

A FEW COMMENTS ON THE FEATURE OF 'PERSISTENT HARASSMENT' IN THE LIGHT OF ARTICLE 190A CRIMINAL CODE

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1. PERSISTENT HARASSMENT IN POLISH LAW

The offence of persistent harassment (together with the offence of what is called theft of identity) was introduced to the Polish Criminal Code by Article 1(2) of the Act of 25 February 2011 amending the Act: Criminal Code,¹ which entered into force on 6 June 2011. The introduction of this prohibited act to the Polish legal system resulted from international obligations, namely the Council of Europe Convention on preventing and combating violence against women and domestic violence adopted in Istanbul on 11 May 2011, which stipulates in Article 34 entitled Stalking that: 'Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised.'² Before the provision of Article 190a CC entered into force, in cases of persistent harassment (apart from civil law protection measures: Articles 23 and 24 Civil Code),³ the following provisions had been applied based on criminal law: Article 107 Misdemeanour Code (MC) (malicious intrusion), Article 207 CC (mistreatment), Article 190 CC (punishable threat), Article 191 CC (coercion), Article 193 (domestic trespass), Article 202 § 3 (dissemination of the so-called hard-core pornography), Article 216 CC (insult), Article 217 (breach of personal inviolability), Article 267 (breach of the secrecy of correspondence),

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¹ Dz.U. of 2011, No. 72, item 381; hereinafter CC.

² Dz.U. of 2015, item 961.

³ A. Michalska-Warias, K. Nazar-Gutowska, *Prawnokarne aspekty nękania w polskim prawie karnym*, *Studia Iuridica Lublinensia* 14, 2010, pp. 73–75.

Article 278 (theft) and by analogy Article 119 MC in the case of the property value up to PLN 250, Article 288 (property damage or destruction) and by analogy Article 124 MC in the case of the property value up to PLN 250, Article 126 MC (theft, appropriation, or damage of someone else's objects of non-pecuniary value), Article 127 MC (using someone else's property without consent) or, less frequently, Article 140 MC (indecent deed), Article 51 (disturbance of public order).⁴ However, in most cases, a harasser could avoid the breach of any of the indicated norms (sometimes knowing very well what conduct is prohibited by the binding provisions), and the police refused to take steps based on no breach of law. Therefore, the idea of regulating the phenomenon of harassment was justified,⁵ although it is possible to encounter an opinion that the new provision was a response to some social discussions rather than to a real need.⁶ The current wording of Article 190a was introduced by the Act of 31 March 2020 amending the Act on special measures to prevent, contain and combat COVID-19 and other contagious diseases and related crisis situations, and amending some other acts,⁷ which entered into force on 31 March 2020. *De lege lata*, in the Polish criminal law, criminalisation covers persistent harassment of another person or another person's next of kin, which creates a justified sense of danger, humiliation or torment, or substantially violates the person's privacy (which is subject to the penalty of deprivation of liberty for a period of up to three years – Article 190a § 1 CC). There is an aggravated type of the offence when persistent harassment or the so-called theft of identity, under Article 190a § 2 CC,⁸ results in a suicide attempt of the aggrieved (it carries the penalty of deprivation of liberty for a period from two to twelve years). The standard type is prosecuted based on the complaint of the aggrieved party. The aggravated type is prosecuted *ex officio* (Article 190a § 3 CC).

2. PERSISTENT HARASSMENT IN EUROPEAN LAW

In the European countries where the phenomenon is criminalised, the term of harassment is defined with the use of various words that are synonyms of the word 'stalking' in a given language (Albania, Austria, Belgium, Croatia, the Czech Republic, Finland, the Netherlands, Liechtenstein, and Luxembourg). Another group includes countries where stalking is called 'harassment' in a given national language, e.g. in Germany, Romania, and Hungary.⁹ In the states that criminalise

⁴ For more, compare M. Mozgawa, [in:] J. Warylewski (ed.), *System Prawa Karnego. Przepisów przeciwko dobrom indywidualnym*, Vol. 10, Warszawa 2016, p. 452 et seq.

⁵ *Ibid.*, p. 454.

⁶ Thus M. Budyn-Kulik, *Kodeks karny. Komentarz do zmian wprowadzonych ustawą z dnia 25 lutego 2011 r. o zmianie ustawy – Kodeks karny*, thesis 2, LEX/el 2011.

⁷ Dz.U. of 2020, item 568.

⁸ The so-called theft of identity is classified in Article 190a § 2 CC and its wording is as follows: 'Anyone who poses as another person and uses his or her image or other personal details, or other data by which he or she is publically recognised, in order to cause property or personal damage shall be liable to the same penalty.'

⁹ K. Nazar, *Uporczywe nękanie oraz kradzież tożsamości*, [in:] M. Mozgawa (ed.), *Przestępstwa przeciwko wolności*, Lublin 2020, pp. 298–299.

stalking, the offence is defined in various ways, e.g. as 'threatening or provoking another person' (Albania), 'multiple threats, following, getting in touch or oppressing in another comparable way' (Finland), 'unlawful, regular and intentional violation of privacy' (the Netherlands), 'multiple intrusion of another person or monitoring the place of residence, workplace or another place where a given person stays' and 'making telephone calls or initiating communication with the use of telecommunications devices' (Romania).¹⁰ Due to the description of a prohibited act, there are legislations that treat the offence in a concise way (Belgium: Article 442 bis, Luxembourg: Article 442–2, the Netherlands: section 285b), and more or less casuistic way (Albania: Article 121a, Austria: § 107a, Croatia: Article 140, the Czech Republic: section 354, Finland: section 7(a), Liechtenstein: § 107a, Germany: § 238, Romania: Article 208, Hungary: section 222).¹¹ For example, stalking is described in a rather detailed way in Austrian law (Article 107a).¹² A prohibited act described in general in para. 1 consists in unlawful and persistent harassment of another person, and in para. 2 this harassment is defined as an action that aims to have influence on the life of the aggrieved persons by getting in touch with them, getting in touch with the use of means of telecommunication, and creating conditions for communication with the aggrieved with the use of means of communication or third persons. Persistent harassment also consists in ordering goods or services with the use of someone else's personal data, at someone's expense, or making third persons contact the aggrieved person with the use of his or her data. The casuistic definition of particular forms of stalking can also be found in Croatian, Czech and German law.¹³ Some legislations require that the commission of the offence result in a consequence determined in the provision, which independently constitutes a feature of the objective aspect, a feature of the executive activity (possibility of an action to result in an effect), or a feature of the subjective aspect (a perpetrator acts to achieve a particular effect). And so, in the Finnish law, the statute requires that a perpetrator's conduct be able to evoke fear. In the Dutch law, an effect constitutes an element of the subjective aspect: it concerns conduct that is aimed at forcing the aggrieved person to action, omission or suffering, or at evoking fear. The Romanian legislator directly determined the effect (causing the state of fear) as a feature of a prohibited act.¹⁴ Sometimes, there are aggravated types distinguished beside a standard type of the offence. The aggravating features are, e.g. the commission of the offence to the detriment of a person who is especially vulnerable to threat, due to old age, pregnancy, illness, physical or mental impairment (Belgium); the commission of the offence against a minor, a pregnant woman, with the use of weapons or with an accomplice (the Czech Republic); exposing the aggrieved persons, their next of kin or another person close to them to the threat of death or serious body injury (Germany); the threat of using violence or the creation of public hazard that

¹⁰ *Ibid.*, p. 299.

¹¹ For more on this issue, compare M. Kulik, *Stalking w wybranych państwach europejskiego systemu kontynentalnego*, [in:] M. Mozgawa (ed.), *Stalking*, Warszawa 2018, p. 134 et seq.

¹² The same solution is adopted in the criminal code in Liechtenstein (§ 107a).

¹³ K. Nazar, *supra* n. 9, pp. 300.

