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LAWMAKING AND SENTENCING IN RAPE AND CHILD SEXUAL ABUSE CASES IN POLAND – DEAD END OR RATIONAL CRIMINAL POLICY?

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ABSTRACT. Sexual offences have assumed crucial importance in Polish criminal policy in recent years. Several statutes have been enacted with a view to implementing a more appropriate penal response to this category of offence. For all their imperfections, the new regulations have the potential to create a rational, equitable and consistent penal response. These regulations prioritise resocialisation and correction. For reasons discussed in this paper, the courts have declined to apply these regulations, instead continuing to hand down their 'time honoured' custodial and suspended sentences. There appear to be several reasons for this, including cultural ones: an abhorrence of sex offenders and a fear of such crimes; a willingness to mete out what society regards as justice; a dismissive attitude towards the legislature; and perhaps a tendency, common among public institutions, to fulfil their legal obligations with a minimum of effort. Although there had been no increase in sexual crimes, the Polish Government (without any empirical research) declared that the existing measures were not working and decided (in 2015) that a paradigm shift was in order. This paper briefly discusses these issues and their likely ramifications. The current state of criminological knowledge about sexual crimes and its legislative implications are discussed. Some conclusions from the author's own empirical research on rape and child sexual abuse sentencing policy are also presented.

I INTRODUCTION

Sexual offences are of special interest to criminological, forensic psychiatric, and psychological researchers and academics. For many years now, theoretical concepts have been developed, and their practical significance and implementation investigated. The effectiveness, utility, advantages and disadvantages of these concepts have been analysed, and sentencing practices have been examined empir-

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ically.[1] Various theories have been verified, modified, and sometimes found to be untenable or of no practical value.

Sexual offences have also assumed crucial importance in Polish criminal policy in recent years. Several statutes have been enacted with a view to implementing a more appropriate penal response to this category of offence. For all their imperfections, the new regulations have the potential to create a rational, equitable and consistent penal response. These regulations prioritise resocialisation and correction.

The first aim of this article is to present and briefly describe the Polish legislation in order to assign the Polish criminal law in this area to one of two schools of thought on the motivations behind sexual offences (and on the proper penal response to such crimes). The literature on this topic does not analyse the Polish legislation this way.

The second aim is to present empirical research on whether, and if so how, the Polish courts have interpreted and applied the new legislation. Have they availed themselves of the new legal remedies in order to make the penal response to sexual offences more effective, proportionate, or deterrent in light of the current state of knowledge about this class of criminal, or have they declined to apply these regulations, instead continuing to hand down their 'time honoured' custodial and suspended sentences? It is worth trying to answer the questions about the reasons behind the research findings. As there is a dearth of empirical analyses of Polish criminal proceedings, even between academics, this aspect of 'the law in action' has not been adequately verified. The fact that Poland is the fifth most populous

[1] Call, 'Megan's law 20 years later: a systematic review of the literature on the effectiveness of sex offender registration and notification', Journal of Behavioral & Social Sciences 5(4) (2018), 205–217; Bratina, 'Sex offender residency requirements: an effective crime prevention strategy or a false sense of security?' International Journal of Police Science & Management 15(3) (2013), 200–218; Hanson and Bussiére, 'Predicting relapse: a meta-analysis of sexual offender recidivism studies', Journal of Consulting and Clinical Psychology 66 (1998), 348–362; Hanson et al., 'First report of the collaborative outcome data project on the effectiveness of psychological treatment for sex offenders', Sexual Abuse: A Journal of Research and Treatment 14(2) (2002), 169–194; Harkins and Beech, 'Measurement of the effectiveness of sex offender treatment', Aggression and Violent Behavior 12(1) (2007), 36–44; Polaschek and Ward, 'The implicit theories of potential rapists: What our questionnaires tell us', Aggression and Violent Behavior 7 (2002), 385–406. Polaschek and Gannon, 'The implicit theories of rapists: what convicted offenders tell us', Sexual Abuse: A Journal of Research and Treatment 16 (2004), 299–315.

country in the European Union[2] makes this lack of academic research and literature (especially in international journals) all the more surprising and disappointing.

The third aim is to illustrate the paradigm shift evident in the new legislative response to sex crimes and to determine whether the evidentiary, procedural and sentencing practices of the courts have influenced the legislature, and if so, how.

As mentioned above, there are two schools of thought on the motivations behind sexual offences. The first has the support of a sizeable group of academics, researchers and practitioners devoted to studying the causes of sexual offences.[3] Some of the most influential theories explaining these motivations and impulses, specifically those found in the writings of Malamuth[4], Finkelhor and Araji[5], Marshall and Barbaree[6], Hall and Hirshman[7], Ward and Siegert[8], and Beech and Ward[9], should be mentioned. These theories give cause to believe that if the motivations and impulses for committing sexual offences can be identified, then sentences can be most effectively tailored to

[2] Eurostat, 'Population and population change statistics', <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population_and_population_change_statistics#Population_change_at_a_national_level> (2019) (accessed 25th January 2021).

[3] Hall and Hall, 'A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues'. Mayo Clinic Proceedings 82(4) (2007), 457–471; Seto, 'Pedophilia and Sexual Offending Against Children. Theory, Assessment and Intervention.' Washington DC: American Psychological Association (2008); Marshall and Barbaree, 'An integrated theory of the etiology of sexual offending' (1990); Ward et al, 'Theories of Sexual Offending.' London: Wiley & Sons (2006).

[4] Malamuth, 'The confluence model of sexual aggression: feminist and evolutionary perspectives', In: Buss and Malamuth (Eds) 'Sex, power, conflict: Evolutionary and feminist perspectives.' New York: Oxford University Press, (1996), 269–295.

[5] Finkelhor and Araji, 'Explanation of pedophilia: A four factor model', The Journal of Sex Research 22 (1986), 145–161.

[6] Marshall and Barbaree, Supra note 3.

