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Consequences the Coronavirus pandemic on amendments to Polish Penal Code in the area of harassment offences

Abstract

RESEARCH OBJECTIVE: The aim of this research was to summarize that impact has exerted on legal regulations aimed at eradicating stalking and cyberstalking crimes in the Polish criminal law during the COVID-19 pandemic. The paper explores also some operation methods employed by perpetrators, in particular those involving violent acts with the use of digital tools.

THE RESEARCH PROBLEM AND METHOD: The text is based on the analytical method aiming to measure the factual, not the declarative *ratio legis*. The problem was studied based on the interpretation of the applicable law, as well as a survey of the legal doctrine views and judicial decisions. To some extent, the historical method was employed in order to demonstrate how former stalking regulations in Poland had been evolving.

THE PROCESS OF ARGUMENTATION: This paper discusses the analysis the issue of the methods employed by perpetrators, legal nature of stalking as a criminal offence, focused particularly on the characteristics of causal acts stipulated in Art. 190 a of the Polish Criminal Code.

RESEARCH RESULTS: The Polish legislator was correct, that was necessary amending the former criminal law regulations on the criminal offence of stalking, due to an observable surge in cyberbullying during the pandemic. It was also reasonable tightening the penal liability for committing qualified stalking and extending descriptions of prohibited acts by adding new crime qualities

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should be also viewed as justified and beneficial. However, increasing penal measures for criminal offences stipulated in Art. 190.a.1 and 2 of the Criminal Code should not be approved of.

CONCLUSIONS, INNOVATIONS, AND RECOMMENDATIONS: Despite of the changes introduced in the Polish criminal law cannot be fully justified as properly addressing international appeals for tackling gender-based cyberbullying, all in all, they should be seen as a step in the right direction.

KEYWORDS:

stalking, cyberstalking, COVID-19 pandemic

INTRODUCTION

One of the little-recognized effects of the covid 19 pandemic was a dramatic surge in the number of gender-based cybercrime cases. The problem has been brought up by the European Institute for Gender Equality whose representatives issued a report stating that during the COVID-19 pandemic, as many as seven out of ten women had experienced cyberstalking (European Institute for Gender Equality, Gender-Based Violence Report, *passim*).

A survey conducted by the European Union Agency for Fundamental Rights (Fundamental Rights Survey) in 2019 found that from 4 to 7% of respondents in the European Union had suffered online harassment, and 1 to 3% had experienced persistent harassment (Crime, Safety and Victims' Rights – Fundamental Rights Survey, p. 84). The survey indicates also that due to an increasingly frequent use of the Internet and social media, such problems are likely to persist and exacerbate, thus a relevant legal action seems necessary across all countries of the EU (Crime, Safety and Victims' Rights – Fundamental Rights Survey, p. 92). The issue was noted also by the Council of Europe (Council of Europe Types of Cyberviolence), whose representatives urge that the consequences of cyberbullying in the form of physical, sexual, psychological or economic harm may be immense, which makes cross-border eradication efforts a true necessity across the European Union (Report of the Council of Europe, Types of Cyberviolence).

The problem of increased cyberbullying during the coronavirus pandemic had been identified also by the Polish parliament which decided to amend Art. 190 of the Criminal Code regulating the crime of stalking and cyberstalking, in the language of psychology known also as emotional harassment or persecution. Underpinning the drafted provision was an awareness that despite penalising the aforementioned behaviours, the growth dynamics of transgressions occurring in 2020 was very high, amounting to 218% (statistics published by the Polish Police Portal). Official legislative documents pointed out to the fact that a dramatic rise in the number of Internet users would most certainly lead to a proportional spike in cyberbullying cases and their intensity (Parliamentary print No. 299-A).

RESEARCH PROBLEMS AND METHODS

The text is based on the analytical method aiming to measure the factual, not the declarative *ratio legis*. The problem was studied based on the interpretation of the applicable law, as well as a survey of the legal doctrine views and judicial decisions. To some extent, the historical method was employed in order to demonstrate how former stalking regulations in Poland had been evolving. The paper is rounded up by a handful of conclusions and opinions from the author concerning the implemented statutory adjustments.

At the core of the paper lies a discussion of the legal nature of stalking as a criminal offence, focused particularly on the characteristics of causal acts stipulated in Art. 190 of the Polish Criminal Code, as well as in the amendment thereto, pursuant to the provisions of the special act of 31 March 2020 on special solutions for the prevention, counteraction and eradication of COVID-19 and other infectious diseases including crisis situations inflicted thereby, and some other acts (Journal of Laws 2020, item 568).

The author aims to establish whether the occurrence of cyberbullying in Poland, resulting from a rapid technological growth and an increasingly wider access to the Internet and social media, is being effectively tackled. As online violence may come in various forms and escapes a uniform classification, the study presented in this paper intends to verify whether the amendments made to Art. 190 of the

Polish Criminal Code regulating the crimes of stalking and cyberstalking constitute a sufficient response to international appeals for cyberbullying enforcement.

