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THE OFFENCE OF STALKING IN POLISH CRIMINAL LAW (ART 190A § 1 OF THE CRIMINAL CODE)

The article discusses the statutory features of the offence of stalking, which is quite new in Polish criminal law systems. Therefore its present shape may lead to some controversies and cause some interpretation problems, especially in practice. This is important as there are many such offences detected each year.

Key words: *stalking, persistent stalking, harassment, protection of privacy.*

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Правопорушення переслідування в польському кримінальному праві (стаття 190а § 1 Кримінального кодексу)

У статті розглядаються нормативні ознаки злочину переслідування, яке є абсолютно новим у польській системі кримінального права. Тому його нинішня форма може призвести до деяких спірних питань і викликати деякі проблеми інтерпретації, особливо на практиці. Важливість цієї проблеми пояснюється великою кількістю щорічного вчинення цього злочину.

Ключові слова: *переслідування, постійні переслідування, утиски, захист приватного життя.*

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Правонарушение преследование в польском уголовном праве (статья 190а § 1 Уголовного кодекса)

В статье рассматриваются нормативные признаки преступления преследования, которое является абсолютно новым в польской системе уголовного права. Поэтому его нынешняя форма может привести к некоторым спорным вопросам и вызвать некоторые проблемы интерпретации, особенно на практике. Важность этой проблемы обьясняется большим количеством ежегодных совершений этого преступления.

Ключевые слова: *преследование, постоянные преследования, притеснения, защита частной жизни.*

Problem statement. The phenomenon of stalking, which is treated as a manifestation of the so called emotional violence, has been already criminalised in many countries all over the world. This was undoubtedly supported by the cases of stalking of known persons (among others J. Foster, J. Lennon, M. Seles, R. Schaeffer), as well as by the results of conducted empirical research which demonstrated clearly that a great number of the surveyed persons admitted they had experienced the phenomenon of stalking [1].

Anti-stalking legislation exists both in European countries (e.g. Austria, Belgium, Denmark, Germany, Ireland, Malta, Holland, Great Britain, Italy) and in non-European ones (e.g. Canada, Australia, the United States). Poland has belonged to these countries since June 6, 2011. As is observed by D. Woźniakowska-Fajst, «in Europe the phenomenon of stalking is called different names, however, most often it is the word stalking (in Anglo-Saxon countries) and words which in a given language correspond in meaning to stalking (e.g. in Austria, Belgium, Denmark, France, Holland, Slovenia or Sweden). Another group is formed by countries in which stalking is described as «harassment» in the national language (Cyprus, the Czech Republic, Estonia, Finland, Germany,

Greece, Hungary, Italy, Lithuania, Luxembourg, Malta, Portugal, Slovakia and Spain)».

The main problem which appears when fighting with stalking is the fact that the activities of the offender (very troublesome for the victim) often do not constitute offences or even petty offences (standing in front of the victim's house or working place, writing letters, sending numerous SMS messages or e-mails and so on), and they can cause the victim a lot of inconvenience. It seems that two basic groups of situations characteristic for the phenomenon can be distinguished: the first is stalking of people closely related to the offender, his family (then stalking becomes part of the home/partner violence understood in a broad way); and the second group comprises stalking of strangers (usually commonly known persons). D. Woźniakowska-Fajst is right when she states: «The tragedy of stalking victims is most visible in the fact that the stalker may intimidate them, force them to change their habits, plans, make them live in constant fear and cause sometimes enormous psychological suffering by activities which are legally indifferent». The author of research on the phenomenon of stalking in Poland, J. Skarżyńska-Sernaglia states that for 62 % of victims the experience of stalking had negative influence on their life and health, causing the feeling of being endangered, anxiety, psychosomatic disorders and problems in interpersonal relationships (psychological and relation consequences), including: anxiety (attacks of panic, phobias and so on) – 49 % of victims, sleeping disorders, eating disorders and similar ones – 22 % of victims, changes or problems in interpersonal contacts – 57 % of victims [2]. All this undoubtedly made it necessary to research the problem and consider the justification of criminalising stalking also in the Polish criminal law system.

Statistical data coming from the Main Police Headquarters referring to the period 2011 – 2015 show that the number of detected offences of stalking (art. 190a § 1 of the Criminal Code) is quite significant (except for 2011 when the discussed provision came into force on June 6) and it reaches around 2500 a year.