[7] Hall and Hirschman, 'Towards a theory of sexual aggression: a quadripartite model', Journal of Consulting and Clinical Psychology 59 (1991), 662–669.

[8] Ward and Siegert, 'Toward a comprehensive theory of child sexual abuse: a theory knitting perspective', Psychology, Crime and Law 9 (2002), 319–351.

[9] Beech and Ward, 'The integration of etiology and risk in sexual offenders: A theoretical framework', Aggression and Violent Behavior 10 (2004), 31–63.

particular offenders.[10] In this respect, the concept of cognitive distortions stands out. Briefly, this assumes that sex offenders often maintain beliefs and entertain thoughts that cause them to misinterpret reality. Their views on what constitutes 'normal' sexual behaviour lead them to see sexual violence on, or sexual activities with, a minor acceptable or at least excusable. Sex offenders with cognitive distortions often misinterpret innocuous behaviour as an invitation to engage in sexual activity.[11] Researchers obviously differ as to the best treatment regimen, and, far more importantly, the one most effective in reducing the risk of reoffending, although cognitive-behavioural therapy, psychodynamic therapy, and pharmacological treatment are the leading contenders.[12] However, the empirical research results on the overall effectiveness of these treatments are mixed. Additionally, many academics see tremendous advantages in comparing these solutions with the community protection model.[13]

The second school of thought is more commonly found among politicians than academics. This holds that in the absence of any universally accepted theory, and the lack of certainty regarding the

[10] Marshall et al., 'Handbook of sexual assault: Issues, theories, and treatment of the offender', New York: Plenum Press (1990); Ward et al., Supra note 3; Marshall et al, 'Cognitive behavioral treatment of sexual offenders', New York: Wiley (1999); Laws and O'Donohue (Eds) 'Sexual deviance: Theory, assessment, and treatment', New York: Guilford (2008).

[11] Ward and Keenan, 'Child molesters' implicit theories', Journal of Interpersonal Violence 14 (1999), 821–838; Polaschek and Ward, Supra note 1; Polaschek and Gannon, Supra note 1, Marshall et al., Supra note 10; Laws and O'Donohue, Supra note 10.

[12] Call, Supra note 1; Bierie, 'The utility of sex offender registration: a research note', Journal of Sexual Aggression 22(2) (2016), 263–273; Bonnar-Kidd, 'Sexual Offender Laws and Prevention of Sexual Violence or Recidivism', American Journal of Public Health 100(3) (2010), 412–419; Duwe and Goldman, 'The impact of prison-based treatment on sex offender recidivism: evidence from Minnesota', Sexual Abuse: A Journal of Research and Treatment 21(3) (2009), 279–307; Hall and Hall, Supra note 3; Hanson et al, Supra note 1; Hanson et al., 'Assessing the Risk of Sexual Offenders on Community Supervision: The Dynamic Supervision Project', Public Safety Canada website (2007), Available at: http://www.publicsafety.gc.ca/res/cor/rep/_fl/crp2007-05-en.pdf (accessed 1 April 2022); Hanson and Bussiére, Supra note 1; Hall and Hall, Supra note 3; Ward et al., 'Cognitive distortions in sex offenders: An integrative review', Clinical Psychology Review 17 (1997), 479−507; Ward, 'Sexual offenders' cognitive distortions as implicit theories', Aggression and Violent Behavior 5 (2000), 491–507.

[13] Call, Supra note 1; Bierie, Supra note 12; Duwe and Goldman, Supra note 12; Hall and Hall, Supra note 3; Hanson et al, Supra note 1; Hanson et al., Supra note 12; Hanson and Bussiére, Supra note 12.

effectiveness of any rehabilitation or treatment regimen, the best course of action is simply to isolate sex offenders.

II MODELS OF PENAL RESPONSE TO SEX OFFENDERS

Two fundamental theoretical models of how the criminal law should respond to the sexual offenders can be distinguished in the literature: (i) community protection[14] ; and (ii) clinical work[15].The former includes measures predicated on the belief that sexual offenders cannot be resocialised and will forever remain a danger to society[16]. The most ardent advocates for this model typically view the death penalty, or at least life imprisonment, as condign punishment. The community protection model, as the name suggests, places greater emphasis on protecting society from the perpetrator and preventing him/her from reoffending than on social rehabilitation, whereas the clinical work model focuses on therapeutic measures – both while the perpetrator is in custody and after being released. The main proposals of the community protection model (based primarily on United States data) include registers of sexual offenders[17], restrictions

[14] Vess, 'Risk assessment with female sex offenders: Can women meet the criteria of community protection laws?', Journal of Sexual Aggression 17(1) (2011), 77–91; Vess, 'Sex offender risk assessment: Consideration of human rights in community protection legislation', Legal & Criminological Psychology 13(2) (2008), 245–256; Craissati, 'Managing High Risk Sex Offenders in the Community' (2004) New York: Brunner–Routledge; Hanson et al., Supra note 12; Lewandowska, 'Karać czy leczyć? – strategie postępowania ze sprawcami przestępstw seksualnych wobec dzieci na przykadzie wybranych krajów', Dziecko krzywdzone 18 (2007), 1–14; Morawska, 'Strategie postępowania ze sprawcami przestępstw seksualnych wobec dzieci na przykadzie wybranych krajów', Dziecko Krzywdzone. Teoria, badania, praktyka 7 (2004), 1–14.

[15] Losel and Schmucker, 'The effectiveness of treatment for sexual offenders: A comprehensive meta-analysis', Journal of Experimental Criminology 1(1) (2005), 117–146; Lewandowska, Supra note 14; Morawska, Supra note 14.

[16] Mancini and Mears, 'To execute or not to execute? Examining public support for capital punishment of sex offenders', Journal of Criminal Justice 38 (2010), 959–968; Burstein, 'The impact of public opinion on public policy: A review and an agenda', Political Research Quarterly 56 (2003), 29–40; Cullen et al, 'Public opinion about punishment and corrections', Crime and Justice 27 (2000), 1–79; Quinn et al, 'Societal reaction to sex offenders: A review of the myths surrounding their crimes and treatment amenability', Deviant Behavior 25 (2004), 215–232.