The adopted research methodology relies on the analytical method aiming to measure the factual, not the declarative ratio legis. The problem was studied based on the interpretation of the applicable law, as well as a survey of the legal doctrine views and judicial decisions. To some extent, the historical method was employed in order to demonstrate how former stalking regulations in Poland had been evolving.

THE PROCESS OF ARGUMENTATION

The coronavirus pandemic and the resulting restrictions on human activity in the real world had a significant effect on increased levels of various types of cybercrime. The mass shift to remote work presented a rare opportunity for hackers who through social media and communication platforms gained a much easier access to their victims. Universal digitalisation, much hyped digital services of all kinds, necessary simplification of procedures and using digital channels for authorisation led to an observable surge in the number of hacker and phishing assaults. Those attacks involved various forms of password, credit card or bank account fraud (Zalewski, & Szymański, 2022, p. 94 et seq.). The number of cases of fake fundraising or illegal sale of products with allegedly healing effects was on the rise too (Coman, & Mihai, 2021, p. 63; *Barometr Cyberbezpieczeństwa* [Cybersecurity Barometer], p. 2).

During the COVID-19 pandemic a severe upturn in the frequency of cybercrime was recorded, particularly in the form of stalking, cyberstalking, hate acts or cyberbullying. It should be borne in mind that the notion of cybercrime can be broken down into three components: the use of technology, characteristics of traditional violence, and the perpetrator's advantage of forces (Bozbayindir, 2019, p. 427). The first component involves the culprit employing technological, information and communication tools. The second means that cyberbullying is treated as traditional bullying with the offender's *modus operandi* involving intentional and persistent intimidation, blackmail, abuse,

harassment, persecution, menacing or humiliation of the victims. The advantage of forces component includes four aspects: the perpetrator's anonymity, ability to reach a practically unlimited number of users on the Web, fast dissemination and multiplication of content and an unlimited harassment potential (Bozbayindir, 2019, p. 428).

Acts of traditional bullying are performed by a specific person or group of people, so the victim knows where the threat comes from and stands a chance of using some defence methods. In most cases of cyberbullying the culprit remains anonymous. This sense of anonymity provides an additional encouragement for offenders to engage in the acts which they normally would not dare trying in the real world. Increased virtual bullying arises certainly from a belief, however erroneous, that the digital environment is free of social surveillance and may prevent the stalker from being held criminally liable. Obtaining useful data about the victim is also relatively easy. Another issue from the victim's perspective is anonymity and undisclosed identity of the viewers. Inability to verify the number and identity of users who had viewed the content which was detrimental or exposing to the victims deprives them of their defences and can further exacerbate the fear of having their intimate details and personal data put on public display (Siemiennicka, Skibińska, & Majewska, 2020, p. 9). What makes this form of harassment particularly damaging, is an exceptionally wide reach of virtual bullying. Traditional harassers act in relatively small groups, however the audience of virtual perpetrators may be countless. The problem becomes even more complex as the injurious materials can be circulated extremely fast and shared by the virtual witnesses themselves (Cupach, & Spitzberg, 2007, p. 12).

Taking aggressive behaviour out of the physical space into the digital environment is more compromising due to its limitless nature. The ability to carry on communication via digital devices round the clock makes individuals who experience cyberbullying permanently exposed to attacks, irrelevant of their location or time of the day. Acting in the cyberspace is more convenient for the attacker, not merely due to a generally reduced risk, but also because it carries much less exposure to physical distress resulting from personal contact with the victim and is much less time-consuming.

Establishing clear and unambiguous reasons for cyberbullying acts is difficult, as they tend to be complex and dynamic. Key motives

are mostly jealousy, hostility, intolerance, guilt and rage. Such behaviours may be the effect of a mental disorder or a general perpetrator's desire to either rekindle or strike an intimate relationship with the victim.

The verb 'to stalk' means to lurk, lie in wait, skulk or creep and was originally used in the hunting jargon to describe the action of hunters when they stealthily corner their prey. Nowadays, in colloquial speech 'stalking' signifies the emotional violence of harassment, persecution and pestering. These causal acts may come in different forms, but all of them can be brought down to gaining control of the victim and violating their personal liberty or invading privacy. (Purcell, Pathé, & Mullen, 2004, p. 157 et seq.). All of these may evoke the feelings of physical and mental discomfort, anxiety or embarrassment in the victim. Very often the stalker will intend to isolate their target from their inner circle (Purcell, Pathé, & Mullen, 2004, p. 159).

The perpetrator's most common motives for engaging in criminal conduct are: the desire to regain control of the victim or take personal revenge for real or imaginary harms, unrequited love, mental disorders or infidelity (Mullen, Pathé, Purcell, & Stuart, 1999, p. 1245 et seq.; Kosińska, 2008, p. 33 et seq.).

