However, none of the dilemmas listed calls into question the justification of the principle.

Final considerations. The application of the principle of the opportunity of prosecution in Serbia so far shows its full criminal and political justification. However, this does not mean that there are no controversial issues in its standardization and implementation. There are indeed a number of dilemmas in both its standardisation and application, and they are mainly due to the lack of precision of the norms that govern it.

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THE OFFENCE OF RAPE IN POLISH PENAL LAW

The offence of rape is addressed in Chapter XXV "Offences against sexual liberty and decency", in Article 197 of the Polish Penal Code. This provision provides for two basic types of offence (§ 1 and § 2) and aggravated types (§3 and § 4). The subject of protection under Article197 of the Penal Code are sexual liberty (the right to freely dispose of one's sexual life) and decency (which prohibits involuntary sexual intercourse and other involuntary sexual activities).[1] For the offence of rape to exist, it requires a lack of an effective consent from the entitled person to a specific perpetrator's behaviour. The lack of consent is both the absence of a positive decision and the expression of a negative decision. Where such consent (to sexual intercourse or other sexual activity) is expressed there are no statutory criteria of the offence of rape.[2] In the literature, there is also a statement that there is no rape when the resistance is not actual (is apparent)[3], however, as M. Mozgawa points out, it can cause

serious practical difficulties to determine the nature of resistance.[4]

The basic type of the offence of rape consists in subjecting another person, by force, illegal threat or deceit, to sexual intercourse (§ 1) or to other sexual act or to perform such an act (§ 2). In the scholarly opinion and judicial decisions it is being assumed that the criterion of "sexual intercourse" includes the so-called appropriate sexual intercourse (copulation), as well as surrogates of sexual intercourse, i.e. all forms of sexual contact equivalent to copulation that lead (or can lead) to satisfying one's sexual desire (e.g. oral and anal intercourses).[5] Homosexual relations are also included in the concept of sexual intercourse.[6] The condition for considering a given activity as sexual intercourse is the involvement in this activity of the genital organs of the perpetrator or the victim[7] or both at the same time. Therefore, rape occurs when the causative act involves direct sexual contact of the perpetrator's body with the sexual organs of the victim or with those parts of the victim's body which the perpetrator treats as an equivalent thereof and on or by which the perpetrator releases his/her sexual desire. The concept of sexual intercourse does not comprise touching genitals because such behaviour is defined as "another sexual activity." It should be assumed, however, that all other activities, exceeding just touching, and involving the penetration of genital organs, e.g. with a finger or with the help of another object, will fall within the term of sexual intercourse.[8] Therefore, "another sexual activities" are all other activities that are not penetrative and involve the bodily contact between participants in such activities, combined with the physical involvement of the intimate areas of the body of at least one of them, or with at least the physical involvement of the intimate areas of the body of one of them, that will be of a sexual nature, i.e. they can be considered as a form of satisfying stimulation of natural sexual desire. Such activities include, among others, non-penetrating contact with the genitals or anus, touching and kissing them, touching the breasts, mutual masturbation (which is not combined with the insertion of e.g. a finger into the vagina or anus).[9]

Pursuant to Article 197 § 1 of the Penal Code, the statutory criterion of rape is the behaviour consisting in bringing subjecting another person to sexual intercourse using violence, an illegal threat or a deception. Such an act constitutes a misdemeanor, punishable by imprisonment of 2 to 12 years, while the penalty of imprisonment from 6 months to 8 years is to be imposed for subjecting another person to submit to another sexual act or performing such an act (Article 197 § 2 of the Penal Code). Violence is such a means of action which, while preventing or overcoming the forced person's resistance, is supposed to either prevent the decision of their will from being made or executed, or, by pressing the current motivational processes with a severe strain, to set his or her decision as desired by the perpetrator.[10] An illegal threat, according to its statutory definition in Article 115 § 12 of the Penal Code, is both a punishable threat (a threat to another person to commit an offence

detrimental to that person or detrimental to his next of kin), and also a threat to cause the institution of criminal proceedings, or to disseminate derogatory information concerning the person threatened or his next of kin. The third way in which the perpetrator acts is deception. In the legal scholarly opinion, there are two approaches to deception: the narrower one (deception consists in misleading or exploiting the victim's mistake as regards motivational premises which influence the victim's decision on sexual consent) and the broader one (deception consists in both misleading or exploiting the victim's mistake as regards motivational premises, as well as in exploiting or causing the victim's mistake and thus leading the victim to a state in which the victim could not make or execute a decision of will due to the exclusion of the decision-making or movement apparatus).[11]