[17] Ackerman et al., 'Who are the people in your neighborhood? A descriptive analysis of individuals on public sex offender registries', International Journal of Law and Psychiatry 34 (2011), 149–159; Levenson et al, 'Sex offender residence

on their place of residence[18], and electronic tagging[19]. Numerous scientific studies confirm that implementing these solutions can be highly problematic. Sex offender registration and notification laws (Megan's law) is more likely to result in socially excluding and stigmatising convicted sex offenders, and instilling fear in potential victims, than in lowering crime rates.[20] Failing to register is another problem identified by the researchers.[21] GPS and Radio Frequency monitoring is expensive, and even if it was infallible, this kind of surveillance it would be more useful in detecting other crimes than in deterring from reoffending.[22] However, this sort of monitoring is emphatically not infallible; in fact, it has not been shown to significantly reduce recidivism among sex offenders.[23] However, as

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Footnote 17 continued
restrictions: Sensible policy or flawed logic?', Federal Probation 71 (2007), 2–9; Lussier and Mathesius 'Not in My Backyard: Public Sex Offender Registries and Public Notification Laws', Canadian Journal of Criminology & Criminal Justice 61(1) (2019), 105–116; Call, Supra note 1.

[18] Mancini and Mears, Supra note 16; Payne and DeMichele, 'Sex offender policies: Considering unanticipated consequences of GPS sex offender monitoring', Aggression and Violent Behavior 16 (2011), 177–187; Bratina, 'Sex offender residency requirements: an effective crime prevention strategy or a false sense of security?' International Journal of Police Science & Management 15(3) (2013), 200–218; Rainey, 'The registration and monitoring of sex offenders', Journal of Sexual Aggression 21(2) (2015) 266–268.

[19] Beck and Travis III, 'Sex offender notification: An exploratory assessment of state variation in notification processes', Journal of Criminal Justice 34 (2006), 51–55; Rollman, "Mental illness': A sexually violent predator is punished twice for one crime', The Journal of Criminal Law & Criminology 88(3) (1998), 985–1014; Carlsmith et al, 'The Function of Punishment in the "Civil" Commitment of Sexually Violent Predators', Behavioral Sciences and the Law 25 (2007), 437–448; Calkins-Mercado and Ogloff, 'Risk and the preventive detention of sex offenders in Australia and the United States', International Journal of Law and Psychiatry 30 (2007), 49–59; Gannon et al, 'Rape: Psychopatology, theory and treatment', Clinical Psychology Review 28 (2008), 982–1008.

[20] Call, Supra note 1.

[21] Call, Supra note 1.

[22] Button et al., 'Using electronic monitoring to supervise sex offenders: Legislative patterns and implications for community corrections officers', Criminal Justice Policy Review 20(4) (2009), 414−436; Padgett et al., 'Under surveillance: An empirical test of the effectiveness and consequences of electronic monitoring', Criminology and Public Policy 5(1) (2006), 61−92.

[23] Bratina, Supra note 18; Rainey, Supra note 18; Lussier and Mathesius, Supra note 17; Call, Supra note 1; Gannon et al, Supra note 19; Hanson and Morton-Bourgon, 'The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A

emphasised in the literature, it is not the effectiveness (or lack thereof) of these measures that warrant their use or explain their popularity (especially in the United States). The authorities derive their legitimacy to implement and enforce such measures primarily from public opinion.[24] The average citizen admittedly knows little if anything about the specifics of sexual offenders, let alone what might constitute an adequate and proportionate criminal law response. Despite this, however, sexual offences arouse such powerful emotions – especially when the victim is a child – that rationality simply does not come into it, and our psychological, medical and criminological knowledge on this topic is dispensed with altogether.

In contrast to those measures aimed at protecting society, the clinical work model attempts to change the convictions, attitudes and behaviour of the perpetrator. As mentioned above, specific thoughts, beliefs, justifications, and rationalisations of one's actions are common traits of sex offenders.[25] Many researchers and therapists claim (with empirical research to back them up) that modifying these distortions can help change behaviour, and in so doing, help reduce recidivism among sex offenders.[26] It should additionally be noted that scientific research has identified the individual stages of the motivational and decision-making processes that result in committing sexual offences and in re-offending. If the perpetrator's thoughts and beliefs cannot be changed, then he/she should at least be taught enough self-control to avoid situations in which he/she would be tempted to reoffend. This approach boils down to offering psychotherapy, often supplemented with pharmacological treatment, and professional

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Footnote 23 continued
Meta-Analysis of 118 Prediction Studies', Psychological Assessment 21(1) (2009), 1–21.

[24] Mancini and Mears, Supra note 16; Quinn et al., Supra note 16; Cullen et al., Supra note 16; Burstein, Supra note 16; Petruccelli et al, 'Moral Disengagement Strategies in Sex Offenders', Psychiatry, Psychology & Law 24(3) (2017), 470–480; Hoppe, 'Punishing Sex: Sex Offenders and the Missing Punitive Turn in Sexuality Studies', Law & Social Inquiry 41(3) (2016), 573–594.

[25] Ward, 'Sexual offenders' cognitive distortions as implicit theories', Aggression and Violent Behavior 5 (2000), 491–507. Ward Tet al., 'Cognitive distortions in sex offenders: An integrative review', Clinical Psychology Review 17 (1997) 479−507.

[26] Witt et al., 'Cognitive/behavioral approaches to the treatment adult sex offenders', The Journal of Psychiatry & Law 36 (2008), 245–269; Marshall et al., Supra note 10.

assistance in readapting from social workers.[27] The provision or strengthening of protective factors, resources, along with a support network, combined with the minimalisation of risk factors, is stressed as a reasonably effective method of reducing risk of re-offending.[28]

When examining the criminal law response to sexual offenders, it can be difficult to discuss either of the two models in their 'pure' form. Many countries[29] have opted for a hybrid system that incorporates elements of both, but a predominance of one over the other is not uncommon.[30]

III CRIMINAL POLICY ON SEX OFFENDERS IN POLAND – HISTORICAL REMARKS AND CURRENT TRENDS

When assessing Polish criminal policy through the prism of the two models mentioned above, it is worth examining and analysing the most important (from the standpoint of this publication) changes in the criminal law in recent years.