The fact that stalking acts have moved to the virtual space is a consequence of the recent wide spread of mobile phones and the Internet. Causal acts perpetrated by cyberstalkers are often very similar to following and harassing the victim in real life, however they are performed via Facebook, Instagram or communicators. These media allow the culprit to know the location of the victim, control and watch their relations with other people, analyse the times of their log-ins, activity duration or message receipts. Although the range of actions performed by stalkers may be very wide and versatile, and their acts may relate to the computer itself or its user, the most commonly observed forms include: cyberstalking, swatting harassment, dissing revenge, porn impersonation, google bombing, outing (A.W Burgess, 2006, pp. 383–404). The above mentioned types of causal acts rarely come in isolation, stalkers usually engage in multiple ways of harassment. Sometimes they go beyond their virtual activity and seek a face-to-face contact with the victim (A.W Burgess, 2006, p. 386 et seq.).

Through the statistical lens, most frequent stalking and cyberstalking offenders are 35-40-year-old male university graduates. They are

often single, living outside of marriage or civil partnership. Statistical data indicate they are often unemployed, with no home ownership, financially dependent and frustrated with a low quality of their lives (Jędrek, 2018, p. 273 et seq.). They may have some narcissistic personality traits, be antisocial, socially awkward, egoistic and egocentric (Skarżyńska-Sernaglia, pp. 3–4). The stalking acts they engage in happen mostly online, but some of them may be also seen in real life (Siemiennicka, Skibińska, & Majewska, 2020, p. 81; Woźniakowska-Fajst, 2019, p. 52).

According to the doctrine, it is claimed that stalkers often have a criminal past, and their behaviour is triggered by the victim breaking up the intimate relationship with them, which is followed by outbursts of obsessive love and aggression. First, their actions are aimed at rekindling the lost relationship, therefore stalkers would arrange dates, buy gifts and obsessively confess love. When the desired response from the victim is not obtained, stalkers' actions get redirected (Woźniakowska-Fajst, 2019, p. 53). From that moment on, they would seek to punish the victim. Dominant intents include ruining the victim's private and professional life and compromising them in public. Stalkers tend to blame victims for their own fails. In other cases, when the stalker and the victim have no history of a former relationship, stalking is usually geared towards starting a relationship. In any case, a key perpetrator's motive remains the desire for power and control (Groth, 2010, p. 87).

The most frequent consequences of psychological and sociological stalking suffered by the victims include fear for own life and health, but also paranoid reactions, chronic sleep deprivation, panic attacks, increased alertness. Many victims state a need for changing their personal or professional lifestyle, relocation, switching jobs or quitting social activities (Woźniakowska-Fajst, 2019, p. 54).

The crime of persistent harassment (stalking) was regulated in the Polish criminal law in June 2011. Pursuant to the formerly applicable law, conviction for this type of conduct had been severely limited, it was necessary to break down the entire causal act into the so called prime factors, being specific, individual acts meeting the criteria of crimes or offences recognised under the existing legal system, i.e. abuse, punishable threat, unlawful threat, intrusion upon seclusion or malicious harassment. Consequently, legal instruments available at

that time had been glaringly insufficient to ensure proper protection against the acts encompassed by the concept of stalking (Jankowska-Prochot, 2022, p. 119; Woźniakowska-Fajst, 2019, p. 198 et seq.).

The crime of stalking was stipulated in Art. 190 of the Criminal Code in chapter XIII titled Crimes against liberty (Act of 25 February 2011 on amending the act – Criminal Code and some other acts – Journal of Laws No. 72, item 381). A generic subject of legal protection provided by the law was defined as liberty in its all forms. (Kulik, 2020, pp. 29–62; Gardocki, 2021, p. 268; Sowirka, 2013, p. 78; Lach, 2012, p. 32). The individual subject of protection of the law stipulating stalking was liberty in its psychological dimension, understood as the right to conduct one’s life free of fear or menace and the right to preserve each individual’s privacy and personal freedom (Nazar, 2020, pp. 289–293; Mozgawa, 2018, pp. 39–41; Malicka-Ochtera, 2020, p. 108).

Pursuant to this regulation, stalking as a two-variant type of a prohibited act was a common tort which did not require any particular qualification on the part of the perpetrator, other than the ability to incur criminal liability. While studying the functional qualities of the crime stipulated in Art. 190.a. 1 and 2 of the Criminal Code, it should be noted that the Polish law-makers performed a kind of synthesis by placing two types of prohibited acts under one provision, i.e. persistent harassment (stalking) and identity theft, also known as cyberstalking (Woźniakowska-Fajst, 2019, pp. 17–19).

