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THE OFFENCE OF IDENTITY THEFT IN THE POLISH CRIMINAL LAW (ARTICLE 190A § 2 OF THE PENAL CODE) (PART ONE)

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Purpose: *the main purpose of the paper is to present the analysis of the statutory features of the offence described in Art. 190a § 2 of the Polish Penal Code which consists in the impersonating another person and is known as theft identity.* ***Methods:*** *in order to achieve the above indicated purpose mainly the dogmatic method was applied.* ***Results:*** *art. 190a § 2 describes a special type of fraud the core of which is the impersonation of another person with the use of that person's image or personal data in order to cause to the victim damage or injury. The offence is a formal one (no result is required); it is committed at the moment when the offender impersonated the victim or pretended to be the victim; it is irrelevant whether the intended damage/injury was really inflicted by the offender. The misdemeanour is a common one and can be only committed with the directional intention (dolus coloratus).* ***Discussion:*** *while the introduction of the offence of identity theft into the Polish Penal Code should be approved, some doubts should be raised referring to the placing of the offence in Chapter XXIII ("Offences against freedom"), the range of its mens rea (which is limited to the direct intention) and the maximum punishment for the aggravated type.*

Keywords*: impersonating; image of another person; personal data; damage, injury; identity theft.*

Introduction. The Act of 25 February 2011 on the amendment to the Penal Code [1], which entered into force on 6 June 2011, modified Chapter XXIII of the Penal Code ("Offences against freedom") by defining new types of offence: persistent harassment (stalking – Article 190a § 1 of the Penal Code) and identity theft (i.e. impersonating another person – Article 190a § 2 of the Penal Code). It should be noted that the criminalisation of these behaviours was rational and rooted in genuine social needs. As stressed in the explanatory note to the bill, in the fragment regarding acts of impersonating another person (Article 190a § 2 of the Penal Code), its aim is to penalise the "misappropriation" of the identity of the victim, whose criminalisation should take place at the forefield of the result [2]. Further in the explanatory note to the bill, it is emphasised that the ratio legis of the provision was to guarantee the freedom to decide on the use of information about one's personal life, which perfectly correlates with the right to protect private life.

The concept of privacy had not been referred to in the Penal Code before. Privacy is a term which, in its broadest sense, defines the possibility of individuals or groups of individuals to keep their personal data and personal habits and behaviours not disclosed to the public. Privacy is often considered as a right vested in an individual. Scholars of law define it as the right to privacy rather than mere privacy [3, pp.71-72]. It should be noted that some personality rights not specifically referred to in Article 23 of the Polish Civil Code are protected even though they are not expressly specified in the wording of the article. An example of such a personality right is the right to privacy. The sphere of privacy is a certain area that is free from interference by others, and in which given individuals are free to develop their personalities and to decide on their own lives. This is the so-called right to be alone. This concept was developed and accepted by most American scholars of law. Among the Polish scholars, the issue of the right to privacy was raised by A. Kopff. In his opinion, "every individual must be

able to shape his or her personality and way of life on his/her own, and to demand that this life be not a subject of other people's curiosity based on sensation-seeking [4, p.38]". Privacy is a broad and complex concept. It includes a set of values such as: good name, reputation, personal life, freedom, the past of a given person, etc. It is worth mentioning the reflections of Z. Zaleski, who distinguished closer privacy (privacy in the strict sense) covering the intimacy, states, features and processes known only to the person concerned and further privacy (open privacy), which includes e.g. possessing a certain territory [5, p.96]. Privacy covers also the freedom to enter into and maintain social relations. It can be assumed that in the context of Article 190a of the Penal Code, privacy is essentially composed of the following two elements: deciding on the flow of information on one's own person and free managing of one's own conduct. Under civil law – as viewed by Z. Radwański and A. Olejniczak, "human privacy includes, in particular, events related to the family life, sexual life, health condition, personal history, financial situation, including the income earned. Breach of privacy includes even the mere conduct targeting the mental peace of a person, manifested in eavesdropping, tracking, filming, speech recording, even if not published later [6, p. 167]. "These observations are also reasonable in the context of Article 190a of the Penal Code.