As sexual offenders seem to be public enemy number one for the Polish legislature, several major amendments have been made to the relevant statutes and the Polish Criminal Code (CC) over the past 15 years. There are two main reasons why the governing coalition has identified sexual offenders as a group of criminals that should be treated with zero tolerance (or which serves to vindicate and promote penal populism). The first is fear. This is reminiscent of the panic about child sex predators in the United States in the 1990s.[31] The second, and related, reason is that penal populism has been on the

[27] Andrews and Bonta, 'The Psychology of Criminal conduct', Cincinnati: Anderson Publishing Company (2003); Hart et al., 'The risk–need model of offender rehabilitation' In: Ward et al. (Eds) 'Theoretical issues and controversies in sexual deviance' Londyn: Sage (2003), 338–354; Beech and Ward, Supra note 10; Beech et al., 'Risk assessment of sex offenders' Professional Psychology: Research and Practice 34 (2003), 339–352.

[28] Thornton, 'Constructing and testing a framework for dynamic risk assessment', Sexual Abuse: A Journal of Research and Treatment 14 (2002), 139–154; Hanson and Bussiére, Supra note 1.

[29] For Germany, Italy, France see: Lewandowska, Supra note 14; Morawska, Supra note 14.

[30] Lewandowska, Supra note 14; Morawska, Supra note 14.

[31] Salter, 'Predators: Pedophiles, Rapists, and Other Sex Offenders: Who They Are, How They Operate, and How We Can Protect Our Children' (2003) New York: Basic Books.

rise this century in Poland. Previously, criminal policy had not been the subject of a wide ranging public debate, and calling for harsher penalties had not been an easy way to earn political capital. Criminal law and criminal policy were the province of experts until the 1990s. Unfortunately, once the Law and Justice party (PiS: a socially conservative party that has used penal populism to enhance its electoral appeal) appeared on the political stage (in 2001), criminal law, criminal procedure, sentencing, and lawmaking became issues for laypeople. Sexual offenders (and their deeds) are ideal for convincing the public that the criminal law needs to made more severe. Nevertheless, the legislative response was informed by the clinical work model in 2005–2013. For example, probation obligations to undergo psychotherapy (Article 72 § 1 Pt. 6 CC), preventive, post-conviction detention, and compulsory psychotherapy for those convicted of offences involving sexual deviancy or paraphilia (Article 95a CC) were introduced. In addition, more acts were criminalised: making contact with a minor via an information system or telecommunications network in order to arrange a meeting for the purpose of engaging in sexual activity,[32] producing or possessing any pornographic material involving a minor; making sexually suggestive proposals to a minor (Article 200a § 1 and § 2 CC); and any condoning of paedophilic behaviour (Article 200b CC).

While sexual offences legislation has always been an emotional issue, these amendments were highly problematic from the standpoint of fundamental legislative principles in that they were open to the charge of emotional criminalisation. The statistical data on registered cases of condoning paedophilic behaviour and contacting minors for improper purposes via an information system or telecommunications network suggests that criminalising such conduct (the possibility of prosecuting these acts using existing regulations was not considered) was not a response to a growing social problem, but rather an appeal to penal populism and a desire on the part of the legislature to show that something was being done.

The most recent statute that follows the clinical work model is the Law of 22 November 2013 on the Treatment of Persons with Mental Disorders that Pose a Threat to the Life, Health, or Sexual Freedom of Others (Dz. U. 2014, poz. 24). This statute established the National Centre for the Prevention of Dissociative Behaviour. This institution, together with proceedings pursuant to the abovemen-

[32] The age of consent in Poland is 15 years. Consensual sexual intercourse with a minor, while a serious criminal offence, is distinct from 'statutory rape'.

tioned act, are similar to the United States' sexually violent predator laws and proceedings. Dangerous sex offenders in Poland are sent to a state-run detention facility once they have completed their sentences, and are confined there until they have been rehabilitated. This is because these offenders are deemed to have a 'mental abnormality' or personality disorder that predisposes them to commit sexual offences. A certain inconsistency can be observed in this normative act. Many commentators and proponents of the clinical work doctrine considered the purported justification for these provisions a façade that concealed their real purpose, viz to extend the sentences for sexual offences extrajudicially by having convicts isolated indefinitely once they had served their time. When viewed this way, these provisions clearly and unambiguously follow the community protection model. This exegesis was countered by politicians, who unwaveringly declared that the provisions were merely intended to provide the treatment and readaptation necessary to ensure the undisturbed functioning of society, and who claimed to have been vindicated by the Constitutional Tribunal ruling of 23 November 2016. This perception of the Act places it firmly within the clinical work model, although the ongoing criticism of the Constitutional Tribunal's position, together with recent reports on the functioning of the National Centre for the Prevention of Dissociative Behaviour, make it difficult to completely discount the operation of the community protection model.