To describe this causal act, Polish criminal legislators chose the framework of a consequential crime which can only be committed by taking action. The act defined in Art. 190.a.1 of the Criminal Code was described by legislators with the quality of a causal act embedded in the gerund form ‘harassing’. It implied that the penalised behaviour involved persistent harassing (stalking) of another person or a person close to them, thus evoking a justified sense of danger or causing an invasion of privacy. Thus, the law left out these situations in which the victim neither perceived the perpetrator’s conduct as harassing, nor felt exposed to threats or invasion of privacy. It seemed irrelevant whether the intent of the culprit’s action was to cause suffering of the victim or to show attention.

Additionally, the sense of danger as interpreted by the said regulation was understood as an objectively justified by the circumstances

feeling of insecurity in the victim. Moreover, a significant invasion of the victim's privacy was recognised as a protected interest, pursuant to Art. 46 and 76 of the Polish Basic Law (Jachimowicz, 2011, p. 46).

In the absence of a legal definition of the term 'stalking' and in recognition of the primacy of the linguistic interpretation in decoding the qualities of a prohibited act, it should be assumed that according to the dictionary definition of the word, the core nature of this punishable act is a behaviour involving persistent and repetitive tormenting (harassing) of the victim (Słownik Języka Polskiego [Polish Dictionary], PWN). The consequence of this behaviour is the feeling of danger and invasion of privacy. The description of 'persistence' was interpreted in a similar way to other acts stipulated in the criminal law which used the same term (Art. 209.1 of the Criminal Code; Art. 218.1 of the Criminal Code; Jachimowicz, 2011, p. 44.). Also judicature was the source of opinion that the term 'persistent' should be understood as continuous, relentless, oppressive and lasting for a longer period of time (Resolution of the Supreme Court of 9 June 1976, File reference number VI KZP 13/75).

Under the newly adopted regulation, the victim of stalking can be any other person or a person closest to them (next of kin). The latter term was interpreted pursuant to the definition of 'next of kin' outlined in Art. 115.1 of the Criminal Code. The article stipulates 'next of kin' as: the spouse, ascendants, descendants, siblings, in-laws of the same line and degree, adoptive children and their spouses and the person in cohabitation.

Attribution of liability for the crime stipulated in Art. 190.a.2 of the Criminal Code, i.e. victim's identity theft, was only possible when the offender had used the personal data of another person with the intent to cause material or personal harm. Considering the criterion of acting with the intention to cause harm, it should be assumed that the crime of cyberstalking can only be committed with a direct specific intent.

The notion of personal data as a subject of the perpetrator's abuse in this variant of stalking is identical with the definition stipulated in Art. 4 of the act of Regulation (EU) 2016/679 of the European Parliament and of the Council 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). Pursuant to the above regulation, the category of 'personal data' comprises all information related to the identified or identifiable natural person. The crimes of stalking and cyberstalking are common criminal offences which can be committed by any person with an ability to incur criminal liability. Both varieties of stalking were punishable by a prison sentence of up to 3 years.

In Art. 190.3 the Criminal Code constitutes another qualified type of the stalking crime which involves the victim attempting to take their own life as a result of experiencing the culprit's behaviour codified in the foregoing articles. The perpetrator of this kind of stalking could be punished by imprisonment from 1 year to 10 years. The factor for a stricter penalisation was the occurrence of a consequence in the form of a suicidal attempt. The crime of qualified stalking was included in the category of consequential crimes. Stricter penalisation was applied whenever a causal relationship between the act of stalking and the victim's suicidal attempt was established.

The former two types of stalking as causal acts stipulated in Art. 190.a.1 and 2 of the Criminal Code were prosecuted at the victim's request. Only the qualified form of stalking stipulated in Art. 190.a.3 of the Criminal Code was prosecuted *ex officio*.

Pursuant to the provisions of the special act of 31 March 2020, on special solutions for the prevention, counteracting and tackling of COVID-19 and other infectious diseases and crisis situations caused thereby and some other acts (Journal of Laws 2020, item 568), the formerly applicable Art. 190 of the Criminal Code was amended. Its amendment supplemented the descriptions of prohibited acts with new qualities as well as tightened criminal liability for committing them.

The amendment to Art. 190.a.1 of the Criminal Code was justified by the fact that under the formerly applicable law, the crime description did not include "some characteristic and exceptionally tormenting to the victim consequences of the perpetrator's conduct" (Parliamentary print No. 299-A). The former criminal law regulation in para. 1 penalised "persistent harassing of another person or a person closest to them" and "evoking a justified by circumstances sense of danger and a serious invasion of privacy", whereas in the amendment the causal act was supplemented with "a sense of humiliation or torment". A significant change on the former law was

tightening the punitive measure of the prison sentence from “up to 3 years” to “from 6 months to 8 years”. The postulated purpose of this legislative move was extending the scope of the said regulation and enhancing the legal protection of victims suffering as a result of this criminal offence. (Parliamentary print No. 299-A).