Analysis of recent research and publications. The provision of art. 190a § 1 criminalises the act of persistent stalking of another person or of a person closely related to the victim and thus causing the feeling of danger justified by the circumstances or significantly infringing on the victim's privacy. The main protected value in this case is the freedom understood broadly (both as freedom «from something», from fear, from soliciting, from unwanted company of another person and freedom «to something», mainly to preserve one's privacy). As S. Hypś states, «The protected value is the right - connected with the protection of human freedom - to live in a feeling of safety, i.e. free from any form of harassment, stalking and feeling of danger. Therefore it is the psychological freedom that is protected as well as the victim's right to protection of his/her private and family life, since the offender can be punished for significant infringement on the victim's privacy. However, the essence of the offence most often lies in the attack on the psyche of a man by infringing on his privacy». According to M. Budyn-Kulik, the individual protected value is the «value in the shape of certain well-being. In the case of the offence from art. 190a of the Criminal Code it is the psychological well-being. The individual value protected by this provision is also the right to privacy». The secondary protected value seems to be the health of a person (psychological, physical), his/her bodily inviolability, correspondence inviolability and so on.

Analysing the discussed provision it should be noticed that it contains many unclear features leading to serious interpretation difficulties. The first difficulty is connected with the verb feature «stalks», not defined in the statute. According to the dictionary, «to stalk» means «to constantly harass, annoy, alarm somebody (with something), pester somebody, not give somebody a moment of peace». It is stressed in the criminal law doctrine that stalking refers to multiple repeated harassment consisting of different acts, bothering the victim, the aim of which is to distress, annoy or disturb the victim or a person closely related to him/her. Additional difficulties stem from the fact that the stalking described in art. 190a § 1 of the Criminal

Code must be persistent. It may be questioned whether such a statutory description is justified. «Persistent» means difficult to get rid of, remaining for a long time or constantly repeated, constant, disturbing. The feature of persistence was known in the Criminal Code before (art. 145 point 1, art. 209, art. 218 and art. 341 § 2 of the Criminal Code) and has been interpreted many times (mainly for the needs of the offence of not paying alimony).

In the judicature persistence is understood as a long lasting behaviour, repeated, characterised by the bad will and stubbornness. In the verdict from January 5, 2001 the Supreme Court stated that persistence is the antinomy of a single behavior of the offender or even of a behaviour repeated a few times. It is therefore clear how the problem of persistence is treated in practice (when interpreting art. 209 of the Criminal Code,) and it may be assumed that a similar approach will be present in the case of art. 190a (i.e. for the commission of the offence even a few acts of the offender will not suffice). Undoubtedly when interpreting the provision of art. 190a § 1 of the Criminal Code the interpretation of the statutory features of the offence of not paying alimony will be useful, yet it cannot be indiscriminately applied to art. 190a of the Criminal Code. Therefore it is justly underlined that since the very word "stalk" implies the continuity of behaviour (many acts), it is superfluous to imply additional statutory requirements according to which the harassment by the offender should be persistent [3, p. 441]. Such an approach leads to the narrowing of the criminalisation range of the provision to the most oppressive activities and as a consequence this may lead to the limitation of the victims' protection as a result of this requirement. The assessment of stalking from the point of view of its persistence must be based on the analysis of concrete circumstances of a case since it is impossible to make a complete list of activities which may be treated as manifestations of persistent stalking. And this is a task for the criminal courts.

In the verdict from February 19, 2014 (II AKa 18/14), referring to art. 190a § 1 of the Criminal Code, the Appellate Court in Wrocław stated that: «the persistence of the offender's bahaviuor may be inferred from, on the one hand, his special psychical attitude which is shown in the tenacity of the stalking, i.e. remaining in a kind of stubbornness in spite of the pleas and admonishments of the victim or other persons trying to persuade the offender to refrain from such acts, on the other hand – the longer period of time when such acts are undertaken. The offender's activities must cause the victim to experience a justified feeling of danger or the feeling of significant infringement of his/her privacy». This opinion is rational, yet one should remember that the pleas (e.g. from the victim) or admonishments (e.g. from the police) de lege lata are not elements forming the statutory features of the offence from art. 190a § 1 of the Criminal Code, therefore they are not required for the existence of the offence.

An interesting problem appears when the offender stalks a few persons (who are closely related to one another – e.g. the stalking of the offender's wife and children). In such a case to properly assess the feature of persistence it is necessary to assess jointly all the activities of the offender; it is inadmissible to divide single acts referring to individual victims. Also the individual acts of the offender which are part of the stalking do not need to be identical in the case of all the victims (e.g. following and calling the wife, SMS messages and e-mails sent to the children).