A fundamental paradigm shift has been noticeable since 2016. The current Polish government concluded (without any research data or other empirical evidence) that the existing regulations on the penal response to sex offenders were not working. The Act on Counteracting the Threat of Sexual Offenses Crime was adopted on 13 May 2016. This statute introduced several new measures, including a register of sex offenders, a publicly available map indicating where sexual offences had been committed, and an obligation on employers to not have persons convicted for sexual offences working in positions that involve contact with minors. The nature of these solutions places them firmly within the community protection model. This assessment is confirmed by the official governmental justification of the bill, according to which: 'Offences committed for sexual purposes is a growing problem. The ease of communicating with, and preserving the anonymity of, contacts, together with the universality of access to means of communication and the impracticality of effectively monitoring them, have facilitated access to potential victims

and have made communications systems the main hunting ground for perpetrators of these offences. Sexual offences are also facilitated by the increasing anonymity of life and the collapse of informal controls. Committing offences is easier in atomised communities, where retreat into privacy has replaced living in a community. The risk of becoming a victim of crime has therefore increased as well. This risk appears to be very high, especially for children, and it should be emphasised that the harm done to them is often irreparable. The conviction that the state cannot limit itself to apprehending and punishing perpetrators after the fact is gaining ground. The challenge facing society is to implement proactive measures to prevent these kinds of offences. The current legal regime is not sufficiently re-sourced to effectively monitor sexual offenders, with the result that they continue to reoffend'.[33]

Both the content of, and justification for, this normative act compel the conclusion that it is entirely motived by a desire to protect the community. The ability to identify perpetrators of sexual offences (using the register) and places where sexual offences have been committed, and to prevent recidivism of convicted offenders, does nothing to improve or alter the behaviour of perpetrators, and everything to enable precautions to be taken against them.

The Polish parliament recently passed major amendments to the Criminal Code. The bill, made punishments more severe, all but abolish suspended sentences (especially for sexual offences), and made penalties for sex offences extremely harsh. The fundamental change of thinking on criminal policy is best illustrated by quoting the justification for the bill: 'Criminal law is an instrument that serves to satisfy the social sense of security and justice. This function of criminal law is not properly and effectively performed solely by threats of criminal sanctions for acts of great social harmfulness; it requires a multifaceted response – one in which other penalties, particularly preventive and compensatory ones, are imposed. The promoter of this bill intends to make the criminal-law response to prohibited acts directed against sexual freedom better reflect the seriousness of the act and the nature of the threat posed by the perpetrator. Obviously, in cases characterised by brutality, unusual cruelty or the infliction of inordinate harm and suffering, or where the

[33] Parliament, Sejm Rzeczypospolitej Polskiej, Sejm VIII Kadencji, Druk sejmowy numer 189 (2016), Available at: http://orka.sejm.gov.pl/Druki8ka.nsf/0/055744120464461FC1257F3A0050EAFB/%24File/189.pdf (accessed 5 April 2022), 13–16.

perpetrator is a repeat offender or likely to become one, the criminal law response should aim at the long-term – even indefinite if need be – isolation of the perpetrator, both on account of the nature of the act and the need to ensure the safety of society. Providing such a normative framework for the rational and effective application of the criminal law in order to protect society is a fundamental task of the state'.[34]

An analysis of the normative criminal policy changes towards sexual offenders allows some conclusions on the fundamental transformations that have taken place to be formulated. The overall trend has changed significantly, as can be seen in the tendency to pay lip service to the clinical work model, while implementing measures that belong to the community protection model. The bill discussed above is a perfect example of this. The earlier acts (2005-2013) mentioned above included regulations intended to have a preventive impact on the perpetrator – at least in principle. These normative changes were not always perfect and their use in criminal proceedings was sometimes problematic. However, it cannot be denied that the stated aim of the legislature was to reduce crime and ensure public safety by providing offenders with effective treatment and rehabilitation in order to prevent recidivism. The legislature is currently aiming to achieve the same goal (ensuring safety) by imposing long-term (and even indefinite if the nature of the act and the personal circumstances of the perpetrator make it necessary) incarceration.

IV SENTENCING POLICY ON SEX OFFENDERS IN POLAND – AN EVALUATION.

Two sets of data have to be included when evaluating the changes in Polish sentencing policy towards sex offenders: registered sexual offences; and public perception of, and opinions on, the sentences handed down by the courts.

This is best clarified by quoting Article 197 (rape) and Article 200 § 1 (sexual intercourse with a minor) of the Criminal Code in their entirety, as these will be referred to later.

Article 197 of the Criminal Code provides as follows:

[34] Parliament, Sejm Rzeczypospolitej Polskiej, Sejm VIII Kadencji, Druk sejmowy numer 2154, (2018), Available at: http://orka.sejm.gov.pl/Druki8ka.nsf/0/33FA7D96913B8F13C125821000388E45/%24File/2154.pdf (accessed 5 April 2022), 7–11.

§ 1. Anyone who, by force, illegal threat or deceit, subjects another person to sexual intercourse is liable to imprisonment for between two and 12 years.

§ 2. If the offender forces another person to submit to another sexual act, or to perform such an act in the manner specified in § 1, he or she is liable to imprisonment for between six months and eight years.

§ 3. If the offender commits a rape

1) in concert with another person,

2) towards a minor under the age of 15,

3) towards a descendent, ascendant, adopter, adoptee, brother or sister, he or she is liable to imprisonment for at least three years.

§ 4. If the offender commits the rape specified in §§ 1–3, with extraordinary cruelty, he or she is liable to the penalty of imprisonment for at least five years.

Article 200 § 1 provides as follows:

§ 1. Anyone who has sexual intercourse with a minor under the age of 15, or commits any other sexual act, or leads him or her to undergo such an act or to execute such an act, is liable to imprisonment from two to 12 years.

The chart below presents the crime rates for rape and sexual intercourse with a minor (per 100,000 inhabitants in 2010–2020). As can be seen, there is no evidence of any constant upward trend for either offence (Graph 1).

