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PROTECTION OF HUMAN FREEDOM IN THE EUROPEAN UNION ON THE EXAMPLE OF COMBATING STALKING

Outline

The protection of human freedom is a fundamental task of the Member States of the European Union. The EU institutions recommend protection of certain goods related to human freedom by criminal law. In addition, they recommend making efforts to unify or approximate criminal law in this area by EU countries. An example of the unification / approximation of criminal law in EU countries is the criminalization of the crime of stalking. Most EU countries, including Poland, have recognized the behavior of stalking as a crime. On the grounds of national law, the struggle against stalkers has been undertaken and the victim of stalking has been protected.

Keywords:

human freedom, European Union, Poland, criminal law of EU Member States, Polish criminal law, stalking

Introduction

One of the assumptions of European integration is the approximation of the criminal law systems of the Member States of the European Union. We can only talk about a certain pattern of systems, because the unification of criminal law in the EU at present is impossible. National criminal law is a reflection of the history of the nation and the state. History, religion, culture and tradition are part of the protection of goods that the state protects with the help of criminal law.

Society as part of state institutions defines the goods that special protection is required for. Subjecting the good protection of criminal law is the highest form of its protection in a democratic state. It is known that not all goods have such protection. They may be protected by other branches of law, e.g. labor , administrative or civil law.

The Treaty on the Functioning of the European Union of March 25, 1957¹²⁹, in the fifth title, defined the area of freedom, security and justice for EU citizens. Article 67 of Act 3 of the Treaty states that the Union shall endeavor to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, as well as to coordinate and cooperate between police and judicial authorities and other competent authorities, and by mutual recognition of judicial decisions in criminal matters, and, if necessary, by approximating criminal laws.

Approximation of criminal laws takes place, among others by recognizing the same goods subject to criminal protection in EU Member States. The European Parliament and the Council of the EU may set minimum rules on the determination of criminal offenses and sanctions in areas of particularly serious crime with a cross-border dimension, resulting from the type or effects of these offenses or the special need to combat them together¹³⁰. Crimes such as terrorism, human trafficking, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of currency, computer crime and organized crime were recognized as such crimes. Depending on the security situation in the EU, these institutions can expand the catalogue of crimes.

The approximation of national criminal law systems of EU Member States is not only affected by the EU institutions, but also by the development of common values and the recognition that they should be protected. In this way, the EU is trying to expand the human security space.

A group of goods concerning human freedom is protected by various branches of law. The widest regulation in this area is civil law, the narrowest law is criminal law. Social and economic development, and in particular technical development, cause new threats to the safety of the human individual.

Actions that were permitted or only morally reprehensible are called prohibited acts. There is also the expansion of the catalogue of goods protected by criminal law, which were previously protected by other areas of law. The aim of this article is to discuss the crimes of stalking, which have been criminalized in the EU and other countries relatively recently.

These prohibited acts are typical of depicting the evolution of the criminal law doctrine in Poland and the world, as well as EU actions aimed at criminalizing such behavior in the member countries.

¹²⁹ UE Journal of Law nr 9.5.2008

¹³⁰ Article 83 paragraph 1 of the Treaty on the Functioning of the European Union of March 25, 1957

The concept

Defining stalking is not easy. In the project supported by the European Commission No. 2004-1 / 091 / In *Pathways to survive stalking for women victims*¹³¹, the concept of stalking was defined as a repeated interference in the private life of another person against their will and causing anxiety and fear in the victim. According to the American National Center for Crime Victims, stalking is a set of behaviors aimed at the other person who can make them feel fear¹³².

In Poland, Brunon Hołyst describes stalking as deliberate, malicious, repeated persecution and harassment of another person, threatening its security¹³³. According to J. Skarżyńska-Sernaglia, stalking is a repeated persistent harassment taking various forms of violation of personal freedom and privacy of the other person, causing anxiety, self-restraint, physical and psychological discomfort, a number of physical and mental health problems, interpersonal difficulties and legitimate concerns for your own safety¹³⁴. Jolanta Kosinska defines stalking as the perpetrator's behavior directed directly at the persecuted person, involving repeated physical or virtual approach to a given person, communicating against his will, or verbal and written threats that in any reasonably thinking person can cause fear¹³⁵.

Analyzing the above stalking can be briefly described as the repeated psychological disturbance of the other person against their will.