¹⁴ *Ibid.*, p. 301.

can result in harm to the aggrieved or their next of kin, or making an impression that a threat to the aggrieved person's life, body integrity or health is unavoidable (Hungary).¹⁵

3. HARASSMENT UNDER ARTICLE 190A OF THE POLISH CRIMINAL CODE

In accordance with Article 190a of the Polish Criminal Code, the basic difficulty consists in the interpretation of the verbal feature of 'harassment', which is not defined in the statute. However, it is worth recalling that the concept of harassment was used in the Polish law system in the past, namely in the Act of 14 November 2003 amending the Act: Labour Code and some other acts.¹⁶ Article 94³ was added to the Labour Code, which obliged employers to prevent mobbing, and defined mobbing as:

action or conduct aimed at or against an employee consisting in persistent and long-term harassment or threatening, evoking this employee's underrated assessment of vocational usefulness, causing or intended to cause an employee's humiliation or derision, isolation or exclusion from the team of employees (Article 94³ § 2 LC).¹⁷

It is necessary to quote the dictionary definition of the word 'to harass' which means 'to constantly torment, bother, trouble someone with something, tease somebody, keep pestering'.¹⁸ It is not a distinctive feature and as such it raises serious interpretational doubts. It seems that the feature of harassment matches only conduct that upsets the aggrieved person, harms them or causes discomfort. It is indicated in the legal doctrine that different types of conduct may be taken into account. For example, Dagmara Woźniakowska-Fajst believes that harassment is most often demonstrated in such conduct as: making telephone calls constantly; calls going dead; telephone calls at night; wandering around a victim's place of residence; getting in touch via third persons; inquiring about a victim in their surroundings; standing in front of the door/house/workplace; sending letters, e-mails, text

¹⁵ *Ibid.*, p. 302.

¹⁶ Dz.U. 2003, No. 213, item 2081; hereinafter LC.

¹⁷ For more on this issue, compare the Supreme Court judgment of 29 January 2019, III PK 6/18, LEX No. 2619173 ('1. The definition of mobbing laid down in Article 94³ § 2 LC does not determine fixed time limits or the frequency of the conduct classified as mobbing for a period of at least six months. However, it undoubtedly indicates that one-time mobbing or its occurrence a few times in a short period is not sufficient because its relevant feature shall be persistent and long-term harassment or threatening of an employee. 2. Mobbing is an action or conduct: (1) concerning an employee or aimed against an employee; (2) consisting in persistent and long-term harassment or threatening of an employee; (3) evoking an employee's underrated assessment of vocational usefulness; (4) causing or intended to cause an employee's humiliation or derision; (5) isolating or excluding from a team of employees'). Also compare the Supreme Court judgment of 14 November 2008, II PK 88/08, OSNP 2010/9-10, item 114; the judgment of the Court of Appeal in Katowice of 8 November 2018, III APa 47/18, LEX No. 2612789; the judgment of the Court of Appeal in Warsaw of 24 October 2018, III APa 20/18, LEX No. 2637899.

¹⁸ M. Szymczak (ed.), *Słownik Języka Polskiego PWN*, Vol. 2, Warszawa 1984, p. 317.

messages, and presents; ordering goods, e.g. by post on behalf of someone, waiting for someone, following/monitoring a victim; slander (disseminating false information and gossip); breaking into a victim's house or car; theft of a victim's possessions; harassing a victim's family members and friends; assaults on and battering family members and friends.¹⁹ Justyna Fronczak presents a long list of examples of a stalker's possible conduct, including spying and following a victim, sending unwanted gifts, persistent telephone calls and sending short messages or e-mails, ordering a pizza, calling the fire brigade or emergency services to a victim's address, initiating false legal actions.²⁰ Anna Szelegiewicz indicates the following possible examples of harassment: attempts to get in touch with a given person, frequent telephone calls that go dead or calls at night, unwanted e-mails, letters or short messages, leaving messages at the door, and taking pictures without the aggrieved person's consent.²¹ According to the survey conducted by the OBOP Centre for Public Opinion Research, commissioned by the IWS Institute of Justice:

The most common method of harassing victims was dissemination of slander, lies and gossip concerning victims (nearly 70% of the aggrieved experienced that), getting in touch via a third person (more than half of the aggrieved experienced that), threatening the aggrieved and blackmailing them (half of all cases), and frequent telephone calls, quite often going dead or made at night (half of the harassed persons). More than every third victim had to cope with such conduct as receipt of unwanted letters, e-mails, short text messages or voice mail, threats, provocative behaviour towards a victim's friends, and following.²²

According to the research conducted by Marek Mozgawa and Magdalena Budyn-Kulik (concerning the period between 6 June 2011 and 6 June 2012), the basic method of harassment consisted in making (landline or mobile) telephone calls; such conduct took place in 284 cases out of 451 analysed, i.e. 63% (classified under Article 190a § 1, or possibly under Article 190a § 3 in conjunction with § 1), obviously, usually beside other harassing behaviour. Harassment with the use of unwanted short messages occurred in 171 cases (38%). As far as other forms of harassment are concerned, the following ones occurred quite often: intruding – 73 cases (16.2%), sending e-mails – 42 cases (9.3%), spying – 39 cases (8.6%), threatening – 34 cases (7.5%), insult – 13 cases (2.9%), observing – 11 cases (2.4%), taking pictures or filming – 9 cases (2%), sending mail or presents – 9 cases (2%),

¹⁹ D. Woźniakowska-Fajst, *Prawne możliwości walki ze zjawiskiem stalkingu – czy w prawie polskim potrzebna jest penalizacja prześladowania?*, *Archiwum Kryminologii*, Vol. XXXI, 2009, p. 177.

²⁰ J. Fronczak, *Stalking z perspektywy interdyscyplinarnej*, *Białostockie Studia Prawnicze* 13, 2013, pp. 149–150.

²¹ A. Szelegiewicz, *Stalking i przywłaszczenie tożsamości w polskim prawie karnym – zagadnienia wybrane*, *Ius Novum* 3, 2013, p. 68.

²² B. Gruszczyńska, M. Marczewski, P. Ostaszewski, A. Siemaszko, D. Woźniakowska-Fajst, *Stalking w Polsce. Rozmiary – formy – skutki*, [in:] A. Siemaszko (ed.), *Stosowanie prawa. Księga jubileuszowa z okazji XX-lecia Instytutu Wymiaru Sprawiedliwości*, Warszawa 2011, pp. 838–839. For more on the issue, compare also J. Chamernik, *Przestępstwo stalkingu w regulacji kodeksu karnego*, *Zeszyty Naukowe Uniwersytetu Przyrodniczo-Humanistycznego w Siedlcach*, Seria: Administracja i Zarządzanie 99, 2013, p. 310; A. Chlebowska, P. Nalewajko, *Stalking – zarys problemu oraz analiza rozwiązań ustawodawcy niemieckiego, austriackiego i polskiego*, *Prokurator* 4(44)–1(45), 2010–2011, p. 32.