Police statistics[35] do not support the claim that sexual offences are constantly increasing. The legislature, however, cherry picked these statistics and interpreted them in such a way as to confirm its predetermined conclusions and support its pre-established goals. This is because crime incidence, prevalence and concentration are irrelevant to the problem that the legislature wants to resolve, viz the sentences imposed for sexual offences. The fact that almost a third of convicted rapists had had their sentences suspended was adduced as justification for the bill. This was cited as evidence that the courts were overly lenient towards sex offenders, that they had to be forced to impose custodial sentences, and that these had to be more severe. Curiously, the legislature did not conduct any analyses to support its conclusion that sentences were 'too lenient', although it did accurately cite the number of suspended sentences. However, once the fact that a third of rapes (according to court files) are attempted rapes or 'improper

[35] Victimisation surveys, and 'dark number' estimates are beyond the scope of this essay.

touching of a sexual nature'[36] (Article 197 § 1 CC criminalises rape in the form of sexual intercourse obtained by coercion, unlawful threat, or deception whereas Article 197 § 2 CC criminalises 'rape' in the form of other [than sexual intercourse] sexual activity), is taken into account, the preponderance of suspended sentences should not come as any surprise. Moreover, the justification for the bill contains no analysis of rape crime phenomenology, no typology of this category of crime based on empirical research, or indeed anything that would enable the sentences for different categories of rape to be rationally assessed.[37] The situation regarding sexual intercourse with a minor is very similar. The Ministry of Justice attempted to justify these recent amendments to the Criminal Code by producing data that supposedly demonstrated that suspended sentences were unduly lenient for sexual offences. The data were accurately cited, but no conclusions could reasonably be drawn without a detailed analysis. The Polish Criminal Code prohibits sexual activity of any kind with a minor. So, would a 17-year-old boy be a dangerous criminal and a menace to society for having consensual sex with his 14.5-year-old girlfriend?[38] This is by no means a hypothetical situation. Almost 40% of Article 200 cases fall into this category.[39] These are not cases of paedophiles and victims, but of 'innocent' teenagers beginning their sex lives early.

Without an in-depth analysis of the statistics, the charge that the courts are inordinately lenient towards sexual offenders is founded solely in the expectations of an uninformed public.

Research shows that most Poles believe that more stringent laws reduce crime. Over 50% of respondents in one poll were in favour of tightening penalties for the most serious crimes, and as many as 30% were in favour of tightening penalties for all crimes.[40] It should therefore come as no surprise that increasing the severity of penalties is appealing to politicians. Moreover, 72% of respondents indicated

[36] Bocheński, 'Prawnokarna reakcja wobec sprawców przestępstw z art. 197 KK i art. 200 KK w świetle teorii i badań empirycznych' (2016) CH Beck, Warsaw; Mozgawa (ed), 'Przestępstwo zgwacenia', (2012), Wolters Kluwer, Warsaw.

[37] Bocheński, Supra note 36; Mozgawa, Supra note 36.

[38] Adult criminal liability begins at the age of 17 in Poland.

[39] Bocheński, Supra note 36; Mozgawa and Budyn-Kulik, 'Prawnokarne aspekty pedofilii. Analiza dogmatyczna i wyniki badań empirycznych', Czasopismo Prawa Karnego i Nauk Penalnych 2 (2006), 43–78.

[40] Kantar Public, 'Badanie opinii Polaków na temat zaostrzenia polityki karnej' (2018), Available at: http://www.tnsglobal.pl/coslychac/files/2018/09/Raport-Kantar-Public_Opinie-o-zmianach-w-prawie-karnym.pdf (accessed 5 April 2022)

that increasing the penalties for serious crimes against life, health and freedom would be an expression of justice and increase the sense of security among the citizenry.[41] The highest percentage (78%) nominated rape as the crime they would most like to see more severely punished.[42] However, it is highly unlikely that the general public knows much about the specifics of sexual offences, let alone the most effective and adequate criminal-law responses. Moreover, these demands for greater severity are likely to be largely emotionally driven, and this in turn is likely to be a reflection of media coverage and statements by politicians.[43]

Against this backdrop, penal populism cannot help but be a distinctive feature of Polish criminal policy, especially in the case of sexual offences. This point has frequently been raised in academic discourse recently. The consensus is invariably that the recent changes to the criminal law are a backward step, as they were not drawn up as a balanced and adequate response to any identifiable social ill, but merely calculated to win political kudos and build electoral capital.[44] Sadly, Polish criminal policy can indeed be summed up as 'penal populism'.[45] A criminal policy informed by logic and evidence would regard changing the law without conducting any serious research beforehand in the hope of achieving some goal as inane wishful thinking – unless, of course, the goal is to win plaudits from the public.[46]

The foregoing considerations inexorably lead to the conclusion that the increased severity of criminal policy towards sex offenders has not been driven by a higher rate of such offences. Moreover, it evinces a very poor knowledge of the specifics of sexual offences.

From a criminological perspective, it can be instructive to examine whether, and to what extent, the sentences handed down by the

[41] Kantar, Supra note 40.

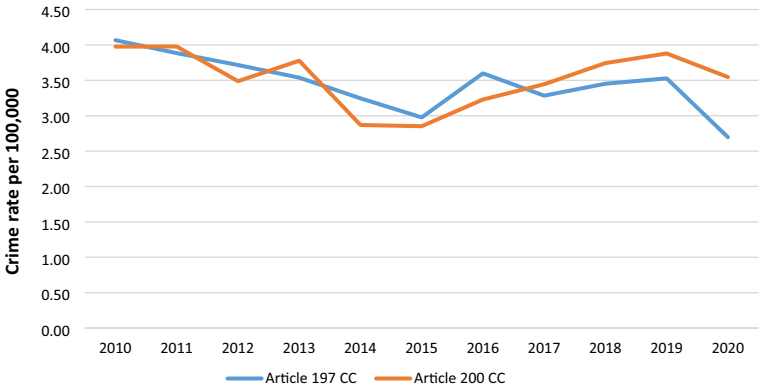
[42] Kantar, Supra note 40.

[43] Garland, 'The culture of Control Crime and Social Order in Contemporary Society', (2001), New York: Oxford University Press; Pratt, 'Penal populism', (2007), New York: Routledge; Tonry, 'Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy' (2004), Devon, Portland: Willan Publishing.

[44] Pratt, Supra note 43.

[45] Bocheński, 'Populizm Penalny w polskim wydaniu – rzecz o kryminologicznej problematyce ustawy o postępowaniu wobec osób stwarzających zagrożenie', Czasopismo Prawa Karnego i Nauk Penalnych 1 (2015), 127–144.