As claimed by the authors of the explanatory note, "we decided not to put the proposed misdemeanour in the Act (...) on the protection of personal data (...), since, first of all, the proposed provision refers to a crime that is definitely universal, which can be committed by anyone, unlike most of the criminal provisions of the above-mentioned Act, which are of an individual character and generally include the penalisation of activities of data controllers or data processors. The protected value of these misdemeanours is mostly the correct handling of the data contained in data sets maintained under the provisions of the above-mentioned statutory regulation. The intention of the proponents of Article 190A § 2 of the Penal Code was primarily to guarantee protection of the freedom to decide on the use of information about one's personal life, which perfectly correlates with the right to protect private life." [7]. It is worth noting that some scholars share the view that the most appropriate location for the provision of Article 190A § 2 of the Penal Code would be Chapter of XXXIII of the Penal Code. ("Crimes against the protection of information"), as this offence seems rather to be directed against the protection of information. According to M. Budyn-Kulik, it would also be possible to consider placing the provision among crimes against human dignity and bodily integrity, as, according to the author, the fulfilment of the statutory features of the offence under Article 190a § 2 of the Penal Code may typically compromise the dignity and good name of the victim [8, p. 89]. The individual protected value seems to cover the right to the image of a given person. Some scholars point out as well that it is also possible to assume that it covers the right to identity. In view of the purpose of the offender's action (harming the victim personally or causing a damage to the victim's property), it can be assumed that interests (both property and non-property interests) of the victim constitute the secondary protected value.

The protected value and the actus reus. Article 190a § 2 of the Penal Code covers a sort of a fraud consisting in impersonating another person by using his or her image or personal data in order to inflict a personal injury or a property damage on that person. As aptly put by some scholars, "this offence supplements the criminalisation of stalking, which involves also malicious disseminating of messages faked by the offender as information coming from the harassed person with the intention to inflict additional harm, nuisance or damage, in particular by using the Internet, e.g. by disseminating matrimonial offers, posting erotic announcements or unceasingly ordering goods and services on behalf of that person". Undoubtedly the definition of personal data is the same as that set out in the Regulation of the European Parliament and Council (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). In accordance with Article 4(1) of the Regulation, "personal

data" means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person". The term "impersonating" - according to the linguistic meaning - is pretending to be someone else, and the “use” (in the context of the wording of Article 190a § 2 of the Penal Code) should be understood as "using something to achieve a goal, profit". According to M. Budyn-Kulik, impersonation means pretending to be someone else. According to A. Zoll, "The causative act is to mislead the recipient of information by creating an impression using an image or other personal data, that this information comes from the person to whom the image or other personal data relate, while in fact this information comes from the perpetrator" [9, p. 593]. M. Królikowski and A. Sakowicz define impersonation as the use of an image or personal data of the victim, as if he/she did it himself/herself [10, p. 590-591].

Circumstances in which personal data are used are irrelevant for the legal qualification of the act; it does not matter whether such use takes place in legal transactions or in private life. As aptly put by J. Kosonoga, one can impersonate only a living person (thus this excludes impersonation of a deceased person). This is firstly because the protected value is freedom, and this can only be violated in relation to a living person, and secondly the provision of Article 190a § 2 of the Penal Code uses the term "person" which may not be used for deceased people. For the same reasons, the statutory features of a prohibited act under Article 190a § 2 of the Penal Code cannot be considered fulfilled in the case of impersonating a non-existent person. The wording of Article 190a § 2 of the Penal Code indicates that it is about impersonation of a natural person (because it refers to one’s image and personal data), and therefore cannot refer to entities other than natural persons (and therefore to any organizational units, regardless of whether they have legal personality or not, state and local administration bodies and other entities). When it comes to the term "image", the Dictionary of the Polish language specifies two meanings thereof: "someone’s likeness in the form of drawing, picture, photograph, etc." and "the manner whereby a given person or object is perceived and presented". It should be assumed that under Article 190a § 2 of the Penal Code, both these meanings of the word will apply. It should be noted that the law-maker used the term "image or other personal data", not the phrase "image or personal data", thereby stating that the image somehow falls under the category of personal data. According to A. Sakowicz, "the image can be considered personal data" [11, p. 7]. It is also worth noting that the legal regulations regarding the dissemination of the image have been set out in Article 81 of the Act of 4.2.1994 on copyright and related rights (however, this refers to image understood as likeness). The image is also protected under the provisions on the protection of personality rights (Articles 23 and 24 of the Civil Code).