disturbing (knocking at the door or wall) – 6 cases (1.3%), damage to property – 5 cases (1.1%), breach of personal inviolability – 3 cases (0.7%), using the entry phone – 3 cases (0.7%), sending parcels containing excrements – 2 cases (0.4%).²³ According to Marcin Jachimowicz, 'the use of the word "harassment" sufficiently expresses the sense of conduct called stalking, in particular the conduct that is repetitive, perceived by a victim as torment, which on its own means affecting an individual's freedom, and as a result limiting it, and causes the sense of danger and violation of privacy.'²⁴ In Natalia Kłaczyńska's opinion, 'Harassment is a phenomenon difficult to define. It can be described as mobbing, oppressing. Repetitiveness is its characteristic feature [...]. Harassment causes a nuisance to a person involved. However, it does not have to reach a highly intensive level.'²⁵ Michał Królikowski and Andrzej Sakowicz write that harassment is conduct that, from the point of view of 'an objective observer, may lead to torment, threatening, domination, humiliation, and evoking negative feelings'.²⁶ In Paulina Furman's opinion, harassment is '[...] taking repetitive steps that affect an addressee's psyche in a negative way. [...] Thus, "'harassment" covers various types of behaviour that objectively have the features of action resulting in torment, troubling, threatening, domination, affecting the will, humiliation, or having other consequences or evoking negative feelings.'²⁷ Marian Filar and Marcin Berent highlight the fact that 'harassment is a perpetrator's conscious and intentional action (there is no harassment by omission) that includes repetitive acts of approaching a victim, e.g. following them, communicating with them against their will, in particular making unwanted proposals, statements, declarations, etc.'²⁸ It is indicated in the doctrine that harassment means multiple repetitive mobbing expressed in many bothering activities aimed at torment, troubling, teasing, or disturbing the aggrieved person or their next of kin.²⁹ Undoubtedly, the concept of harassment contains a perpetrator's repetitive conduct, sometimes of the same and sometimes of a different nature and the level of painfulness (thus, it is not one-time behaviour).³⁰ It is a multi-act offence (thus, there is

²³ M. Mozgawa, M. Budyn-Kulik, *Prawnokarne i kryminologiczne aspekty nękania*, Themis Polska Nova 2(3), 2012, p. 41.

²⁴ M. Jachimowicz, *Przestępstwo stalkingu w świetle noweli do kodeksu karnego*, *Wojskowy Przegląd Prawniczy* 3, 2011, p. 44. As the author states further: 'Using this term, the author of the bill puts general emphasis on the victims' perception of perpetrators' conduct and not on perpetrators' intentions, which are irrelevant in this construction of the provision. An offender under Article 190a § 1 CC must be aware that his or her conduct is unwanted and undesired by the aggrieved. It is irrelevant whether a stalker acts in order to cause a nuisance or because of the need to show admiration'; *Ibid.*, p. 44.

²⁵ N. Kłaczyńska, [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa 2014, p. 470.

²⁶ M. Królikowski, A. Sakowicz, *Kodeks karny. Część szczególna*, Vol. 1: *Komentarz. Art. 117–221*, Warszawa 2017, p. 587.

²⁷ P. Furman, *Próba analizy konstrukcji ustawowej przestępstwa uporczywego nękania z art. 190a k.k. Zagadnienia wybrane*, *Czasopismo Prawa Karnego i Nauk Penalnych* 3, 2012, p. 45.

²⁸ M. Filar, M. Berent, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, pp. 1174–1175.

²⁹ S. Hypś, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Warszawa 2019, p. 1013.

³⁰ M. Królikowski, A. Sakowicz, *supra* n. 26, p. 587.

no obligation to apply Article 12 § 1 CC as a directive on consolidating particular instances of a perpetrator's conduct).³¹ What is worth mentioning is P. Furman's erroneous opinion that an offence under Article 190a § 1 is 'a permanent offence consisting in the maintenance of a particular state of lawlessness'.³² Obviously, she is right that sometimes the periods of harassment are very long (lasting even many years),³³ however, this does not give grounds for a conclusion that we deal with a certain state of lawlessness and maintaining it for a certain period. It is rightly highlighted in the doctrine that, although the result in the form of the aggrieved person's sense of danger must occur in an established form, the essence of the offence consists in the numerous stimuli given to the aggrieved person.³⁴ It seems that harassment, in general, adopts the form of action, however, harassment by omission (although rather exceptionally) cannot be excluded³⁵ (in the same way as in the case of cruelty, which seems to occur much more frequently). For example, there may be a situation in which a postman who is in love with an addressee (rejecting his advances) persistently fails to deliver letters to her because he imagines that they are from his 'rivals', and the aggrieved woman waits for them. Another example may concern a long time of failing to collect litter from the house (where the aggrieved person lives) by a person who is obliged to do the job, or persistent failure to clean the staircase or the pavement (in spite of the obligation to the aggrieved person). One cannot exclude harassment in the form of omission by persistent failure to make necessary repairs (e.g. by an administrator or the owner of a real property) that the given person is obliged to make.³⁶ Anna Golonka gives an example of leaving a noisy device on at night and disturbing the night calm of the neighbours.³⁷

³¹ *Ibid.*

³² P. Furman, *supra* n. 27, p. 49.

³³ According to the research (conducted by OBOP, commissioned by the IWS), in 5% of cases examined, the period of harassment took less than a week; in 13% cases – from one week to one month; in 4.8% cases – four to five months; in 8.1% cases – six to eleven months; in 13.8% cases – from one year to two years; in 15% cases – three or more years; in 19.9% cases, harassment has not finished (and in 3.1% cases, the answer was: I don't know). B. Gruszczyńska, M. Marczewski, P. Ostaszewski, A. Siemaszko, D. Woźniakowska-Fajst, *supra* n. 22, p. 838. According to the research conducted by Marek Mozgawa and Magdalena Budyn-Kulik, the period of harassment in the analysed cases was: less than a week in 7.8% cases, from one week to one month in 9.8% cases, from one month to six months in 41% cases, from six months to one year in 12% cases, from one year to two years in 6.4% cases, from two years to five years in 8.2% cases, for over five years in 2.4% cases, and in other cases, there were no data concerning the period of harassment; see M. Mozgawa, M. Budyn-Kulik, *Prawnokarne*, *supra* n. 23, p. 40.

³⁴ M. Królikowski, A. Sakowicz, *supra* n. 26, p. 588.

³⁵ Thus also M. Budyn-Kulik, *Kodeks karny*, *supra* n. 6, thesis 20; M. Mozgawa, *Analiza ustawowych znamion przestępstwa uporczywego nękania*, [in:] M. Mozgawa (ed.), *Stalking*, Warszawa 2018, p. 56; A. Golonka, *Uporczywe nękanie jako nowy typ czynu zabronionego*, *Państwo i Prawo* 1, 2012, p. 91. According to Michał Królikowski and Andrzej Sakowicz, only action can be considered; see M. Królikowski, A. Sakowicz, *supra* n. 26, p. 588. A similar opinion is expressed by A. Zoll, [in:] W. Wróbel, A. Zoll (eds), *Kodeks karny. Część szczególna*, Vol. 2: *Komentarz do art. 117–211a*, Warszawa 2017, p. 592.

³⁶ M. Mozgawa, *Analiza*, *supra* n. 35, p. 56.

³⁷ A. Golonka, *supra* n. 35, p. 91.

Summing up, one can state that harassment is characterised by repetitive intentional³⁸ conduct, in particular in the form of action (and in exceptional situations also omission), of the same or different type, performed against the aggrieved person's will, constituting torment, troubling or humiliation, and causing harm or discomfort, the sense of danger or the violation of privacy.

Michał Królikowski and Andrzej Sakowicz rightly emphasise that harassment takes place not only in case of a perpetrator's same type of conduct but also when a series of different types of conduct occurs (e.g. following, intruding, texting, sending e-mails, making telephone calls, etc.).³⁹ According to the findings of the empirical research conducted by the IWS, 'only 12% of the aggrieved stated that a perpetrator harassed them with the use of one method. Most often, they were harassed in a few ways: from two to seven (68%). Others experienced harassment with the use of more methods.'⁴⁰ It should be emphasised that in order to attribute harassment to a perpetrator's conduct (in accordance with the subjective perception of the aggrieved and the possibility of its objective recognition), the conduct must be against the aggrieved person's will;⁴¹ thus, we cannot speak about harassment when person X is flooded with short messages by person Y, and the addressee (not being forced to do that in any way, e.g. by threats or blackmail) answers them (and next states that they are harassed by Y).