[46] Pratt, Supra note 43; Garland, Supra note 43.



Graph 1. Crime rates for rape and sexual intercourse with a minor per 100,000 inhabitants in Poland in 2010–2020. Source: Statistical yearbook of Poland 2010–2017

courts have influenced the legislature, especially with respect to the policy transition from the clinical work model to the social protection model.

V METHODOLOGY

Court files for offences under Article 197 and Article 200 of the Criminal Code were examined using a questionnaire designed by the author. This contained predefined questions concerning, *inter alia*, crime description, and circumstances, characteristics and data concerning perpetrators and victims, but above all, the kinds of penal response employed by the courts. The research was conducted in February and March 2014 in the Criminal Divisions of the Regional Courts (where cases of rape and sexual intercourse with a minor are generally tried in the first instance), and District Courts (which hear appeals from the Regional Courts and are vested with jurisdiction to hear more serious cases in the first instance) in Katowice and Kraków. The research was conducted as a PhD research project, and consequently had a limited geographical scope and mainly exploratory character. All relevant cases from 1 January 2006 to 31 December 2012 were considered, but only those that resulted in a final conviction for rape or sexual intercourse with a minor were selected for examination. When examining (on the basis of actual court files, that were analysed personally by the author in the court) the response of the judiciary to a particular offence, it is imperative

that only those cases where the offence meets the statutory definition thereof, and where a final conviction has been recorded, be investigated. At the time of conducting the research, 230 court case files (out of 288) were available. Every file in the sample was analysed – 148 concerned rape (35 rape case files were not available) and 82 concerned sexual intercourse with a minor (23 case files were not available).

According to the author's research, as well as nationwide data, those convicted of rape generally receive a custodial sentence (65%)[47], whereas those convicted for sexual intercourse with a minor mostly receive a suspended sentence (60%).[48] On the face of it, then, sexual offenders would seem to be treated leniently by the courts. However, once the fact that over 40% of cases of sexual intercourse with a minor involve consensual sexual activity between young people (and 23% between girlfriend and boyfriend, and 17% between friends or acquaintances) is taken into account, this proportion is quite understandable. In these cases, there were no paedophiles or sexual predators attacking children; sexual intercourse was simply sexual initiation (or early sexual experiments and experiences). As recent domestic research shows, the age of sexual initiation is constantly decreasing.[49] However, according to criminal code, every sexual activity with a person younger than 15 years old, even if consensual, is a crime. It is hard to imagine the courts incarcerating teenagers for engaging in this sort of sexual activity. Such behaviour may well be psychologically harmful but the criminal law is not the most appropriate means of response or prevention.[50] Far more interesting are the

[47] Bocheński, Supra note 36.

[48] Bocheński, Supra note 36.

[49] Giddens, 'Przemiany intymności. Seksualność, miość i erotyzm we współczesnych spoeczeństwach' (2006) Warsaw: Wydawnictwo Naukowe PWN; Izdebski, 'Seksualność Polaków na początku XXI wieku. Studium badawcze', (2012) Cracow: Wydawnictwo Uniwersytetu Jagiellońskiego; Kaczorek and Stachura, 'Przemiany seksualności' (2009), Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego; Pacewicz-Biegańska, 'Przemiany seksualności nastolatków', Przegląd Pedagogiczny 2 (2013), 108–118; Izdebski, 'Inicjacja seksualna po polsku' (2002), Available at: tnsglobal.pl/archiv_files/IP37-02.doc (accesed 4 April 2022); Woynarowska and Mazur, 'Zdrowie modzieży szkolnej w Polsce. Zachowania zdrowotne i samoocena zdrowia. Raport z serii badań wykonanych w 1998 roku', (1999) Warsaw.

[50] Faller, 'Child Sexual Abuse: Intervention and Treatment Issues' (1993) Darby: Diane Publishing; Faller, 'Understanding and Assessing Child Sexual Maltreatment' (2003) New York: Sage.Finkelhor, 'Child Sexual Abuse: New Theory and Research' (1984) New York: Free Press; Finkelhor, 'Child Sexual Abuse. Challenges Facing

TABLE 1
Special forms of penal response to rape and sexual intercourse with a minor

Penal response of the courts	Rape – percentage of cases where special form was applied	Sexual intercourse with a minor – percentage of cases where special form was applied
None	67%	35%
Police supervision	16%	42%
Protection orders	6%	25%
Substance abuse treatment	4%	6%
Treatment (psychotherapy or sexological therapy)	2%	6%

Source: Author's empirical research

results concerning the special forms of penal response (ie other than a custodial or suspended sentence) introduced since 2005. Some of the amendments to the Criminal Code comprise regulations that belong to the clinical work model. These include: restraining orders (which prohibit a person from attempting any sort of contact with, or being within a specified distance from, his/her victim(s), and even from being in the vicinity of children's playgrounds, schools, etc.); substance abuse treatment (where convicts are obliged to undergo treatment if they offended under the influence of alcohol or drugs); and other forms of treatment, including psychotherapy and sexological therapy. Table 1 below also mentions 'police supervision'. This was introduced before 2005 – not as a special form of penal response to sex offenders, but one that was applicable to all crimes. It was often obligatory in the case of suspended sentences.

These results are hardly surprising given that 65% of those convicted of rape and 40% of those convicted of sexual intercourse with a minor receive custodial sentences. However, it has to be stressed that all these penal measures can also be applied upon release from prison. Although incarcerated criminals can be legally required to undergo treatment programs, experience shows that the Polish prison

Footnote 50 continued
Child Protection and Mental Health Professionals' [in:] Ullman and Hilweg (eds), 'Childhood and Trauma. Separation, Abuse, War' (1997), Aldershot, Brookfield: Ashgate.

service is reluctant to implement them.[51] The cost involved is obviously a factor, especially when the government sees sex offenders as 'beasts' undeserving of humane treatment and on whom any expenditure is deemed not only a waste of money, but a gross injustice. To return to Table 1, the legislature has a point in claiming that the current system is not working, as the law will obviously be ineffective unless it is applied by the courts.

