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**Offense of sexual exploitation
helplessness or insanity**

***Przestępstwo seksualnego wykorzystania
bezradności lub niepoczytalności***

SUMMARY

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The issue of sexual crime currently appears as an extremely interesting and multi-threaded topic. As a serious social problem, it is of great interest to the public, politics and, above all, criminal law.

However, it needs to be pointed out that while in the field of crimes such as rape (Article 197 of the Polish Penal Code) or pedophilia (Article 200 of the Polish Penal Code) many extensive studies have been published so far, but there are still other areas covered by this issue that have not been distinctly noticed by representatives of the doctrine.

One of the examples of terra incognita in this aspect is the crime under Article 198 of the Polish Penal Code - sexual abuse of helplessness or insanity resulting from mental illness or mental retardation. There is no sufficient scientific study concerning this type of prohibited act from Chapter XXV of the Polish Penal Code is a gap that is puzzling due to the theoretical doubts related to it, which are reflected in the practical application of the said provision. Therefore, the presented argument is a direct reason for undertaking the preparation of a dissertation on the crime of sexual abuse of helplessness or insanity.

The purpose of the research is to carry out a thorough analysis of both the premises constituting the content of the provision of Article 198 of the Polish Penal Code, as well as determining its place in the catalog of sexual offenses due to its essence and assumptions behind this sanctioning norm.

In connection with shaping the content of the provision of Article 198 of the Polish Penal Code, which penalizes the discussed type of crime, it should be pointed out that it is associated with complexity already at the stage of its interpretation.

The reasons for this state of affairs, and at the same time the hypothesis of this dissertation, can be found in the characteristics of the victim, which include: "helplessness", "mental illness" and "mental retardation". Being vague terms, they create space for interpretation doubts, both strictly theoretical and practical. This, in turn, leads to a partial conclusion, according to which interest in the presented issue will lead to the development of the science of criminal law, ordering the intricacies related to the interpretation of Article 198 Polish Penal Code.

Carrying out this process is impossible without the subsidiary use of elements from extra-legal sciences, such as psychology and psychiatry. The interdisciplinary approach to the subject of research allows for a broader context, and thus its appropriate application and adaptation to the purposes of criminal law, which is, after all, part of a broader category

of sciences, which are social sciences.

The reasoning of the dissertation is conducted in a way that aims to treat the fact cited here as a control point. The aim is to analyze the issue in such a way that it is consistent with the methodology appropriate for research on law, with simultaneous vigilance regarding the essence of law in general, including and criminal law. This means constantly referring the assessed problem to the assumption that the law is primarily an element of regulating social relations, so it is a tool, a means to an end, and not an artifact. So it's supposed to be useful and fair. This research attitude corresponds to changes in social awareness and sensitivity to mental health issues, and at the same time it is an expression of care for an interdisciplinary approach to the conducted considerations.

With reference to the argument quoted here, it should be noted that the doctoral dissertation in question was prepared taking into account the formal-dogmatic method, the axiological method, the historical-descriptive method and the comparative method. It has been divided into six chapters.

In view of the above, the considerations in question begin with a discussion of the changes that the idea of regulation has undergone in the past, which now constitutes the crime of sexual exploitation under Article 198 PC. The assessment in question indicates the accompanying and indirectly driving legislative changes, which were reflected in the criminal acts of 1932 and 1969, and which ultimately led to the current shape of the analyzed provision from Chapter XXV of the Criminal Code.

Conclusions in this regard are an introduction to the further relevant part of the study, dealing with the issue of determining the right good protected by Article 198 Polish Penal Code. Having a choice of two title objects of protection indicated by the legislator in the title of the aforementioned chapter of the criminal act, this is sexual freedom and decency, the latter can be defined as the legal good of the crime of sexual exploitation of helplessness or insanity. This is evidenced by the nature of sexual freedom in general, which, having two aspects: freedom "to" and freedom "from", in the case of the assessed type, consists in the violation of the victim's right to consciously and freely make decisions in the field of sexual activity undertaken by him/her. So it is positive freedom.

In the context of decency, a skeptical attitude towards this good in general can be raised, bearing in mind its archaic nature in relation to the current, relatively liberal approach of society to the issue of an individual's sexual life. This issue is considered an element of the

sphere of private life of a person, and therefore interference in this type of area by criminal law should be limited to the minimum necessary. On the other hand, the good protected in the form of morality does not fit into such a framework, leaving room for constructing dangerous ones from the point of view of human rights, criminal law regulations that could lead to unjustified penalization of certain manifestations of sexual activity. In addition, it can be argued that due to the sufficiently sufficient nature of the legal good in the form of sexual freedom, a postulate may be made to abandon morality as a protected good and grant it only a subsidiary role, as a rule of morality.

Considerations on the amendments to the Polish Penal Code proposed by the group of deputies, including the introduction to Article 197 of the Polish Penal Code, which would also be reflected in the context Article 198 Polish Penal Code. The analysis of the project of March 8, 2021, combined with comparative legal considerations shows the legitimacy of the proposed changes in the mentioned range.

The presented issues lead to a further discussion of the subject matter of the crime under Article 198 of the Polish Penal Code, this is taking into account the issue of interpretation of vague non-legal premises characterizing the injured party, which include: helplessness, mental illness and mental retardation. Elements of knowledge from such fields as psychology and psychiatry due to their etiology rooted in the cited sciences. The interpretation outlined in this way shows a broader context, thus becoming more useful for the purposes of criminal law. This is intended to contribute to the reduction of related doubts with the interpretation of the extra-legal premises of the prohibited act of sexual exploitation under Article 198 of the Polish Penal Code, and thus help in the correct legal qualification of the act.