Particular types of a perpetrator's conduct (when assessed *in abstracto* and in separation from the situational context) do not have to, as a rule, constitute prohibited acts. There is nothing wrong with sending somebody a letter, a short message, or paying a courteous visit. A problem occurs when the number of these letters or messages is absolutely excessive (e.g. dozens a day) and the addressee does not want to receive them. Obviously, it can also happen that even a single instance of a perpetrator's conduct constitutes a statutory breach of particular provisions of criminal or misdemeanour law (e.g. domestic trespass – Article 193 CC, threat – Article 190 § 1 CC, theft – Article 278 CC and Article 119 CC, illegal access to information – Article 267 CC, recording a naked person's image – Article 191 CC, and many others). In Sławomir Hypś's opinion, due to the nature of the protected interest, a perpetrator's activities cannot take the form of direct physical assault (e.g. on the aggrieved person's health or bodily inviolability).⁴² However, it seems that the opinion is not right. Why is it not possible to recognise harassment in a situation when someone breaches someone else's personal inviolability many times (evoking the person's sense of danger justified by the circumstances) because the requirements that are obligatory to classify this conduct as harassment under Article 207 are not met (the aggrieved person is not the next of kin or helpless due to old age

³⁸ Obviously, this concerns deliberateness in the context of potential penal liability under Article 190a CC. In practice, one can imagine cases of unintentional harassment (e.g. persistently listening to loud music and not realising the acoustics of the room, which results in constant disturbance of the peace of other people).

³⁹ M. Królikowski, A. Sakowicz, *supra* n. 26, p. 588.

⁴⁰ B. Gruszczyńska, M. Marczewski, P. Ostaszewski, A. Siemaszko, D. Woźniakowska-Fajst, *supra* n. 22, p. 840.

⁴¹ P. Furman, *supra* n. 27, p. 46.

⁴² S. Hypś, [in:] *Kodeks karny*, *supra* n. 29, p. 1013.

or physical or psychological condition)? Magdalena Budyn-Kulik also presents such an opinion in the legal doctrine. According to her, harassment affects mainly the aggrieved person's psychological sphere, which does not mean of course that affecting the physical sphere cannot occur (e.g. breach of personal inviolability or causing harm to health). In this author's opinion,

It should be considered whether an act consisting in affecting an object or animal belonging to the aggrieved, e.g. by teasing the aggrieved person's dog which gets angry and is barking almost all night so that the aggrieved cannot sleep and have a rest, matches the features of an offence under Article 190a CC. It should be noticed that a perpetrator's conduct in itself constitutes the 'harassment' of the dog. Introducing Article 190a to the Criminal Code, the legislator could have also introduced a similar provision to the Act on the protection of animals' rights, because 'harassment of a dog' does not always have to match the feature of misdemeanour under Article 35 of the Act on the protection of animals.⁴³

It should be assumed that it is possible to match the statutory features of persistent harassment by affecting an object or animal. It can be, e.g. persistent damaging someone's property (e.g. damage to the aggrieved person's car or scribbling graffiti on the real property of the aggrieved person) or mistreating the aggrieved person's animals (in the case of an animal or chicken farm owner). However, it does not seem justified to introduce a provision analogous to Article 190a CC to the Act on the protection of animals. It is necessary to draw attention to the fact that in accordance with Article 6 para. 2(9) of the Act of 21 August 1997 on the protection of animals,⁴⁴ 'maliciously threatening or teasing animals' is a statutory exemplification of one of the methods of mistreating animals. If a perpetrator teasing an animal aims to disturb its owner's night calm and rest, we deal with a misdemeanour under Article 51 MC (violation of peace, public order or night sleep). Moreover, we cannot lose sight of Article 78 MC ('Whoever, by teasing or frightening, makes an animal become dangerous [...]').

Although in practice, in the case of harassment, a perpetrator usually acts in person and matches the features of the offence, it cannot be excluded that they can use a third person for the purpose of harassment. P. Furman indicates that it is possible, e.g. to provoke 'many persons' persistent communication with the aggrieved⁴⁵ (e.g. by providing false information about the situation of the aggrieved, calling emergency services or the police to their address, ordering a taxi or a pizza, etc.). Also J. Fronczak rightly states that 'a stalker's conduct can be direct when the perpetrator harasses their victim in person as well as indirect when they use other persons' assistance or tools that make it possible to remain anonymous'.⁴⁶ According to M. Królikowski and A. Sakowicz, the opinion that a perpetrator can use a third person does not seem to be justified; however, they do not present any arguments for it.⁴⁷

⁴³ M. Budyn-Kulik, *Kodeks karny*, *supra* n. 6, thesis 23.

⁴⁴ Dz.U. of 2020, item 638.

⁴⁵ P. Furman, *supra* n. 27, p. 47.

⁴⁶ J. Fronczak, *supra* n. 20, p. 149.

⁴⁷ M. Królikowski, A. Sakowicz, *supra* n. 26, p. 588.

4. OBJECTIVE FEATURES OF THE OFFENCE OF HARASSMENT

In accordance with Article 190a, it is not sufficient for harassment to occur. For the occurrence of the offence, it must be 'persistent'.⁴⁸ Analysing the feature of persistence, it is also necessary to start with the linguistic meaning of the word. 'Persistent' means difficult to eliminate, long-lasting or continually repeated, ceaseless, burdensome.⁴⁹ As it is known, the feature of persistence occurs in the definitions of other offences: Article 145 § 1(1) CC – persistent evasion of substitute military service; Article 191 § 1a CC – use of another (i.e. indirect) type of violence persistently;⁵⁰ Article 218 § 1a CC – persistent infringement of an employee's rights; Article 341 § 2 CC – persistent refusal to perform the duty arising from military service; Article 209 § CC (before the amendment of 23 March 2017) – persistent evasion of the obligation of maintenance, and it saw many interpretational attempts (mainly in the context of the offence of maintenance evasion⁵¹).⁵² In the judicature, persistence is interpreted as long-term, repetitive, ill will and uncompromising conduct (e.g. the Supreme Court judgment of 27 February 1996, II KRN 200/95;⁵³ the ruling of the Court of Appeal in Kraków of 13 December 2000, II AKz 289/00⁵⁴). In the judgment of 5 January 2001 (V KKN504/00),⁵⁵ the Supreme Court stated that persistence is

⁴⁸ In some criminal statutes, the provision directly indicates the persistence of a perpetrator's conduct (as in the Polish Criminal Code), e.g. the criminal codes of Austria, Liechtenstein, Germany, the Czech Republic, and Croatia; in other countries, multiplicity of the conduct is indicated (Finland, Luxembourg, and Romania); or repetitiveness of conduct (Albania), or long-term (the Czech Republic) or systematic harassment (the Netherlands). See K. Nazar, *supra* n. 9, p. 300.

⁴⁹ S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. 4, Warszawa 2003, p. 1007. A similar definition can be found in T. Szymczak (ed.), *Słownik Języka Polskiego*, Vol. 3, Warszawa 1984, p. 610 ('difficult to remove, eliminate, remaining for a long time, troublesome').

⁵⁰ For more on the issue, compare M. Mozgawa, M. Kulik, *Zmuszanie przy zastosowaniu przemocy pośredniej – art. 191 § 1a k.k.*, [in:] J. Sawicki, K. Łuczak (eds), *Na styku prawa karnego i prawa o wykroczeniach. Zagadnienia materialnoprawne oraz procesowe. Księga jubileuszowa dedykowana profesorowi Markowi Bojarskiemu*, Wrocław 2016, p. 302 et seq.; A. Michalska-Warias, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 542. It can be assumed that relations between harassment specified in Article 190a § 1 CC and the use of indirect violence (under Article 191 § 1a) are definitely closer than they seem to be (which implicates difficulties in determining the mutual relationship between the provisions).