Criminalization of stalking in EU countries and other countries

The problem of stalking has been known for centuries. It has been described many times in literature most often in the form of obsessive love of a rejected lover or mistress. In Western culture, it was rather a rejected person who was a victim. It is most often an unfortunate man or an unfortunate woman who writes a stack of letters to a loved one, protruding under her home, sending flowers, gifts, calling, and with the development of technology sending text messages or e-mails.

¹³¹ <http://stalking.medlegmo.unimo.it>, access: 10.07.2014

¹³² <http://www.victimsofcrime.org>, access: 10.07.2014

¹³³ B. Hołyst, *Psychologia kryminalistyczna*, [Forensic psychology]Warsaw 2004, ps. 241.

¹³⁴ J. Skarżyńska-Sernaglia, *Stalking w Polsce – występowanie i charakterystyka zjawiska*, [Stalking in Poland - occurrence and characteristics of the phenomenon] <http://psychologia.net.pl/artukul.php?level=415>, access: 10.07.2014

¹³⁵ J. Kosińska, *Prawnokarna problematyka stalkingu*, [Criminal law issues of stalking]"Prokuratura i Prawo" nr 10, 2008, p. 33

The self-imposition, disturbance of the other person, striving for her favors was not penalized by criminal law. The law only entered when an emotionally committed person resorted to threats, physical violence or homicide.

The Americans were the first to perceive the problem in terms of criminal law. The breakthrough event was the murder of an actress Rebecca Schaeffer in 1989 shot by an obsessive fan Robert John Bardo, who previously wrote letters to her and tried to meet her many times¹³⁶.

During the public debate, it was noticed that the seemingly innocent behavior of the stalker, such as worship, could have disastrous consequences for the victims. Many of them are forced to change their current life, continuous escape, move to another country, change their identity. Often, words of worship are transformed into physical violence against the admirer, and can even lead to murder.

In 1990, California was the first US state to introduce stalking to its criminal law¹³⁷. Article 646.9 of the California Criminal Law provided that *Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking*¹³⁸. Encouraged by California other American states followed, and in 2006 stalking became a federal crime¹³⁹. This crime is described in paragraph 2261A of the federal penal code. The essence of federal crime is physical tracking, observation or other form of surveillance of another person with the intention of killing, wounding, harassing and intimidating, as well as using e-mails, other interactive services, computers, electronic communication systems or other means of communication for this purpose. Behavior of the perpetrator does not have to cause in the victim a legitimate concern about his life, health or worries about life, health of a close family member, spouse or life partner. Sufficient possibility of such anxiety in the victim is enough for the existence of a prohibited act.

¹³⁶ R. L. Snow, *Stopping a Stalker: A Cop's Guide to Making the System Work for You*, Cambridge 1998, p. 71 and later

¹³⁷ *The Model Stalking Code, Responding to the New Realities of Stalking*, 2007, p. 11, <http://www.victimsofcrime.org>, access: 12.07.2014

¹³⁸ Ibidem. Cf. D. Woźniakowska-Fajst, *Prawne możliwości walki ze zjawiskiem stalkingu – czy w prawie polskim potrzebna jest penalizacja prześladowania?*, [Legal possibilities to fight the phenomenon of stalking - is penalisation of persecution necessary in Polish law?], „Archiwum Kryminologii”, v. XXXI, 2009, p. 190

¹³⁹ *The Model Stalking...*, ed. cit., p. 11

The offense under § 2261A is the most severe form of stalking and does not exhaust all the behavior of the perpetrator. That is why in American law there are regulations about stalking, e.g. § 223 - *obscene or persecuting telephone calls*¹⁴⁰.

Europe also slowly matured to criminalize stalking. In many EU countries, including Poland, there were crimes and offenses related to stalking, which were its consequence but did not penalize such behavior. *Daphne* projects of the European Commission contributed to the observation of this problem, as well as to activate Member States to undertake legislative work in this area.

The final report supported by the General Directorate for Justice and Home Affairs of the European Commission. *Protection of women against the crime of stalking. The comparison of legislation in the European Union from 2007*¹⁴¹ presents the current research on the phenomenon of stalking in Europe and anti-stalking legislation in the member countries.

In 2007, among the EU countries, only eight penalized the typical crime of stalking - Austria, Belgium, Denmark, Germany, Ireland, Malta, the Netherlands, and the United Kingdom. Other states criminalized offenses connected in some way with stalking¹⁴².