Also para. 2 of the said regulation was amended. In the formerly applicable law legislators criminalised “impersonation”, “abusing another person’s image” or “their other personal data in order to cause personal harm or harm to property”, whereas after the amendment had been adopted, penalisation was extended to “the use of other data allowing to publicly identify the person”. The punitive measure of punishment was changed too, and parallel to para. 1 of the said regulation, was increased from the previous “up to 3 years” to “from 6 months to 8 years”. In para. 3 relating to the victim’s attempt to take their life the punishment was increased from the former “from 1 year to 10 years” to “from 2 to 12 years”. Para. 4 remained unchanged. The change was due to the fact that in the era of unprecedented technological progress in telecommunications it was deemed necessary to provide protection also to people using aliases or nicknames in their artistic, literary or publishing activities. As for the decision to increase the punitive measure of sanctions for prohibited acts stipulated in Art. 190.a of the Criminal Code, it was justified by an obvious inadequacy of the former punitive measures. The grounds provided pointed also to a highly socially detrimental influence of the crimes of persistent harassment (stalking) and a necessity to enhance protection of the persons exposed to them, also through general preventive measures (Parliamentary print No. 299-A; Jankowska-Prochot, 2022, p. 121 et seq.).

RESEARCH RESULTS

The results of this research illustrate that the COVID-19 pandemic changed not only the way in which the people engaged with others and their ability to enjoyed free movement away but also contributed to increased and evolved stalking behaviour.

In the view of renowned domestic and international practitioners, causal acts undertaken by cyberstalkers during the pandemic came

in highly complex and diversified forms of conduct. These involved: making hundreds of silent or offensive phone calls, sending tonnes of e-mail or text messages. Perpetrators engaged in making offensive or suggestive comments about the posts of their victims, circulated correspondence to random recipients in the name of the harassed person against their will, as well as left comments on Internet forums about the posts or life choices of their victims. These acts involved also sending gifts or photographs showing the common past to victims or other persons, installing spyware in victim's devices, sending viruses, rootkits, keyloggers, Trojans, or backdoors, or even destroying their computer equipment (Internet Organised Crime Threat Assessment, p. 19 et seq.; Impact of COVID-19 on Cybersecurity; Stolarski, 2021, p. 65 et seq.).

Naturally persistent harassment is not a homogeneous type of behaviour, it may have different motivations and come in various forms with various levels of intensity (Decision of the Supreme Court of 12 December 2013). Apart from the classic cyberstalking, it may take the form of intimidation with persistent sending of suggestive and offensive threats, or demanding that the victim perform a particular action or refrain from it. The perpetrator may also denigrate the victim by circulating unfavourable, fake or compromising photos, messages or information on social media. The offender may impersonate the victim both by creating fake social media profiles or by obtaining, without their consent or awareness, an access to the victim's official social media account, e-mail box or communicators. This or other way, culprits may place fake posts on chats, discussion groups or dating portals. They may also order various goods in the name of the victim, including products which will cause embarrassment or confusion to the sufferer.

Causal acts performed by the stalker may involve sharing deeply secret information about the victim on the Internet. These may include personal or intimate photos, recorded conversations, messages, intimate stories recorded with no consent or awareness of the victim. This information may pertain to the victim's sexual orientation or preferences, illicit personal relations or any other intimate details or embarrassing secrets of their private or professional life. Apart from the victim's computer infiltration, revealing secrets may lead to the so called doxing, a deliberate online collection and disclosure of identifying information and sensitive data of the victim. These may

include victim's addresses, telephone numbers, employment records, professional and private contacts, financial data, photographs or previously mentioned shaming information (Groth, 2010, p. 89).

Having enumerated all various forms of stalking, it should be noted that the consequences suffered by stalking victims largely depend on their own individual sensitivity and attitude towards stalking acts. A victim may be an anxious person with low self-esteem, unable to set boundaries, as well as a resolute and self-confident individual who will react to stalking with irritation and weariness rather than fear.

Results also indicate the considerable pressure for Polish State to adapt and respond not only to increased incidents but also the changes in the nature of stalking behaviour. This Article explores the methods employed under Polish law in striving to combat stalking, the problems arising therefrom, and the most recent changes in stalking legislation. On based act of 31 March 2020, on special solutions for the prevention, counteracting and tackling of COVID-19 and other infectious diseases and crisis situations caused thereby and some other acts (Journal of Laws 2020, item 568) Polish criminal legislature has supplemented the descriptions of criminal acts of the crime of stalking with new elements, as well as aggravated criminal liability for their commission.

Summary

The aim of this research was exploring the impact of Covid 19 pandemic on Cyberstalking Behaviors in Poland. The author also points out the impact has exerted on legal regulations aimed at eradicating stalking and cyberstalking crimes in the Polish criminal law during the COVID-19 pandemic. The aim of this research was also examining some operation methods employed by perpetrators, in particular those involving violent acts with the use of digital tools.