⁵¹ For more on the issue of possible interpretations of the feature of persistence (in accordance with Article 209 CC in the original wording): 'objectivist' and the (dominating) objective-subjective ones, compare A. Wasek, J. Warylewski, [in:] A. Wasek, R. Zawłocki (eds), *Kodeks karny. Część szczegółowa*, Vol. 1: *Komentarz do artykułów 117–221*, Warszawa 2010, pp. 1247–1249.

⁵² According to Jacek Kosonoga, the term 'persistence' should be assigned the same sense as is based on the interpretation of the quoted provisions, which results from the ban on homonymous interpretation consisting in the exclusion of the possibility of attributing different meanings to the same phrase used in the same legal act (called the directive on the identity of meaning). J. Kosonoga, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 1169. According to Michał Królikowski and Andrzej Sakowicz, the possibilities of applying homonymous interpretation in this case are limited; see M. Królikowski, A. Sakowicz, *supra* n. 26, p. 588.

⁵³ LEX No. 25594.

⁵⁴ LEX No. 46065.

⁵⁵ OSNKW 2001/7–8, item 57.

an antinomy of a perpetrator's one-time or even multiple conduct. Thus, it is clear how the issue of persistence was treated in practice (mainly in the context of Article 209 CC before the amendment of 23 March 2017), and it should be assumed that the same approach is presented in Article 190a CC (i.e., as a rule, it is not sufficient to recognise the commission in relation to a multiple conduct of a perpetrator, although in such a case the issue of liability for an attempt is of course open).⁵⁶ Undoubtedly, while interpreting the provision of Article 190a, certain former findings concerning the interpretation of the feature of persistence will be helpful (to a certain extent), however, they cannot be uncritically applied to Article 190a CC.⁵⁷ Therefore, e.g. ill will, the existence of which is usually assumed in the analysis of the feature of persistence, does not seem to be an element necessary in the case of the offence of harassment. Taking into account that in practice the motive behind a perpetrator's conduct is very often the feeling of love for a victim (the feeling that is unrequited or already extinct on the part of a victim), it would be difficult to state that in every case like this a perpetrator acts because of ill will.⁵⁸ In the judgment of 19 February 2014 issued based on Article 190a CC (II AKa 18/14),⁵⁹ the Court of Appeal in Wrocław stated that:

What shows a perpetrator's persistent conduct is, on the one hand, their specific mental attitude expressed in uncompromising harassment, i.e. sticking to the specific obstinacy regardless of reprimands and polite requests from the aggrieved or other persons to discontinue the conduct and, on the other hand, a longer period of time when a perpetrator demonstrates it.

The above stance is rational, however, one cannot lose sight of the fact that whatever requests (e.g. on the part of the aggrieved) and reprimands (e.g. on the part of the police) *de lege lata* are not elements of the statutory features of the offence under Article 190a § 1 CC, thus they do not have to occur for the recognition of the existence of the offence.⁶⁰ According to M. Królikowski and A. Sakowicz, 'due to the

⁵⁶ M. Mozgawa, [in:] *System*, *supra* n. 4, p. 461.

⁵⁷ For more on the issue, compare M. Mozgawa, M. Budyn-Kulik, *Prawnokarne*, *supra* n. 23, p. 44.

⁵⁸ According to empirical research findings, in most cases (62.5%), a perpetrator and a victim were in a close emotional relationship. M. Mozgawa, M. Budyn-Kulik, *Prawnokarne*, *supra* n. 23, p. 47. According to Joanna Długosz, 'There are no doubts that the conduct typical of stalking does not have to result from such a negative attitude of a perpetrator; moreover, it is quite often influenced by emotions that are in their essence positive, such as admiration or adoration of the aggrieved, although unwanted and undesired by him/her. Therefore, in such situations, it is not possible to assume that a perpetrator's action results from ill will. This circumstance leads to a conclusion that the understanding of persistence in the context of a prohibited act regulated in Article 190a § 1 CC must be substantially different from the interpretation of this feature adopted based on other provisions, which subsequently raises justified doubts in the context of the legislator's compliance with the *nullum crimen sine lege* principle in the process of formulating the statutory features of stalking'; see J. Długosz, *O zasadności kryminalizacji tzw. stalkingu*, [in:] S. Pikulski, M. Romańczuk-Grącka, B. Orłowska-Zielińska (eds), *Tożsamość polskiego prawa karnego*, Olsztyn 2011, p. 254.

⁵⁹ LEX No. 1439334.

⁶⁰ Unlike it was in the criminal law of Denmark until recently, where (in accordance with Article 265 CC) for the recognition of the offence of stalking, it was required that a perpetrator continued acting despite 'the police warnings'.

nature of the feature of "harassment", the content of "persistence" was reduced only to elements of the subjective aspect of a perpetrator's act.⁶¹ In the authors' opinion, the flow of time connected with harassment does not always have to be long because the effect in the form of the aggrieved person's justified sense of danger or substantial violation of privacy can occur as a result of short-term harassment.⁶² To some extent, the opinion is right. It can happen that the sense of danger can arise even after a perpetrator's first act, however, this does not justify the adoption of the definition of commission of the offence under Article 190a § 1 CC because of the lack of the element of persistence (and it is doubtful whether the institution of an attempt can be applied). Therefore, a perpetrator's conduct must take some time (although it does not have to be especially long) in order to make it possible to speak about persistence. By the way, it is worth mentioning that in accordance with the above-mentioned Article 94³ § 2 LC (which defines mobbing), the legislator speaks about 'persistent and long-term harassment', and thus recognises that persistent conduct does not always have to be long-term.

Obviously, it is not possible to state *in abstracto* how long the period should be for the feature to be matched; it should be established each time in the light of the circumstances of a particular case.⁶³ Therefore, it seems that it can be a period of a few days (e.g. in case of hundreds of short messages sent by a perpetrator every day) as well as a few months (when the harassing conduct occurs with a few days' intervals). One cannot agree with the opinion of Waldemar Woźniak, who believes that a given conduct can be described as stalking if it occurs for at least 30 days and during this period at least ten acts are performed.⁶⁴ It is hard to say based on what factors the author drew the above conclusion, but it cannot be assumed that those arbitrarily determined criteria could be binding.

An interesting problem arises in case a perpetrator's conduct harasses a few people (who are the closest relations, e.g. a perpetrator's wife and children). In such a case, in order to assess persistence properly, a combined assessment of all types of his/her conduct is necessary; it is inadmissible to divide particular acts into groups concerning particular aggrieved persons.⁶⁵ Particular types of a perpetrator's conduct that are elements of harassment also do not have to be the same in relation to particular victims (e.g. following and soliciting a wife on the telephone, and short messages and e-mails sent to children).⁶⁶ It seems that there

⁶¹ M. Królikowski, A. Sakowicz, *supra* n. 26, p. 588.

⁶² *Ibid.*

⁶³ Thus also J. Kosonoga, [in:] R.A. Stefański (ed.), *supra* n. 52, p. 1123.

⁶⁴ W. Woźniak, *Stalking jako zjawisko patologiczne – definicje, zakres, charakterystyka stalkera i radzenie sobie ze stalkingiem*, [in:] M. Ilnicka (ed.), *Wybrane elementy pedagogiki resocjalizacyjnej – ujęcie teoretyczne i praktyczne*, Lublin 2011, p. 133. The author adds that given conduct can be described as stalking if (apart from the element of time and number: the minimum of ten acts within thirty days) it has the following features: it is intended, evokes fear, results in negative psychical and social consequences (anxiety, insomnia, need to change the telephone number, workplace or place of residence), involves a victim's next of kin, friends and colleagues; see W. Woźniak, *ibid.*, p. 133.

⁶⁵ Thus, rightly, the Supreme Court judgment of 12 January 2016, IV KK 196/15, LEX No. 1976249 (with a gloss of approval by K. Nazar, *Paestra* 7–8, 2016, pp. 176–182).