Austria

Legal provisions	§ 107a of the Criminal Code - "persistent persecution"
Date of entry into force	01-07-2006
Behavior of the perpetrator	He persistently strives to: 1) contact, closeness, 2) contact by means of telecommunications devices, 3) ordering goods, services for the victim 4) persuade another person to contact the victim on their behalf
Repeatability of behaviors	One or many
Effect	Disruption of the victim's life for a longer period of time

¹⁴⁰ <http://www.victimsofcrime.org>, access: 12.07.2014

¹⁴¹ <http://stalking.medlegmo.unimo.it>, access: 12.07.2014

¹⁴² *Protecting women from the new crime of stalking: A comparison of legislative approaches within the European Union 2007*, s. 12, <http://stalking.medlegmo.unimo.it>, access: 12.07.2014

State of the perpetrator's consciousness	Intent
Maximum penalty	One year's imprisonment
Law enforcement	Ex officio

Source: Austria's Penal Code of January 23, 1974, the last amendment of November 4, 2013, <http://www.legislationline.org/documents/section/criminal-codes>, access: 14/07/2014; Protecting women from the new crime of stalking: access to the European Union 2007, p. 12, <http://stalking.medlegmo.unimo.it>, access: 12/07/2014, p. 41; D. Woźniakowska-Fajst, Legal Opportunities ..., ed. cit., pp. 182-183

Belgium

Legal provisions	Article 443 bis of the Criminal Code - "abuse / harassing"
Date of entry into force	28-12-1998
Behavior of the perpetrator	Persecutes / harasses the victim
Repeatability of behaviors	One or many
Effect	it can seriously disrupt the victim's peace of mind
State of the perpetrator's consciousness	Intent
Maximum penalty	Two years imprisonment
Law enforcement	At the request of the aggrieved party

Source: Criminal Code of the Kingdom of Belgium of June 8, 1867, the last amendment, June 9, 2014. <http://www.legislationline.org/documents/section/criminal-codes>, access: 14/07/2014., Protecting women ..., ed. cit., p. 43; D. Woźniakowska-Fajst, Legal Opportunities ..., ed. cit

Denmark

Legal provisions	§ 265 of the Criminal Code - "harassment "
Date of entry into force	1933 changed in 1965 and 2009.
Behavior of the perpetrator	He contacts the victim in person, in writing or in any other way, despite an earlier police warning
Repeatability of behaviors	Many
Effect	Disturbing the victim's peace
State of the perpetrator's consciousness	Intent
Maximum penalty	Two years imprisonment
Law enforcement	At the request of the aggrieved party

Source: Penal Code of the Kingdom of Denmark of 24 June 1939, last amendment of 6 May 2012, <http://www.logir.fo>, access: 15/07/2014, Protecting women ..., ed. cit., p. 46; D. Woźniakowska-Fajst, Legal Opportunities ..., ed. cit., pp. 185-186

Germany

Legal provisions	§ 238 of the Criminal Code - "Persistent disturbance"
Date of entry into force	2001 in the Act, 2007 in the penal code
Behavior of the perpetrator	Without permission and persistently: 1) strives for contact, closeness, 2) strives to contact using telecommunications devices, 3) orders the goods, services for the victim or persuades another person to contact on their own behalf, 4) threatens homicide, violation of bodily integrity, deprivation of health, freedom of the victim or people close to him, 5) performs other similar activities
Repeatability of behaviors	Many
Effect	Seriously influencing the victim's way of life

State of the perpetrator's consciousness	Intent
Maximum penalty	Three year imprisonment
Law enforcement	At the request of the aggrieved party / due to the public interest - ex officio

Source: Federal Criminal Code of Germany of May 15, 1871, last amendment of April 23, 2014, <http://www.gesetze-im-internet.de>, access: 15/07/2014, Protecting women ..., issue . cit., p. 49; D. Woźniakowska-Fajst, Legal Opportunities ..., ed. cit., p. 184.

Ireland

Legal provisions	Article 10 of the Act on crimes against a person not terminated by death - "abuse / harassing"
Date of entry into force	1997
Behavior of the perpetrator	Without permission and for a legitimate reason, using all means, including using the telephone, persistently harasses another person by imposing himself, observing, disturbing or communicating with her
Repeatability of behaviors	many
Effect	Seriously disturbs the peace and privacy of the victim
State of the perpetrator's consciousness	Intentional or unintentional
Maximum penalty	Seven-year imprisonment
Law enforcement	At the request of the aggrieved party

Source: Law on crimes against a person not terminated in death in 1997, <http://www.bailii.org>, accessed on 15/07/2014, Protecting women ..., ed. cit., p. 52; D. Woźniakowska-Fajst, Legal Opportunities ..., ed. cit., pp. 186-187