The assessment of the premises of the objective side leads to the question about the subject and the subjective side of the discussed type of generic sexual crime. In the context of the issue of the subject, a general statement can be used that due to the legislator's failure to apply any features, there is no limitation in this respect. This means that the perpetrator of the crime under Article 198 of the Polish Penal Code can be anyone, for example a spouse or a partner in a homosexual relationship etc.

However, with regard to the acceptable form of committing the crime of sexual exploitation of helplessness or insanity, the analysis of this problem is complex. Apart from the obvious conclusion regarding the possibility of the perpetrator committing the cited act

with direct intent, a question arises as to conditional and quasi-conditional intention. It seems that the last two forms of intent can also be carried out by the perpetrator, which is justified, among others, by the in the possibility of constructing a credible hypothetical factual state assuming circumstances in which both *dolus eventualis* and *dolus quasi-eventualis* could be implemented. Such a statement also results from the nature of vague premises - helplessness, mental illness or mental retardation.

This in turn leads directly to another problem discussed in this dissertation, namely the error and the inept attempt. Given the specificity and subjectivity of the features listed here, doubts may arise regarding the above-mentioned institutions of criminal law.

In the event of an error as to the fact, it can be pointed out that in the light of the 2015 amendment, it is not possible to have it in the context of Article 198 Polish Penal Code. However, in a relationship with the overlap of this topic with the general rules on intentionality and the possibility of attributing crimes of this type to the perpetrator, it should be noted that the alleged perpetrator who is not aware of the presence of a sexual partner at the time of the act, e.g. insanity due to mental illness, will not be liable due to lack of guilt.

In the context of an error as to the law, its adoption is highly doubtful, bearing in mind the hypothetical factual state that is difficult to conceive, which is a justified error of this type and boils down to the perpetrator's lack of awareness of the legal prohibition of using wasps for sexual purposes may e.g. unconscious due to alcohol intoxication. Such behavior fundamentally violates the principle related to humanity and life in society, and based on the general prohibition of harming another person and doing something against his will. It is, therefore, above all an immanent moral principle inherent in the human species living in civilized societies.

A different legal assessment accompanies the institution of failed attempt in the discussed context. The possibility of occurrence of circumstances that would justify its adoption is in the light of Article 198 of the Polish Penal Code probable. The position according to which the perpetrator, who, being in error as to the occurrence of the features indicated in the provision specifying the type of crime under analysis, undertakes sexual intercourse or other sexual activity with such a person in the circumstances of actual non-fulfilment of any extra-legal premise, may be fully justified as fully justified. in connection with the content of Article 13 §2 Polish Penal Code.

Considerations of this kind, showing the spectrum of issues affecting the sexual abuse of helplessness or insanity, close with a discussion of the issue of the statutory threat of punishment of the crime under Article 198 Polish Penal Code.

They show, also using the method of legal and historical transformations, which the regulation of this institution affected the discussed issue. At the same time, great emphasis is placed in this context on indicating the difference in the legislator's approach to the crime under Article 198 of the Polish Penal Code in juxtaposition with rape under Article 197 Polish Penal Code. This is especially visible in the context of the amendment by the Act of July 7, 2022, which will come into force at the beginning of October 2023. It thoroughly rebuilds the provision of Article 197 of the Polish Penal Code by adding new qualified types, modifying the existing ones, but above all, it assumes a decided increase in the risk of punishment, providing for life imprisonment in cases with a particularly high degree of social harmfulness. At the same time, this image contrasts with the provision of Article 198 of the Polish Penal Code, which has been operating in its current form since the adoption of the current Polish Penal Code in 1997.

However, in this context, attention should be paid to the only previously mentioned draft amendment to the Polish Penal Code of 2021, which assumes, among others, increasing the statutory threat of punishment for the perpetrators of the crime in question. This is the right direction in which the legislator should go, but it is not the only possible one. It is also necessary to pay attention to other forms of influencing the law on sexual crime of the analyzed type through general prevention, individual prevention through public education and showing the scale of the problem and threats of sexual crimes, as well as the implementation of an individual approach to serving a prison sentence by such a perpetrator.

The final conclusion regarding the entirety of the considerations undertaken assumes noticing one basic dependence that affects the regulation of the so-called sexual offences, including those codified by Article 198 Polish Penal Code. It is a constant change and a close connection with social changes in the sphere of social attitude to the issue of the sexual life of individuals. Criminal law regulation in this area is to play a special role of a regulator, but adequate and appropriate to the current challenges and social problems in this area.

Therefore, the *de lege ferenda* proposals focus primarily on amending Article 198

Polish Penal Code through among other introducing the condition of non-consent to the crime of rape. This would allow for the actual breakdown of helplessness into physical and mental, which is actually synonymous with, for example, in Article 31 of the Polish Penal Code with the term "other disturbances of mental activity". This, in turn, would contribute both to increasing the protection of the criminal law against the crime under Article 197 of the Polish Penal Code, as well as to exclude at least some interpretative doubts regarding Article 198 Polish Penal Code. Other problematic issues would be resolved by introducing Article 115 of the Polish Penal Code of the statutory definition of mental illnesses by enumerating the general types of mental disorders which, according to the legislator, deserve to be included within the term "mental illness".

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