⁶⁶ M. Mozgawa [in:] *System*, *supra* n. 4, p. 462.

can be a real situation in which one deals with mutual harassment (by analogy to mutual mistreatment, which is possible, in my opinion).⁶⁷ It should be recognised that neither the construction of statutory features of the offence under Article 190a nor the nature of the phenomenon can be an obstacle to adopting the construction of mutual harassment. It seems that in the case of mutual harassment, there can be situations when perpetrators (being the aggrieved at the same time) evoke consequences in the form of substantial violation of their privacy (e.g. by filming each other, disturbing). Obviously, those specific acts of retorting do not lead to the exclusion of penal liability of any of the parties but they undoubtedly must influence a penalty.

In accordance with the Supreme Court ruling of 12 December 2013, III KK 417/13,⁶⁸

In order to recognise conduct as stalking, harassment must be persistent, i.e. it must consist in continual and substantial violation of another person's privacy and evoking a victim's justified sense of danger. The legislator does not require that a stalker's conduct carry an element of aggression. Moreover, it is legally irrelevant in the context of the subjective aspect of the offence whether a perpetrator's act is motivated by the feeling of love for the aggrieved or hatred, intention to tease them, malice or desire to take revenge. For the recognition of this offence, it does not matter whether a perpetrator intends to implement their threats. What is decisive is the threatened person's subjective feeling, which must be assessed in an objective way.

The above stance is right in general, however, 'continual' violation of privacy is not necessary. The term 'continual' means: 'lasting continuously, non-stop for a longer period; unceasing, constant, permanent.'⁶⁹ Harassment is possible for a long time but there can be shorter or longer intervals. The aggrieved can, e.g. be flooded with e-mails or short messages for a few days and then a perpetrator takes a break (for subjective or objective reasons), and then harassment starts again.⁷⁰

In my opinion, the addition of the feature of 'persistence' to the content of Article 190a is absolutely useless. If the word 'to harass' on its own means that the action consists in a series of acts, it is useless to implicate additional statutory requirements, which only hamper the application of the provision in practice. If to harass means 'to ceaselessly disturb' or 'to constantly mistreat' (i.e. do this many times), what is the purpose of the requirement that the disturbance should be 'persistently multiple'? Some similarity between harassment and mistreatment can be seen. However, it is worth drawing attention to the fact that Article 207 CC uses

⁶⁷ In the judgment of 4 June 1990, V KRN 96/90, *Wojskowy Przegląd Prawniczy* 1–2, 1993, p. 56, the Supreme Court expressed an erroneous opinion that it is not possible to recognise spouses' mutual harassment at the same time. It was critically assessed by I. Kozłowska-Miś, M. Mozgawa (*Glosa do wyroku SN z 4.06.1990 r., V KRN 96/90, Wojskowy Przegląd Prawniczy* 1–2, 1993, p. 56 et seq.); thus also A. Wąsek, J. Warylewski, [in:] *Kodeks karny, supra* n. 51, p. 1198. Also compare detailed comments on the issue of mutual harassment by Sławomir Hypś, who seems to admit the possibility of such a situation (S. Hypś, [in:] *Kodeks karny, supra* n. 29, p. 1105). It is also worth noticing that in another judgment (of 23 September 1992, III KRN 122/92, LEX No. 22076), the Supreme Court disagreed with the thesis on impossibility of mutual harassment.

⁶⁸ LEX No. 1415121.

⁶⁹ M. Szymczak (ed.), *Słownik Języka Polskiego PWN*, Vol. 2, Warszawa 1984, p. 367.

⁷⁰ On the issue, compare K. Nazar, *Glosa do postanowienia Sądu Najwyższego z dnia 12 grudnia 2013 r., III KK 417/13, Prawo w Działaniu* 26, 2016, p. 247.

a phrase 'who mistreats' and not 'who persistently mistreats', and the same concept should be adopted in Article 109a CC. One can risk an opinion that by the use of the feature of 'persistence' the legislator, in fact, substantially narrowed the penal law protection of the aggrieved person.⁷¹

5. SUBJECTIVE FEATURES OF THE OFFENCE OF HARASSMENT

The offence under Article 190a § 1 is substantive in nature. A necessary consequence is evoking the aggrieved person's justified sense of danger, humiliation or torment,⁷² or substantial violation of privacy. The broad approach to the consequence can be recognised as purposeful, because in practice there can be cases when a victim of harassment starts feeling fear, changes their relations with other people or even seeks help of a doctor or a psychologist, as well as such cases where the victim does not have the sense of danger (due to a very strong mental toughness or because they have effective personal guards). Even if such sense of danger does not occur but the aggrieved is forced to substantial (uncomfortable) changes in their private life, a perpetrator's conduct should be criminalised. There can be also cases in which a perpetrator's acts do not evoke the sense of danger, humiliation or torment, and they do not substantially violate the victim's privacy but the victim perceives them as troublesome (although they do not result in the change in the aggrieved person's lifestyle or habits). In such a case, a construction of an attempt to commit the offence under Article 190a § 1 CC can be considered.⁷³ This offence is common and intentional in nature; due to the feature of persistence laid down in the provision, which has a subjective element, it should be recognised that this group of features must be related to direct intent. On the other hand, one can believe that there are no

⁷¹ M. Budyn-Kulik, *Kodeks karny, supra n. 6*, thesis 22.

⁷² It is worth stressing that the two new consequences (humiliation and torment) were introduced to the provision by the Act of 31 March 2020 amending the Act on special measures to prevent, contain and combat COVID-19 and other contagious diseases and related crisis situations, and amending some other acts. Doubts are raised in the legal doctrine whether the extension of the consequences (which have already been detailed) is justified. As argued by Katarzyna Nazar, '[...] the consequence in the form of humiliation may be achieved (relatively easy) by a one-time act, which contradicts the feature of the act described as "persistent harassment". The consequence in the form of humiliation in the case of this type of offence is possible only when such behaviour is recurring or when, e.g. offensive or humiliating comment posted on the Internet accompanies other harassing acts of a perpetrator. One-off humiliating conduct towards the aggrieved may not be regarded as persistent harassment. Certainly, the issue that remains to be considered is attempt or liability for some other offence depending on the perpetrator's conduct (e.g. libel or insult).' (See, K. Nazar, *Uporczywe, supra n. 9*, pp. 323). It is hard to imagine harassment (which must be persistent) that would not lead to torment, although obviously a lot depends on the types of the perpetrator's acts and the psychological predisposition of the aggrieved person. It is rightly raised in the legal doctrine that the new consequences (humiliation or torment) will be practically easier to prove than, for instance, the sense of danger or substantial violation of privacy, yet it should be stated that extending the provision to include further non-distinctive features was not necessary (K. Nazar, *Uporczywe, supra n. 9*, p. 324).

⁷³ M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warszawa 2019, p. 611.

obstacles to relate the feature of consequence (i.e. evoking the aggrieved person's sense of danger, humiliation or torment, or substantial violation of privacy) to both direct and oblique intent. Such approach to the subjective aspect of the offence of persistent harassment (a basic type) seems to dominate the Polish legal doctrine.⁷⁴ The aggravated type (laid down in Article 190a § 3 CC) is common and consecutive (attempted suicide is a consequence that occurs here); its commission can be an example of mixed guilt (*culpa dolo exorta*).⁷⁵

6. CONCLUSION

Undoubtedly, it is good that the offence of persistent harassment was introduced to the Polish Criminal Code, although certainly the adopted solution is not perfect. The concept of harassment itself is extraordinarily broad and unclear, and raises many interpretational doubts (which have been discussed in this article). Empirical research indicates that the basic tool used to harass is a telephone at present, because in the majority of cases (63%) concerned making telephone calls to someone (usually beside other types of harassment conduct). Referring to the construction of the provisions analysed, it should be stated that it seems useless to include the feature of persistence in Article 190a CC because doing so the legislator, in fact, narrowed the penal law protection of the aggrieved person.