According to the decision of the Supreme Court from December 12, 2013 (III KK 417/13): «In order to treat some behaviour as stalking it must be persistent, and therefore it must consist of constant and significant infringement on the privacy of another person and of making the victim feel endangered which is justified by the circumstances. The law-maker does not require the behaviour of the stalker to possess elements of aggression (…). For the existence of the offence it does not matter whether the offender intends to fulfill his threats. The subjective feeling of the victim is decisive here and it must be assessed in an objective way».

The above presented reflections make it again necessary to ask about the sense of the statutory requirement of «persistence», especially so because conducted research shows that the most often cause of refusal to start criminal proceedings referring to

the discussed offence is the lack of the feature of «persistence» in the offender's behaviour. One should not overlook in such cases the possibility of establishing that the offence was attempted. The offender in such cases, by his behaviour reveals the intention of committing the forbidden act and directly heads toward its execution [4, p. 19]. Such an approach leads to a more effective protection of the victim and is the source of yet another argument for resigning from the describing of «stalking» as «persistent».

Another doubt is connected with the object of the criminal act (stalking of another person or of a person closely related to him/her). Closely related person means, according to art. 115 § 11 of the Criminal Code: a spouse, relatives in the directly ascending and descending lines, siblings, relatives by marriage in the same line or degree, the adopted and adopting person and their spouses and cohabitants. Therefore, e.g. a fiancée not living together with the victim is not a closely related person to him (in the meaning of art. 115 § 11 of the Criminal Code). There are some doubts in the criminal law doctrine whether a person who stays in a cohabiting relationship with a person (of the same sex) in the so called partnership relation should be treated as a closely related person. In our opinion a positive answer is the right one, but this opinion is not commonly accepted, therefore there may be some doubts in practice connected with this issue. On the other hand, the provision referring to the «stalking of another person or of a person closely related to him/her», establishes quite a wide objective range for its application.

The purpose of this article. It seems that stalking, as a rule, will have the form of action, however, stalking by omission to act cannot be totally excluded, though it can be very rare (just as in the case of the offence of maltreatment). The offence is a material one (i.e. it must cause changes in the outside world to be considered fully executed), the result in the feeling of danger of the victim or of the person closely related to him/her justified by the circumstances or in the significant infringement of the victim's privacy. The use of the word «or» by the law-maker should be stressed since it results in the fact that for the existence of the analysed offence the appearance of one of the above indicated results is sufficient (i.e. causing the feeling of danger or significant infringement of privacy), though it is certainly possible that the two results appear together.

Statemant of the base materials. The broad approach to the result for the purposes of art. 190a of the Criminal Code can be considered as justified since in practice there may appear both such cases in which the victim of stalking starts feeling fear, changes hi/her s relations with other people or even looks for medical help and cases in which the victim does not feel endangered (because he/she has a very strong psychic construction or it is a person who has a very effective personal protection). Even when the feeling of being endangered is not present but the victim is forced to make substantial (uncomfortable) changes in his/her private life, the behaviour of the offender should be criminalised.

It should be emphasised that the fulfillment of the statutory features of the offence from art. 190a § 1 of the Criminal Code takes place both when the result of the persistent stalking is the victim's feeling of danger and when the stalked person does not feel endangered but that feeling characterises a person closely related to him/her, as well as when the danger is felt both by the stalked person and by a person closely related to him/her [5, p. 526].

There is no doubt that there may be such cases in practice when the behaviour of the offender does not make the victim feel endangered and does not significantly infringe on his/her privacy, yet is perceived as quite troublesome (though it is not connected with changes in the mode of life or in the victim's habits); in such a situation the offender's behaviour – according to M. Budyn-Kulik – «fulfills only the statutory features of art. 107 of the Code on Petty Offences». Of course, it is quite possible, yet one should not overlook the possibility of applying the construction of attempt to commit the offence from art. 190a § 1 of the Criminal Code in such situations.

Serious doubts are bound to appear in practice when interpreting the expression «infringes on the victim's privacy» (it is not enough to cause the danger of infringement of privacy), the more so

because the infringement has to be «significant». It should be observed that (so far) the term privacy has not been present in the Criminal Code. Privacy is a term which – in the broadest meaning – describes the ability of an individual or a group of persons to keep their data and personal habits and behaviours publicly unknown. Privacy is often considered as a right belonging to an individual. In the law doctrine the right to privacy is defined more often than the privacy itself.