Rape is a material crime (its effect is to lead another person to have sexual intercourse or to submit to or perform another sexual activity). It is a generally-defined perpetrator offence, i.e. that anyone can be the perpetrator, regardless of their sex, sexual orientation or relationship with the victim (a stranger, relative or spouse). It is possible to rape one's own spouse or to rape a person (woman, man) who is professionally or occasionally involved in prostitution. Rape is an intentional offence which can only be committed with direct intent.

Article 197 § 3 of the Penal Code provides for aggravated types (both in relation to § 1 and § 2), where the aggravating criteria are: acting together with another person (gang rape) or towards a minor under 15 years of age (paedophile rape) or towards an ascendant, descendant, adopted person, adopting person, brother or sister (incestuous rape). All these aggravated types are classified as felonies punishable by imprisonment for not less than 3 years. Another aggravated (in relation to § 1 to 3) type, defined in § 4, is rape with special cruelty, which is a felony punishable by imprisonment for not less than 5 years. Paedophile and incestuous rape appeared in the Penal Code as a result of the amendment of 5 November 2009, which should be assessed negatively, as it makes the structure of the Code more and more complicated, and the entire penal content of the act had been reflected in the institution of cumulative qualification. The recent amendments set out in the Act of 13 June 2019[12], which provide for additional aggravated types: rape against a pregnant woman; using a firearm, knife or other similarly dangerous object or incapacitating means, or acting in any other way directly threatening life; recording sound or image from the course of the activity (punishable by a penalty of imprisonment from 3 to 20 years - such a penalty applies also to gang rape and incestuous rape) should be similarly assessed. The aggravation of the sentence (imprisonment for a period of not less than 5 years) is also provided for as regards paedophile rape, and in addition, its multiple aggravated type if the act was committed to the detriment of a minor who was in relation of dependence on the offender at the time of the act being committed, in particular under his custody or using the critical position of the minor, is punishable by a custodial

sentence of not less than 8 years. Moreover, the Act introduces types of offences characterised by their result, including severe damage to health (punishable by imprisonment for a period of not less than 10 years – similarly for rape with particular cruelty) or death of a person (punishable by imprisonment of not less than 10 years or a life sentence).

In Polish penal law, rape has traditionally been classified as an offence wholly prosecuted upon complaint.[13] A fundamental change in the manner of prosecution was brought by the amendment to the Penal Code by the Act of 13 June 2013[14], which abolished the prosecution upon complaint of the victim. Since then, the offence of rape has been prosecuted ex officio. It should be noted that the change in the manner of prosecution did not affect (as its advocates had claimed) the number of offences identified. According to police statistics, a total of 1,432 offences were identified in 2012 and in subsequent years the figures were as follows: 2013 - 1,362; 2014 - 1,249; 2015 - 1,144; 2016 - 1,383; 2017 – 1,262[15].

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12. Text of the Act of 13 June 2019 amending the Law – Penal Code and certain other laws, finally drafted after consideration of the Senate's amendments to the government's draft Act of 16 May 2019 amending the Law – Penal Code and certain other laws, Sejm Papers No. 3451 (8th term of the Sejm). The provisions of the Act have not yet entered into force, the Act was submitted by the President of the Republic of Poland to the Constitutional Court.

13. Even the Penal Code of 1932 provided for the prosecution of the perpetrator of a rape at the request of the victim and that such manner of prosecution was provided for in two subsequent Penal Codes.

14. Act of 13 June 2013 amending the Act – Penal Code and the Act – Code of Criminal Procedure and certain other acts (Journal of Laws of 2013, item 849).

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ОСОБЕННОСТИ И УГОЛОВНО-ПРАВОВАЯ ПРИРОДА ВОЕННЫХ ПРЕСТУПЛЕНИЙ

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