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⁷⁴ Thus, inter alia M. Mozgawa, M. Budyn-Kulik, *Prawnokarne*, supra n. 23, p. 28; K. Nazar, *Glosa*, supra n. 70, p. 243; N. Kłaczyńska, [in:] *Kodeks*, supra n. 25, pp. 471–472; A. Michalska-Warias, [in:] *Kodeks*, supra n. 50, p. 536; J. Chamernik, supra n. 22, p. 312.

⁷⁵ M. Mozgawa, [in:] *Kodeks*, supra n. 73, p. 615.

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A FEW COMMENTS ON THE FEATURE OF 'PERSISTENT HARASSMENT' IN THE LIGHT OF ARTICLE 190A CRIMINAL CODE

Summary

The article attempts to interpret the term 'harassment' that is used in Article 190a CC. The author presents the doctrinal opinions on the issue as well as the findings of empirical research (and concise legal-comparative comments), and draws a conclusion that harassment means repetitive intentional conduct in the form of action (and exceptionally also omission), of identical or different type, performed against the aggrieved persons' will, constituting their torment, suffering or humiliation, and causing harm or discomfort, the sense of danger or the violation

of privacy. For the offence under Article 190a § 1 to be recognised it is required that this harassment be persistent. It is not possible to determine *in abstracto* how long the period should be to match this feature; it should be determined each time in the light of the circumstances of a given case. Thus, it seems that it can be a period of a few days (e.g. in the case of text messages sent by a perpetrator every day) and a few months (when harassment is committed with a few days' intervals). It can be believed that by including the feature of persistence in Article 190a CC, the legislator in fact has limited the legal protection of the aggrieved. The author presents a stance that there is a real possibility of a situation in which harassment is mutual (by analogy to mutual mistreatment which is possible, in the author's opinion). It should be recognised that neither the construction of statutory features of the offence under Article 190a nor the nature of the phenomenon are an obstacle to adopting the construction of mutual harassment.

Keywords: stalking, persistent harassment, repetitiveness of conduct, sense of danger, substantial violation of privacy

KILKA UWAG NA TEMAT ZNAMIENTA „UPORCZYWEGO NĘKANIA” NA GRUNCIE ART. 190A K.K.

Streszczenie

Artykuł prezentuje próbę wykładni pojęcia „nękanie” występującego na gruncie art. 190a k.k. Autor przedstawia poglądy doktryny w tej materii, jak również wyniki prowadzonych badań empirycznych (i syntetyczne uwagi prawnoporównawcze), dochodząc do wniosku, że nękanie to charakteryzujące się powtarzalnością intencjonalne zachowania, przede wszystkim w postaci działania (a wyjątkowo również zaniechania), tożsame rodzajowo lub rodzajowo odmienne, podejmowane wbrew woli pokrzywdzonego, stanowiące jego dręczenie, trapienie czy upokorzenie, a wyrządzające mu krzywdę czy powodujące jego dyskomfort, poczucie zagrożenia czy naruszenie prywatności. Dla zaistnienia przestępstwa z art. 190a § 1 konieczne jest, aby owo nękanie było uporczywe. Nie da się stwierdzić *in abstracto*, jak długi okres powinien upłynąć, aby owo znamię zostało zrealizowane; ustaleń w tym zakresie należy dokonywać każdorazowo na tle okoliczności konkretnej sprawy. Wydaje się, że może to być zarówno okres kilku dni (np. w przypadku setek smsów wysyłanych codziennie przez sprawcę), jak i kilku miesięcy (gdy nękające zachowania realizowane są w odstępach kilkudniowych). Można sądzić, że poprzez włączenie do treści art. 190a k.k. znamienia uporczywości ustawodawca *de facto* zawęził prawnokarną ochronę pokrzywdzonego. Autor prezentuje stanowisko, że realne jest wystąpienie sytuacji, w której możemy mieć do czynienia z nękaniami się wzajemnym (analogicznie jak jest to możliwe – zdaniem autora – w przypadku znęcania się wzajemnego). Należy sądzić, że przyjęciu konstrukcji nękania się wzajemnego nie stoi na przeszkodzie ani konstrukcja ustawowych znamion przestępstwa z art. 190a, ani też natura rzeczy.

Słowa kluczowe: stalking, uporczywe nękanie, powtarzalność zachowań, poczucie zagrożenia, istotne naruszenie prywatności

VARIOS COMENTARIOS SOBRE EL “ACOSO REITERADO” EN VIRTUD DEL ART. 190A CP

Resumen

El artículo presenta el intento de interpretar la noción “acoso” que aparece en el art. 190a CP. El Autor acude a la doctrina, así como muestra resultados de su investigación empírica (y comentarios sintéticos de derecho comparado), llegando a la conclusión de que el acoso es una conducta intencional con empeño, sobre todo consiste en acción (excepcionalmente en omisión), similar o diferente, emprendida contra la voluntad del perjudicado. Consiste en hacer sufrir, angustiar o humillar causando daño o malestar, peligro o violación de la privacidad del perjudicado. Para que exista el delito del art. 190a §1 es necesario que tal acoso sea reiterado. No se puede definir *in abstracto* cuánto tiempo ha de pasar para que este elemento se cumpla; hay que determinarlo cada vez a la luz de las circunstancias del caso concreto. Parece que pueden pasar tanto varios días (p.ej. en caso de centenar de mensajes enviados a diario por el sujeto), como varios meses (cuando la conducta que acosa se realiza cada varios días). Mediante la inclusión al art. 190a CP de la reiteración, el legislador de facto ha limitado la protección legal del perjudicado. El autor considera que es real la situación en la cual estaremos ante el acoso mutuo (analogicamente, como es posible – según el autor – en el caso de malos tratos mutuos). La admisión del acoso mutuo no es imposible debido a la construcción de elementos del delito del art. 190aCP, ni debido a la naturaleza de las cosas.

Palabras claves: stalking, acoso reiterado, conducta repetitiva, peligro, violación importante de privacidad

НЕСКОЛЬКО ЗАМЕЧАНИЙ ПО ПОВОДУ СОСТАВА ПРЕСТУПЛЕНИЯ «НАВЯЗЧИВОЕ ПРЕСЛЕДОВАНИЕ», ПРЕДУСМОТРЕННОГО СТ. 190А УК

Аннотация

В статье предпринята попытка истолковать понятие «преследование», предусмотренное ст. 190а УК. Автор приводит как доктринальные взгляды на данный вопрос, так и результаты проведенных эмпирических исследований (а также синтетические сравнительно-правовые наблюдения). На этих основаниях он приходит к выводу, что «преследование» – это повторяющееся преднамеренное поведение однотипного или разнотипного характера, проявляющееся, главным образом, в форме действия, а в исключительных случаях – и в форме бездействия. Действия, осуществляемые против воли потерпевшего, состоят в его причинении ему мучений, докучливом приставании или унижении. Они причиняют ему вред, вызывают чувство дискомфорта или опасности либо состоят в нарушении неприкосновенности его частной жизни. Следует подчеркнуть, что для того, чтобы имело место преступление, предусмотренное ст. 190а § 1, преследование должно иметь упорный, повторяющийся характер. В отвлечении от обстоятельств конкретного дела невозможно определить, как долго должно иметь место преследование, чтобы его можно было признать носящим упорный характер. Как кажется, это может быть как период нескольких дней (например, в случае отправления преступником на протяжении этого времени сотен текстовых сообщений), так и нескольких месяцев (когда действия с признаками преследования совершаются с интервалом в несколько дней). Можно полагать, что законодатель, включив в содержание статьи 190а УК признак упорного характера противозаконных действий, де-факто сузил возможности

для уголовно-правовой защиты потерпевшего. Как отмечает автор статьи, можно без труда представить себе ситуацию, в которой имеет место взаимное преследование (аналогично тому, как, по мнению автора, может иметь место и взаимное насилие в семье). Следует полагать, что понятие взаимного преследования не находится в противоречии ни с совокупностью установленных законом признаков преступления, предусмотренного ст. 190а, ни с природой вещей.