One should mention here the reflection of Z. Zaleski, who distinguishes closer privacy (strict one) which comprises intimacy, states, features and processes known only to a given person and further privacy (open) which comprises e.g. the possession of certain territory.

The freedom to form social contacts and maintain them is also an element of the privacy. It may be assumed that for the purposes of art. 190a of the Criminal Code two elements will constitute the core of privacy: deciding about the circulation of information about oneself and unrestricted deciding about one's behaviour. On the ground of the civil law, as it is emphasised by Z. Radwański and A. Olejniczak: «The privacy of a person comprises especially events connected with family life, sexual life, state of health, the past, financial situation including the obtained income. One may talk about infringement on privacy when an act attacks the psychic peace of a person, manifesting itself in overhearing, following, filming, recording of statements, even if they are next not published». These remarks may be also applied to art. 190a of the Criminal Code.

The infringement on privacy itself is not enough to fulfill the statutory features of the offence from art. 190a § 1 of the Criminal Code; as it has already been mentioned, it has to be «significant». Of course, one may question whether this requirement is reasonable. The opinion could be defended that privacy is such an important value that each infringement of it is significant. On the other hand, it seems that there may be many cases when the infringement on privacy can (and should) be treated as insignificant (e.g. checking the waste thrown away – to a public waste bin – by a known person in order to obtain information about his/her diet). What was probably meant by the law-maker, was the exclusion from the provisions range of behaviours which infringe on privacy but not in a significant way (so they are slight). One could have doubts if such an operation was necessary since such insignificant infringement would have been assessed on the basis of art. 1 § 2 of the Criminal Code anyway (their degree of social harmfulness would be minimal).

The offence from art. 190a § 1 is a common one. It is difficult to make any definite conclusions about the suspects since we possess data from the Police Main Headquarters referring only to 4 complete years (2012 – 2015). This data shows that men dominate as offenders (in 2012 – 78,0 %, in 2013 – 78,9 %, in 2014 – 80,6 %, in 2015 – 84,5 %). It is worth mentioning that the percentage of young persons (under 20) among the suspects in the analysed period was quite significant (though the numbers have been decreasing recently): in 2012 – 16,4 %; in 2013 – 17,6 %; in 2014 – 14,7 %, in 2015 – 13,7 %. In most cases these offences, which should be pointed out, are committed by persons over 30 (in 2012 – 63,6 %, in 2013 – 61,8 %, in 2014 – 63,9 %, in 2015 – 64,4 %). Also persons over 50 are a significant part of the suspects (in 2012 – 17,1 %, in 2013 – 16,2 %, in 2014 – 15,9 %, in 2015 – 15,5 %).

As far as the mens rea of stalking is concerned, it is an intentional offence. As it is stressed by the doctrine, no special colouring of the offender's intention connected with his aim or motivation is required. According do M. Budyn-Kulik: «The offender does not have to want to cause the victim's feeling of danger or significant infringement on the victim's privacy. The law-maker does not specify as well the motivation of the offender. Therefore it is legally irrelevant whether the offence was caused by the emotion of love or hatred of the victim, the desire to annoy the victim, maliciousness or the desire to have revenge on him/her». Because of the feature of «persistence» which is connected with the mens rea of the offence, this part of features has to show the direct intent. There are no obstacles, however, as it seems, for the feature referring to the result (i.e. causing the feeling of danger or

significant infringement on privacy) to be characterised by both the direct and eventual intent.

The offence from art. 190a § 1 of the Criminal Code is punished with imprisonment from 1 month to 3 years. If the imposed punishment does not exceed 1 year, then its execution may be conditionally suspended (for a probation period from 1 to 3 years, and in the case described by art. 70 § 2 of the Criminal Code – from 2 to 5 years). It is also possible to apply to the perpetrator of the offence from art. 190a § 1 of the Criminal Code the conditional discontinuance of criminal proceedings, as well as the institution described by art. 37a of the Criminal Code (changeable sanction) and 37b of the Criminal Code (mixed punishment). In the case of conviction for the offence from art. 190a of the Criminal Code the following penal measures may be imposed: the interdiction to stay in specified environments and places, the interdiction to contact certain persons, the interdiction to approach certain person or to leave a specified place of residence without the court's consent, as well as the order to temporarily leave a locum occupied together with the victim (art. 41a of the Criminal Code), deprivation of public rights – art. 40 of the Criminal Code (when the imposed imprisonment is at least three years for an offence committed as a result of motivation deserving special disapproval), interdiction to occupy a given position or to perform a given profession (art. 41 of the Criminal Code) or making the verdict publicly known (art. 43b of the Criminal Code). Sometimes the forfeiture of objects (art. 44 of the Criminal Code) or of financial profits from the offence (art. 45 of the Criminal Code) may be possible, as well as the obligation to compensate for damages (art. 46 of the Criminal Code). The offence described by art. 190a § 1 of the Criminal Code is prosecuted on the victim's motion.