Result of scientific

Undeniably, the Internet remains a very special communication environment in which all meetings, interactions, information and

message exchanges are completely different than when performed in the physical space. The fact that the epidemic situation in Poland and the resulting fast growth of the Internet as well as advanced computer and telecommunications technologies accelerated the dynamics of the crime of stalking remains undisputed (Statistics – Polish Police Portal).

The legislator's response was justified because of it took not only the new threats connected with new reality but also changes in *modus operandi*. However, not all the amendments deserve approval and some of them author is very critical of.

Summary of consideration

In the view of the above, the author strongly believes that the analysis of Art. 190.a.1 of the Criminal Code allows to conclude that this legislative rationale is fully grounded and that the extension of the provision with new qualities may help provide a better legal protection to individuals suffering from the criminal offence of stalking. The victim does not always fear perpetrator's behaviour. In some cases the perpetrator is a well-known person who does not evoke a fear of realistic harm, but causes the victim to feel distressed, tormented, embarrassed, humiliated or diminished by their admiration and attention (Woźniakowska-Fajst, 2019, p. 347.; Hypś, 2021, Nb 9; Marek, 2020, p. 333; Kosonoga, 2021, Vol. 19; Differently: Budyn-Kulik, 2020, p. 23 et seq.; Nazar, 2020, pp. 322–324).

It should be also borne in mind that a stalker is not always a *rejected stalker* who feels hurt by the victim and seeks revenge. Similarly, a stalker does not have to be an obsessive, deluded and highly desperate so called *intimacy-seeking stalker* or a *predatory stalker* with sadistic and predatory traits who spies on the victim and plots a sexual assault. A stalker may sometimes happen to be what is known as an *incompetent suitor*, an exceptionally tiresome, but usually harmless type, also referred to as an *incompetent stalker*. Perpetrators in this category, owing to their frequent intellectual deficiency, may at the beginning misinterpret the universal signs of kindness or good manners expressed by the victim and invade their privacy with unwanted presence. Finally, when a notification of a suspected criminal offence

is filed, these offenders may pull back and refrain from further harassing the victim (Mullen, Pathè, & Purcell, 2008, p. 47 et seq.; McEwan, Mullen, & MacKenzie, 2009, pp. 149–258; Mullen, & Pathe, 1994, pp. 469–477).

An important advantage of this legislative solution is also the fact, that the description used by the legislator in para. 1, as opposed to the original wording, i.e. “persistent harassing and significant invasion of privacy” is not evaluative in nature and raises no doubt as to its interpretation. As rightly postulated by Katarzyna Marek, it possesses an established interpretation which for the instances of humiliation is pursuant to Art. 212.1 of the Criminal Code, and for tormenting to Art. 189.3 of the Criminal Code. (Marek, 2020, p. 334)

In the light of such reasoning, *ratio legis* of the implemented change aimed at a steadfast eradication of violent acts, also these committed using digital tools, seems to raise no objection. Also, it cannot be denied that the pandemic necessity of more frequent communication via telecommunications portals made the pool of potential cyberbullying contexts much larger and more difficult to detect, thus the contents of Art. 190.a.2 of the Criminal Code were designed to match the new normative environment.

The value of the supplemented framework of Art. 190.a.2 of the Criminal Code including “other data allowing to publicly identify them” seems rather ambiguous. On one hand, in the opinion of Polish law theorists and practitioners this phrase is rather controversial, particularly because of its vagueness. Authors supporting this view argue that it is unclear which data are referred to and find it necessary to specify the wording more precisely (Budyn-Kulik, 2020, pp. 31–33; Nazar, 2020, p. 350 et seq.). At the other extreme of this discourse are the authors who approve of the amendment based on the argument of protection of these persons who in their professional activity use online nicknames, graphic symbols, user names or acronyms (Marek, 2020, p. 344). The author of this paper finds herself an adherent of the latter stance and believes that using specific data allowing for public identification would constitute a far reaching casuistry.

Setting the same level of statutory punishment severity for the qualified variant of stalking (Art. 190.a.3 of the Criminal Code) and the one stipulated in Art. 207.3 of the Criminal Code, i.e. the crime of harassing (stalking) leading to the victim’s suicidal attempt, punishable

by imprisonment for 2 to 12 years, should be definitely approved of. Significantly increased sanctions for the criminal offences stipulated in Art. 190.a.1 and 2 of the Criminal Code should be assessed critically. The author believes these changes to be a manifestation of the penal populism of the Polish law-makers. There are three basic premises supporting this critique. The first one derives from the fact that the law-makers did not present any empirical data indicating the need for such repressive changes. Secondly, tightening the criminal liability for stalking and identity theft item cyberstalking constitutes a lack of consistency with other codified solutions, particularly with the measure of sanction for the crime of stalking stipulated in Art. 207.1 of the Criminal Code, and signifies an unjustified divergence in the way these two categories of offenders are being dealt with. However, the degree to which the crimes of stalking and tormenting disrupt the legal order is comparable, thus they should be punishable by an identical or very similar sanction. Last but not least, changes in the measures of punishment in para. 1 and para. 2 make it impossible to apply the institution of a conditional discontinuation of penal proceedings to stalking offenders who have met all necessary criteria, which causes their procedural position to deteriorate.