The crime of impersonating another person is of a formal nature (not effect-bound); it is already done at the moment of impersonation, i.e. moment of pretending to be the victim, using his or her image or personal data. For the perpetration of the crime, it is irrelevant whether the damage sought by the offender actually occurred or not.

It should be noted that the words "property damage or personal injury" used in the provision raise doubts among law scholars. It would probably be more accurate to use the term "personal harm" for personal injury but given the vagueness of the term of damage/injury (both in the penal and civil laws) it does not seems that the phrase used in Article 190a § 2 of the Penal Code implies additional problems with the interpretation of the statutory features of this offence (or generates new, unknown before, doubts with regard to those regulations which use the criterion of damage/injury). It is reasonable to maintain that the concept of "property damage" should be interpreted broadly, covering both *damnum emergens* and *lucrum cessans*.

The perpetrator and the mens rea. The offence described in Article 190a § 2 of the Penal Code has a universal character and can only be committed with directional intention (dolus directus coloratus). However, this raises doubts as to wheth-

er it is appropriate to reduce the sphere of criminalization only to the conduct with directional intention ("in order to cause damage to it") [12, p. 8]. Why release from liability those who use the image of another person or their data, merely accepting that their behaviour would cause injury to that person (either property or personal injury)? We also do not need to demonstrate how difficult it is to provide during the trial the evidence for the mens rea of the crime (especially the existence of dolus coloratus). It should therefore be postulated for the purposes of the future legislation to modify the provision in question, using instead of "in order to" the words "with the intention to". It is worth noting that crimes falling under Article 190a § 1-3 of the Penal Code have not been included in the catalogue of prohibited acts for which a collective entity may be liable or in the group of offences listed in 10 § 2 Penal Code, the commission of which may result in a liability of a juvenile (at the age of 15 at least) on the terms specified in the Penal Code. Therefore, a juvenile who commits an act prohibited under Article 190a § 1 or 2 of the Penal Code may only be liable under the general rules as set out in the Act on proceedings in juvenile matters.

The aggravated type. The aggravated type has been described both for the crime of harassment (Article 190a § 1 of the Penal Code) and for the impersonation of another person (Article 190a § 2 of the Penal Code). The aggravated type is characterized by the occurrence of consequences of the forbidden act (under § 1 or § 2) in the form of suicide or suicide attempt by the victim. Article 190a § 3 of the Penal Code contains an additional protected value, namely the life of a human being. It is a substantive crime, the result of which is the suicide of the victim (either attempted or successful). The condition of the perpetrator's liability for a crime falling under § 3 is: for the actus reus – establishing a causal relationship between harassment or impersonation and the victim's suicide; for the mens rea – considering this aggravating consequence as unintentional. It is a crime characterised by the so-called combined guilt. One should also address the issue of how to hold liable the perpetrator of harassment or impersonation (Article 190a § 1 or § 2 of the Penal Code), who commits this act with an intent (whether *dolus directus* or *dolus eventualis*) to cause the victim to attempt suicide. It is to be assumed that in practice, the perpetrator may cause another person (through persistent harassment or impersonation) to attempt suicide, either with a combination of intentional and unintentional guilt or with the combination of intentional guilt as to the actus reus and the consequence (for example, by deliberately harassing someone, while wanting or accepting that this person may attempt suicide). If the perpetrator (harassing or impersonating) deliberately caused another person to attempt suicide, then he can be held liable for intentional homicide (under Article 148 § 1, and even under § 2, if the perpetrator's motivation deserves special condemnation). Depending on whether the injured person has committed suicide or only attempted to do so, the legal qualification of the perpetrator's conduct will vary; in the case of an attempt - Article 13 § 1 in conjunction with Article 148 (§ 1 or 2) in concurrence with Article 190a (§ 1 or 2) in conjunction with Article 11 § 2 of the Penal Code. If the suicide is successfully committed by the victim, the following qualification will apply: Article 148 (§ 1 or 2) in concurrence with Article 190a (§ 1 or 2) in conjunction with Article 11 § 2 of the Penal Code [13, p.471-472].