Ключевые слова: stalking, навязчивое преследование, повторяющийся характер поведения, чувство опасности, существенное нарушение неприкосновенности частной жизни

EINIGE ANMERKUNGEN ZUM TATBESTAND DER „ANHALTENDEN BELÄSTIGUNG“ IM SINNE VON ARTIKEL 190A DES POLNISCHEN STRAFGESETZBUCHES

Zusammenfassung

Der Artikel stellt den Versuch einer Auslegung des Rechtsbegriffs der „Belästigung“ im Sinne von Artikel 190a des polnischen Strafgesetzbuches dar. Der Autor legt die Auffassungen der Rechtslehre in dieser Angelegenheit dar und präsentiert die Ergebnisse empirischer Untersuchungen (und eine zusammenfassende rechtsvergleichende Betrachtung) und kommt zu dem Schluss, dass Belästigung ein vorsätzliches, durch Wiederholung gekennzeichnetes Verhalten, hauptsächlich in Form von – ihrer Art nach identischen oder unterschiedlichen – Handlungen (im Ausnahmefall auch Unterlassungen) darstellt, die gegen den Willen des Opfers erfolgen und durch die dieser gequält, bedrängt oder erniedrigt wird und die dem Opfer Schaden zufügen oder bei diesem Unbehagen, ein Gefühl der Bedrohung oder eine Verletzung der Privatsphäre verursachen. Für das Vorliegen einer Straftat nach Artikel 190a § 1 muss diese Belästigung über einen bestimmten Zeitraum andauern. Es lässt sich nicht *in abstracto* angeben, wie viel Zeit vergangen sein muss, bis dieser Straftatbestand erfüllt ist und diesbezügliche Feststellungen sind jeweils vor dem Hintergrund der konkreten Umstände des bestimmten Falls zu treffen. Und so scheint es, dass es sich dabei sowohl um einen Zeitraum von wenigen Tagen (z.B. bei vom Täter gesendeten Hunderten von Textnachrichten täglich), als auch um mehrere Monate (wenn die Belästigungen in Abständen von jeweils mehreren Tagen erfolgen) handeln kann. Man kann zu dem Schluss gelangen, dass der Gesetzgeber den strafrechtlichen Schutz des Opfers durch Aufnahme des Tatbestands der Beharrlichkeit in Artikel 190a des polnischen Strafgesetzbuches de facto eingeschränkt hat. Der Autor vertritt die Position, dass es die reale Situation gibt, in der wir es mit einer gegenseitigen Belästigung zu tun haben (so wie – nach Ansicht des Autors – auch Fälle von gegenseitigem Mobbing möglich sind). Es ist davon auszugehen, dass einer Annahme der Konstruktion der gegenseitigen Belästigung weder die Konstruktion der gesetzlichen Straftatbestände nach Artikel 190a des polnischen Strafgesetzbuches, noch die Natur der Dinge entgegen steht.

Schlüsselwörter: Stalking, anhaltende Belästigung, wiederholtes Verhalten, Bedrohungsgefühl, schwerwiegende Verletzung der Privatsphäre

CERTAINES REMARQUES SUR LA NATURE DU «HARCÈLEMENT PERSISTANT» AU SENS DE L'ART. 190BIS DU CODE PÉNAL

Résumé

L'article présente une tentative d'interprétation du concept de «harcèlement» qui se produit à l'art. 190bis du Code pénal. L'auteur présente les points de vue de la doctrine en la matière, ainsi que les résultats de recherches empiriques (et remarques juridiques comparatives synthétiques), concluant que le harcèlement est un comportement intentionnel caractérisé par la répétitivité, principalement sous forme d'action (et exceptionnellement aussi d'omission), identique ou différente dans le genre, prise contre la volonté de la victime, constituant son tourment, sa détresse ou son humiliation, et lui causant du tort ou son inconfort, un sentiment de danger ou une atteinte à la vie privée. Pour le crime d'art. 190bis § 1, ce harcèlement doit être persistant. On ne peut pas dire *in abstracto* combien de temps devrait s'écouler pour que cet élément se réalise; des dispositions à cet égard devraient être prises à chaque fois compte tenu des circonstances d'un cas particulier. Il semble donc que cela puisse être à la fois une période de plusieurs jours (par exemple dans le cas de centaines de SMS envoyés quotidiennement par l'agresseur) et de plusieurs mois (lorsque le comportement de harcèlement est mis en œuvre à des intervalles de plusieurs jours). On peut supposer qu'en incluant l'élément de persistance dans le contenu de l'article 190bis du Code pénal, le législateur a de facto restreint la protection pénale et juridique de la victime. L'auteur présente la position selon laquelle il est tout à fait réelle la situation dans laquelle nous pouvons faire face au harcèlement mutuel (de la même manière qu'il est possible – selon l'auteur – dans le cas de l'intimidation mutuelle). Il convient de supposer que l'adoption de la structure du harcèlement mutuel n'est pas empêchée par la construction des éléments statutaires de l'infraction au titre de l'article 190bis, ni par la nature des choses.

Mots-clés: stalking, harcèlement persistant, répétition du comportement, sentiments de danger, atteinte grave à la vie privée

ALCUNE OSSERVAZIONI SUGLI ELEMENTI COSTITUTIVI DEL REATO DI STALKING ALLA LUCE DELL'ART. 190A DEL CODICE PENALE

Sintesi

L'articolo presenta un tentativo di interpretazione del concetto di "stalking" sulla base dell'art. 190a del Codice penale. L'autore presenta il punto di vista della dottrina su tale materia, così come i risultati di studi empirici condotti (con sintetiche note comparative), giungendo alla conclusione che lo stalking si caratterizza da una ripetitività intenzionale, soprattutto sotto forma di azioni (ed eccezionalmente sotto forma di omissioni), dello stesso tipo o di tipo diverso, intraprese contro la volontà della parte lesa, che costituiscono tormento, vessazione o umiliazione della parte lesa, che le recano un danno, o che provocano disagio, percezione di minaccia o violazione della privacy della parte lesa. Per costituire il reato di cui all'art. 190a § 1 è necessario che tale persecuzione sia persistente. Non è possibile affermare astrattamente quanto tempo debba trascorrere affinché tale elemento costitutivo del reato venga realizzato. Le determinazioni in tale ambito devono essere compiute volta per volta sullo sfondo delle circostanze del singolo caso. Si direbbe che può essere sia un periodo di alcuni giorni (ad esempio in caso di centinaia di SMS inviati quotidianamente dall'autore del reato), sia di alcuni

mesi (se i comportamenti persecutori vengono realizzati a distanza di alcuni giorni). Si può ritenere che attraverso l'inserimento nell'art. 190a del Codice penale dell'elemento costitutivo della "persistenza" il legislatore abbia de facto ridotto la tutela giuridica penale della parte lesa. L'autore presenta la posizione che possa presentarsi una situazione nella quale possiamo avere a che fare con stalking reciproco (analogamente a come è possibile, secondo l'autore, nel caso di maltrattamento reciproco). Bisogna ritenere che nell'assumere il concetto di stalking reciproco non è di ostacolo né la struttura degli elementi costitutivi giuridici del reato, né la natura delle cose.

Parole chiave: stalking, atti persecutori, ripetitività dei comportamenti, percezione di minaccia, violazione essenziale della privacy

Cytuj jako:

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