CONCLUSION AND SPECIFIC RECOMMENDATION

In the virtual reality users deliberately create their image or images, managing their own most appealing personal branding. By publishing the content tailored to their users' expectations, they continue to boost their recognition and reputation, enhance their job market position and grow contact networks. Impersonation with a direct specific intent by the stalker is aimed at tarnishing or damaging the victim's existing image and trust vested in them, or attempts to compromise the individual in their private and professional context. Therefore, the author believes that the rationale of the Polish legislators should be upheld in its support for amending the former criminal law regulations on the criminal offence of stalking, due to an observable surge in cyberbullying during the pandemic, resulting from the extensive use and development of telecommunications technologies in that period. Tightening the penal liability for committing qualified stalking

and extending descriptions of prohibited acts by adding new crime qualities should be also viewed as justified and beneficial. However, increasing penal measures for criminal offences stipulated in Art. 190.a.1 and 2 of the Criminal Code should not be approved of.

Despite of the changes introduced in the Polish criminal law cannot be fully justified as properly addressing international appeals for tackling gender-based cyberbullying, all in all, they should be seen as a step in the right direction.

REFERENCES

Legislation

Ustawa z dnia 25 lutego 2011 r. o zmianie ustawy Kodeks karny (Dz.U. z 2011 r. Nr 72, poz. 381).

Rozporządzenie Parlamentu Europejskiego i Rady (UE) 2016/679 z dnia 27 kwietnia 2016 r. w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych osobowych) (Dz. UE 119/1).

Ustawa z dnia 10 maja 2018 r. o ochronie danych osobowych (t.j. Dz.U. z 2019 r. poz. 1781).

Ustawa z 31 marca 2020 r. o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw (Dz.U. z 2020 r. poz. 568).

Druk nr 299 Rządowy projekt ustawy o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw.

Druk nr 299-A Autopoprawka do rządowego projektu ustawy o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw.

Druk nr 307 Uchwała Senatu RP w sprawie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw.

Jurisprudence

Postanowienie Sądu Najwyższego z dnia 12 grudnia 2013 r., (sygn. akt III KK 417/13), KZS 2014, nr 6, poz. 26.

Wyrok Sądu Najwyższego z dnia 5 stycznia 2001 r. (sygn. akt V KKN 504/00), „Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa” nr 7–8, poz. 57.

Monographs

Burgess, A.W. (2006). *Computer Crimes*. In J.E. Douglas, A.W. Burgess, A.G. Burgess, & R.K. Ressler. *Crime Classification Manual. A Standard System For Investigating And Classifying Violent Crimes*. San Francisco: Wiley.

Gardocki, L. (2021). *Prawo karne*. Warszawa: Beck.

Hypś, S. (2021). In A. Grześkowiak, & K. Wiak (Eds.). *Kodeks karny. Komentarz*. Warsaw: Beck.

Jędrak, D. (2018). *Stalking w świetle badań empirycznych*. In M. Mozgawa (Ed.). *Stalking*. Warszawa: Wolters Kluwer Polska.

Kosonoga, J. (2021). In R.A. Stefański (Ed.). *Kodeks karny. Komentarz*. Edition 26. Warsaw: Beck, Legalis.

Kulik, M. (2020). *Wolność jako przedmiot ochrony w prawie karnym*. In M. Mozgawa (Ed.). *Przestępstwa przeciwko wolności*. Toruń: Wydawnictwo UMCS.

Mozgawa, M. (2018). *Analiza ustawowych znamion przestępstwa uporczywego nękania*. In M. Mozgawa (Ed.). *Stalking*. Warszawa: Wolters Kluwer Polska.

Mullen, P.E., Pathè, M., & Purcell, R. (2008). *Stalkers and their Victims*. Cambridge: Cambridge University Press.

Nazar, K. (2020). *Uporczywe nękanie oraz kradzież tożsamości*. In M. Mozgawa (Ed.). *Przestępstwa przeciwko wolności*. Lublin: Wydawnictwo UMCS.

Siemiennicka, S., Skibińska, M., & Majewska, K. (2020). *Cyberagresja. Zjawisko, skutki, zapobieganie*. Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika.

Sobieraj, J. (2018). *Rewolucja przemysłowa 4.0*. Radom: BIP.