It is worth finding the reason(s) for this state of affairs. The courts have certainly given the legislature a convenient excuse for fundamentally changing criminal policy without having to produce any serious empirical research to justify it, and without having to show that it will have no deleterious side effects. The only criterion for success was public approbation.

One possible answer can be found in judicial scepticism towards new solutions, such as therapy and treatment.[52] Polish courts appear to be unshakeable in their conviction that custodial and suspended sentences are the most appropriate forms of punishment.[53] This is especially likely when it is considered that some of the obligations that typically accompany a suspended sentence (eg psychotherapy, anger management therapy, sexological treatment) raise several important questions, eg who is to bear the costs, what if there are no qualified specialists in the vicinity, etc. Another possible explanation is ignorance. It can be difficult, if not impossible, to adopt an appropriate penal response to a particular offender, who may have a wide range of psychological and/or psychiatric issues, in the absence of detailed specialist information. The author's research reveals that expert witnesses (psychiatrists, psychologists, sexologists) are not always called to give evidence in cases of rape or sexual intercourse with a minor.[54] Moreover, the use of presentence reports are seldom if ever ordered.[55] In this situation, expert witness testimony is often

[51] Rutkowski and Sroka, 'Sprawcy przestępstw seksualnych – oddziaywania terapeutyczne w okresie odbywania kary pozbawienia wolności', Dziecko Krzywdzone 1(18) (2007), 27–34.

[52] Tonry, Supra note 43.

[53] Melezini, 'Punitywność wymiaru sprawiedliwości karnej w Polsce w XX wieku, (2003), 14–25.

[54] Bocheński, Supra note 36; Wysocki, 'Taka sprawiedliwość, jaki jej wymiar', Monitor Prawniczy 3 (2010), 38–43.

[55] Bocheński, Supra note 36; Habzda-Siwek, 'Diagnoza stanu psychicznego sprawcy a rozstrzygnięcia w procesie karnym', (2002) Cracow: Zakamycze; Beisert, 'Pedofilia. Geneza i mechanizm zaburzenia, (2011) GWP, Sopot.

the only source of information about the accused. A third hypothesis concerns the lack of guidance to assist in evaluating conduct and determining an appropriate sentence using with the special forms of penal response enumerated above. Tools such as the Sex Offender Risk Appraisal Guide and the Minnesota Sex Offender Screening Tool have not been adapted to Polish conditions. However, at the very least, they can and should be used to assess the risk of reoffending.[56] A fourth hypothesis has to do with institutional dysfunction. Throughput is a key performance criterion for Polish courts. The average trial duration and the number of cases decided in a given period are more important than substantive issues, including measures intended to prevent reoffending. Sexual offences trials are therefore conducted expeditiously and perfunctorily. Any analysis of crucial issues is superficial at best.[57] It is worth pointing out that so far as the psychiatric state of the accused is concerned, Polish courts rarely do more than assess whether he/she is compos mentis and therefore fit to stand trial All other psychological and psychiatric concerns appear to be dismissed as irrelevant.[58] Before a court can order appropriate psychological or psychiatric treatment, the risk and protective factors have to be balanced, the needs and responsivity of the convict assessed, and his/her psychological and/or psychiatric problems analysed. Without expert witness testimony and/or professional presentence reports, the courts are simply 'flying blind'.

VI CONCLUSIONS

Current Polish criminal policy on sexual offences can be fairly described as an abandonment of the clinical work model, and an embrace of the community protection model. Most recently introduced measures are primarily intended to win public approval. As these measures have proved ineffective in preventing recidivism and protecting society, it can be argued that they constitute nothing more than penal populism and retributivism. Unfortunately, by not implementing measures that had been introduced to mitigate the risk of recidivism through correction and rehabilitation rather than

[56] Bedowski and Sześcio, 'Stan wymiaru sprawiedliwości w Polsce w świetle międzynarodowych badań porównawczych' Monitor Prawniczy 3 (2010), 2–11; Bocheński, Supra note 36.

[57] Habzda-Siwek, Supra note 55; Mozgawa and Budyn-Kulik, Supra note 39; Bedowski and Sześcio, Supra note 56; Wysocki, Supra note 54.

[58] Habzda-Siwek, Supra note 55; Mozgawa and Budyn-Kulik, Supra note 39.

incarceration, the judiciary gave the legislature all the excuse it needed to change the law. This amply demonstrates that sentencing policy and practice can affect the legislative process. It is vitally important that the theory and practice of law be based on evidence, and supported by academic studies on such phenomena as sexual offences. So long as the formulation and application of the law are more responsive to public opinion and media campaigns than scientific evidence, it is futile to speak of any rational system of penal response to sexual offences.

Of course, it can be argued that a nationalist, socially conservative, populist government (such as that which has governed Poland since 2015) can be expected to ignore evidence and research on sex offenders and espouse a more punitive, community protection approach to sex offenders.[59] For penal populists, it usually suffices to warn of 'the need for more severe punishment, in order to protect society' before to enacting new legislation.[60] But as shown here, it can be hypothesised that the judiciary gave the legislature all the justification (or excuse) it needed to change the law in so far as sexual offences are concerned. More academic and empirical research is required to confirm this hypothesis, as it is quite counterintuitive. The impact of legislation on the judiciary is widely recognized as a fact (in the sense that it circumscribes judgments), whereas analyses of judicial rulings on the legislature are far less common (see Weingast et al. 1995).[61]

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[59] O'Malley, 'Volatile and contradictory punishment', Theoretical Criminology 3(2) (1999), 175–196; Garland, 'Penality and the Penal State', Criminology 51(3) (2013), 475–517.

[60] Pratt, Supra note 43.

[61] Weingast et al., 'Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law', Southern California Law Journal 68 (1995), 1631–1683.