As far as the punishments imposed in practice are concerned, the dominant one is imprisonment with conditional suspension of its execution (in 2012 – 66,3 % of all convictions, in 2013 – 61,5 %, in 2014 – 65,6 %). The second place is occupied by the autonomous fine (in 2012 – 18,9 %, in 2013 – 18,6 %, in 2014 – 15,7 %). The punishment of restricted liberty is imposed relatively rarely (in 2012 – 9,9%, in 2013 – 12,3 %, in 2014 – 11,0 %). Even less often is the punishment of imprisonment without conditional suspension of its execution applied (in 2012 – 4,9 %, in 2013 – 7,6 %, in 2014 – 7,7 %).

Conducted empirical research (covering the period from June 6, 2011 till June 6, 2012 and including 478 cases) demonstrates that there is a high number of cases based on art. 190 § 1 – 3 of the Criminal Code (only in the first year when the provision was binding 5000 cases were registered in all prosecution units in Poland, mainly referring to art. 190 § 1 of the Criminal Code). Research shows that the most often cause of stalking is the inability to accept the parting with a partner by one of the relationship parties (marriage or cohabitation). Stalking most often lasts from 1 to 6 months (though cases when stalking lasts many years, even over 5 years are also not rare). In the analysed cases there was, as a rule, a complex of behaviours constituting stalking. It was rare for the stalking activity to be uniform, the rule was that he offender was employing a wider variety of unwanted activities (e.g. calling, sending SMS messages and e-mails). The basic type of stalking consisted of calling with the use of a stationary or mobile phone – this type of activity appeared in 284 cases (of course, usually alongside other stalking activities). Stalking by sending unwanted SMS messages appeared in 171 cases. It is therefore visible that the phone (mainly the mobile one) has become an important means of communication, but also the basic means of stalking nowadays. As far as other means of stalking are concerned, it was, among others: persistent visiting (73), sending e-mails (42), following (39) threatening (34), offending (13), observing (11), taking pictures or filming (9), sending letters or presents (9), disturbing (knocking on the wall, on the door) – 6, destroying property (5), violating bodily integrity (3), using the inter-phone (3), sending packets with excrements (2), maliciously informing various institutions about alleged incorrectness in conducting some activity and so on. Other, less common means of stalking worth mentioning here were: hanging mourning ribbons on the doors, placing pieces of paper on the door, installing

wiretapping, removing handles from windows, malicious car parking, spreading defamatory leaflets or spreading gossip. The typical accused person is male between 22 and 40, single, usually employed, without children. In most cases the accused plead guilty. In all cases the accused knows the victim and in most cases they used to be in a close emotional relationship (62,5 %). The typical victim is female (in a significant number of cases – young.

To sum up, it should be stressed that the introduction of the offence of stalking into the Polish criminal law system was justified. This is confirmed by the fact that the number of detected offences from art. 190a § 1 of the Criminal Code is 2500 a year. It can be questioned whether the present shape of the offence is proper. The provision contains a number of unclear features which cause serious interpretation problems. It might be a good idea to look at the solutions accepted in other countries and use some of them (e.g. the synthetic solution in the Belgian Criminal Code), as well as to take into consideration the remarks expressed in the opinions on the project to change the Criminal Code referring to the analysed offence. De lege ferenda a few modification could be proposed, among others, to replace the expression «persistently stalks» only by «stalks». The feature of persistence causes many interpretation difficulties and the attempts to use the solutions referring to art. 209 (not paying alimony) are not correct. There are also problems in practice with the expression «infringes on the victim's privacy» (and the statute does not define privacy). Another problem is connected with the fact that for the offence from art. 190a § 1 of the Criminal Code to be committed it is not enough that there has been an infringement on privacy, but it has to be «significant».

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