It should be noted that the introduction of this aggravated type has been reasonable. This is a construction analogous to the crime of physical abuse (article 207 § 3 of the Penal Code). Undoubtedly, it may happen that a "tormented" victim of a crime of harassment (or impersonation), who is no longer able to cope with the problem, will attempt suicide. However, the concept of the adopted sanction is incomprehensible, and the rationale for this concept may be even more incomprehensible. The explanatory note for the draft act states: "the limits of the statutory punishment range have been defined at this level to ensure full coherence with other solutions provided for in the Code, in particular the sanctions set out in Article 151 of the Penal Code". There is no consistency, rather disharmony here. Article 151 (instigation to and aiding in committing suicide) provides for a punishment from 3 months to 5 years of imprisonment (deprivation of liberty), while Article 207 § 3 (suicide attempt as a result of abuse) – from 2 to 12 years. What is the qualitative difference between suicide as a result of physical

abuse and as a result of harassment? Why Article 190a § 3 provides for the sanction from one year to 10 years of imprisonment, while Article 207 § 3 - from 2 to 12 years of imprisonment? These sanctions should be identical (between 2 and 12 years) [14, p. 10].

Concluding remarks. As can be inferred from the previous remarks the offence of the so called identity theft is a type of fraud consisting in impersonating another person using the vistim's image or personal data in order to cause damage or personal injury to the victim. It is a common offence, a formal one and can be committed only with the directional intention. While positively assessing the introduction of this offence into the system of Polish penal law, some doubts, already signalled, should be raised, however, referring to the placing of the offence in Chapter XXIII "Offences against freedom" and to the mens rea of the basic type of the offence (limited to *dolus directus coloratus*).

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ВІДПОВІДАЛЬНІСТЬ ЗА КРАДІЖКУ ПЕРСОНАЛЬНИХ ДАНИХ В ПОЛЬСЬКОМУ КРИМІНАЛЬНОМУ ПРАВІ (СТ. 190А § 2 КРИМІНАЛЬНОГО КОДЕКСУ РЕСПУБЛІКИ ПОЛЬЩІ)

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Мета: *основна мета статті – надати аналіз основних ознак правопорушення, передбаченого в ст. 190а § 2 Кримінального кодексу Польщі, яке полягає у імперсоналізації іншої особи і відомий як крадіжка особистості.* ***Методи:*** *для досягнення вищевказаної мети, в основному, застосовувався догматичний метод.* ***Результати:*** *ст. 190а § 2 стосується певного типу шахрайства, суть якого полягає в привласненні персональних даних іншої особи з використанням іміджу або особистих даних цієї особи, щоб заподіяти жертві шкоду або травму. Злочин є формальним (результат на кваліфікацію не впливає). Злочин вважається закінченим в той момент, коли злочинець видав себе за жертву або зробив вигляд, що він є жертвою. Не має значення, чи були завдані збитки реальними. Злочин може бути скоєно тільки з прямим умислом (dolus coloratus).* ***Дискусія:*** *у той час, як доповнення Кримінального кодексу Польщі складом злочину, пов'язаного з крадіжкою персональних даних особи, в цілому, може бути схвалене, виникають певні сумніви щодо його розміщення в розділі XXIII (Злочини проти свободи). Крім того, слід піддати дискусії питання про визначення виду умислу в цьому складі і питання щодо покарання в кваліфікованому складі цього злочину.*

Можна зробити висновок, що злочин крадіжки персональних даних - це тип шахрайства, який полягає у використанні іміджу іншої особи або особистих даних, з тим щоб заподіяти шкоду або травму жертві. Це правопорушення формальне і може бути здійснене лише з прямим умислом. Позитивно оцінюючи введення цього злочину в систему польського кримінального законодавства, треба підняти деякі вже згадані сумніви, однак, посилаючись на розміщення злочину в розділі XXIII (Злочини проти свободи) основний тип правопорушення обмежений до dolus directus coloratus.

Ключові слова: *персоналізація; образ іншої людини; особисті дані; збиток; травма; крадіжка особистих даних.*