Woźniakowska-Fajst, D. (2019). *Stalking i inne formy przemocy emocjonalnej. Studium kryminologiczne*. Warszawa: Wydawnictwo Uniwersytetu Warszawskiego.

Papers

- Bozbayindir, G.B (2019). Cyberbullying and Criminal Law. *Istanbul Hukuk Mecmuasi*, 1(77), 425–450. DOI: 10.26650/mecmua.2019.77.1.0009.
- Budyn-Kulik M. (2020). Nowe znamiona nękania z art. 190 a § 1 Kodeksu karnego. *Palestra* 9, 22–29.
- Coman, I., & Mihai, I.C. (2021). The Impact of COVID-19 on Cybercrime and Cyberthreats. *European Law Enforcement Research Bulletin – Special Conference Edition Nr. 5*. CEPOL, <https://bulletin.cepol.europa.eu/index.php/bulletin/article/view/489/357> (accessed on: 6th Jun. 2023).
- Groth, J. (2010). Cyberstalking perspektywa psychologiczna. *Forum Oświatowe*, 2(43), 85–98.
- Jachimowicz, M. (2011). Przepęstwo stalkingu w świetle noweli do Kodeksu karnego. *Wojskowy Przegląd Prawniczy*, 3, 41–50. <https://www.gov.pl/attachment/6e46e642-c7bb-4be9-8d04-1ea5585d3d51> (accessed on: 6th Jun. 2023).
- Jankowska-Prochot, I. (2022). Modyfikacja prawnokarnego modelu zwalczania przepęstwa stalkingu. *Przegląd Prawa Publicznego*, p. 7-8.
- Kosińska, J. (2008). Prawnokarna problematyka stalkingu. *Prokuratura i Prawo*, 10, 33–47.
- Lach, A. (2012). Kradzież tożsamości. *Prokuratura i Prawo*, 3, 29–39.
- Malicka-Ochtera, A. (2020). Stalking z perspektywy sprawcy i ofiary. *Nowa Kodyfikacja Prawa Karnego*, vol. LV, No. 3970, 105–116. DOI: 10.19195/2084-5065.55.8.
- Marek, K. (2020). Przepęstwo uporczywego nękania (stalkingu) w świetle nowelizacji Kodeksu karnego z 31 marca 2020 r. *Studia Prawnoustrojowe*, 50, 327–343. DOI: 10.31648/sp.6047.
- McEwan, T.E., Mullen, P.E., & MacKenzie, R. (2009). A Study of the Predictors of Persistence in Stalking Situations. *Law and Human Behavior*, 33, 149–158. DOI: 10.1007/s10979-008-9141-0.
- Mikołajczyk, K. (2022). Changes in the Approach to Employee Development in Organisations as a Result of the COVID-19 Pandemic. *European Journal of Training and Development*, 5/6(46), 544–562. DOI: 10.1108/EJTD-12-2020-0171.
- Mullen, P.E, Pathé, M., Purcell, R., & Stuart, G.W. (1999). Study of Stalkers. *American Journal of Psychiatry*, 8(156), 1244–1249. DOI: 10.1176/ajp.156.8.1244.
- Mullen, P.E., & Pathe, M. (1994). Stalking and the pathologies of love. *Australian and New Zealand Journal of Psychiatry*, 28, 469–477. DOI: 10.3109/00048679409075.

- Purcell, R., Pathé, M., & Mullen, P.E. (2004). Stalking: Defining and Prosecuting a New Category of Offending. *International Journal of Law and Psychiatry*, 2(27), 157–169. DOI: 10.1016/j.ijlp.2004.01.006.
- Skarżyńska-Sernaglia, J. (2009). Stalking: od miłości do zbrodni – nowe wyzwania dla psychologii, kryminologii i zespołów interdyscyplinarnych przeciwdziałających przemocy. *Seria Psychologiczna*, 1.
- Sowirka, K. (2013). Przestępstwo „kradzieży tożsamości” w polskim prawie karnym. *Ius Novum*, 1(7), 64–80.
- Spitzberg B.H., & Cupach W.R. (2007). The State of the art. of stalking: Taking stock of the emerging literature. *Aggression and Violent Behaviour. A Review Journal*, 1(12), 64–86. DOI: 10.1016/j.avb.2006.05.001.
- Stolarski, M.P. (2021). Wpływ pandemii COVID-19 na cyberbezpieczeństwo. *Cybersecurity and Law*, 2(6), 53–68, http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.ojs-issn-2658-1493-year-2021-volume-6-issue-2-article-oai_editorialsystem_com_article-146457/c/articles-1987334.pdf.pdf, (accessed on: 5th Jun. 2022).
- Zalewski P, & Szymański P. (2022). Aktywność zorganizowanych grup przestępczych w cyberprzestrzeni w czasach pandemii – analiza wybranych podatności i metod anonimizacji. *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 1(45), 89–111. DOI: 10.53024/4.1.45.2022.

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