927/98.

absence of physical resistance by the victim. As Article 36 (2) of the Convention states, consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.<sup>45</sup>

This principle has not been implemented into Polish law: According to the Article 197 of Polish criminal code, only the perpetrator who uses violence, threat or deceit commits rape. The mere lack of consent to a sexual relationship is not sufficient to recognize that rape has occurred. Poland is not unique in Europe in this regard: So far only 13 jurisdictions recognize that sex without consent is rape: Belgium, Croatia, Cyprus, Denmark, Germany, Greece, Iceland, Ireland, Luxembourg, Malta, Spain, Sweden and the UK.<sup>46</sup> However, the position of the Polish far-right government (that ruled until mid-December 2023) was remarkable, as they have taken significant measures to preserve the existing regulations. The official position of the former Minister of Justice Zbigniew Ziobro, provided at the request of the Commissioner for Citizens' Rights, emphasized that according to Polish law, a victim's resistance does not have to rely on physical opposition and its manifestation may be reduced to crying, verbal statements, jerking or calling for help. The Minister thus missed the point – the problem does not concern the means by which the victim expresses disagreement, but the means used by the perpetrator. The Minister also expressed his position on the Istanbul Convention by arguing that „the regulations of the Istanbul Convention are redundant, and in the context of the negative assessment of its ideological layer, it is completely justified to denounce this act; its denunciation would remain without any negative impact on the level of protection guaranteed by national tools”.<sup>47</sup>

### VIII. Conclusion

Sexual crimes, including rape, are acts that undermine a particularly protected good, which is sexual autonomy. The victimization has significant consequences that remain with the victim for life. That is why it is so

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45 *Council of Europe*, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, § 191, <https://rm.coe.int/1680a48903>.

46 DW, Spain: Bill defines sex without consent as rape, 2021, <https://www.dw.com/en/spain-government-approves-bill-to-define-sex-without-consent-as-rape/a-58178985>.

47 *Minister Sprawiedliwości*, The official correspondence of Minister of Justice and Commissioner for Citizens' Rights, 2021, [https://bip.brpo.gov.pl/sites/default/file/s/Odpowiedz\\_MS\\_24.05.2021.pdf](https://bip.brpo.gov.pl/sites/default/file/s/Odpowiedz_MS_24.05.2021.pdf).

important to recognize that sexual crimes, including primarily rape, have a gender, because in the vast majority of cases, the perpetrators of this type of crime are men, and the victims are women. As we mentioned in accordance with the data provided by Eurostat, in the case of rape, the share of women as perpetrators is marginal, while women constitute 99 % of the victims of this act. Yes, women commit crimes, but it is difficult to agree with the thesis put forward in the Europol’s campaign that women are just as likely to commit violent crimes as men. The statistical picture of rape in Poland confirms the gender of this crime, showing that the vast majority of victims of this crime are women. Therefore, it is even desirable to notice and highlight gender aspects in relation to rape (as well as other forms of sexual violence), which is also emphasized by the provisions of the Istanbul Convention. That is the reason why it is so difficult to accept a situation in which the state responsible for protecting victims of crime, especially sexual crimes such as rape, undermines the legitimacy of legal regulations aimed at increasing this protection. Unfortunately, so far such practices were observed in Poland. Implementation of the Convention’s standards with regard to sexual violence has been successful as far as procedural law is concerned. Provisions for the prosecution of rape *ex officio* and a number of rules protecting a person who has experienced rape from secondary victimization have been introduced – and this has not sparked much public debate. However, there are organizational problems with the proper implementation of these provisions. As for substantive criminal law, the implementation is only partly successful. The introduction of restraining and protection orders should be appreciated, but there have been no key changes regarding the construction of the crime of rape – as any non-consensual sexual act. The question is whether the new Polish government (in office since mid-December 2023) will be determined enough to complete the implementation of the Convention.

It is also important to promote gender mainstreaming (and, within its framework, assistance to victims of sexual violence) in the European Union’s activities. The adoption of the Directive on combating violence against women and domestic violence which will incorporate all the key solutions of the Istanbul Convention – will oblige EU Member States to implement its provisions in accordance with Article 288 of the Treaty on the Functioning of the European Union. Implementation of the Directive by Member States would allow achieving the objectives of the Istanbul Convention in EU.