Malta

Legal provisions	Article 251A of the Criminal Code - „harassment"
Date of entry into force	2005
Behavior of the perpetrator	He unlawfully harasses a victim
Repeatability of behaviors	One or many
Effect	To arouse anxiety and suffering
State of the perpetrator's consciousness	Intentional or unintentional
Maximum penalty	Six months imprisonment
Law enforcement	Ex officio

Source: Malta Penal Code of June 10, 1854, the last amendment in 2013, <http://www.legislationline.org>, access: 16/07/2014, Protecting women ..., ed. cit., p. 55; D. Woźniakowska-Fajst, Legal Opportunities ..., ed. cit., pp. 187-188.

Holland

Legal provisions	Article 258b of the Criminal Code - "violation of privacy"
Date of entry into force	2005
Behavior of the perpetrator	It unlawfully and systematically violates the victim's privacy.
Repeatability of behaviors	Many
Effect	Forcing a particular behavior, abandoning a particular activity or raising fear in the victim

State of the perpetrator's consciousness	Intentional
Maximum penalty	Three years imprisonment
Law enforcement	At the request of the aggrieved party

Source: The Penal Code of the Netherlands of March 3, 1881, the last amendment in 2006, <http://wetten.overheid.nl>, access: 16/07/2014; Protecting women ..., ed. cit., p. 55; D. Woźniakowska-Fajst, Legal Opportunities ..., ed. cit., p. 188.

Great Britain

Legal provisions	Art. 1, 2 of the Act on protection against harassment / oppression - "harassment / oppression"
Date of entry into force	1997
Behavior of the perpetrator	It unlawfully harasses the victim, forcing a particular behavior or abandoning a particular act
Repeatability of behaviors	Many
Effect	Calling a specific behavior or fear in the victim
State of the perpetrator's consciousness	Intentional
Maximum penalty	Three years imprisonment
Law enforcement	At the request of the aggrieved party

Source: Law on protection against harassment / harassment of 1997, <http://www.bailii.org/uk>, accessed on 16/07/2014, Protecting women ..., ed. cit., p. 62; D. Woźniakowska-Fajst, Legal Opportunities ..., ed. cit., pp. 188-189.

While reviewing the criminal law legislation of the EU countries, which were the first to penalize the stalking, it appears that the protected good is peace, a normal lifestyle, the privacy of the person. The objective side of an offense illustrated by the behavior of the perpetrator manifests itself in unlawful harassment of the person by imposing himself, contacting in various ways and using various means. In the German Criminal Code, there are also unlawful threats. His behavior must usually occur repeatedly. The result of such behavior is generally disruption of the peace, lifestyle, privacy of the person, as well as anxiety. Unlike in Belgium,

where there is sufficient reason to justify the possibility of such an effect. In most cases, this offense is a deliberate act with two intentions - direct and possible. Ireland and Malta also penalize the behavior of an unintentional perpetrator (the perpetrator should be aware that his behavior may have a specific effect) Austria and Malta are pursuing the crime of stalking *ex officio*, under certain conditions as well as Germany. Other countries require the victim to initiate the case in the form of a complaint or a prosecution application. The maximum sentence is six months imprisonment (Malta) up to seven years (Ireland). After 2007, many EU Member States introduced criminal stalking crimes into their criminal legislation. In 2009, Italy did so by penalizing stalking referred to as persecution in art. 612 bis of the penal code¹⁴³, Luxembourg in 2009 as a crime of obsessive harassment as defined in art. 442-2¹⁴⁴, The Czech Republic in 2010 in § 254 of the Criminal Code as dangerous persecution, in 2011, Sweden in § 4b Chapter 4 of the Criminal Code¹⁴⁶ - persecution. In the same year, Poland started penalizing stalking in art. 190a of the Criminal Code¹⁴⁷— harassment.

The crime of stalking in Poland

In Poland, stalking had not been penalized for a long time. Deeds related to this phenomenon were prohibited. In the Second Polish Republic, in the penal code of July 11, 1932¹⁴⁸, an illegal threat was penalized in art. 250. The behavior of the perpetrator of this act was based on threatening another person to commit an offense to its detriment or harm to relatives, provided that it must have been possible to carry out the threat and the possibility of causing fear to the victim. Another crime recorded in art. 251 of the penal code was forcing a specific behavior - *who, by violence or unlawful threat, forces another person to act, abandon or endure....*¹⁴⁹ During the Polish People's Republic in the penal code of 19 April 1969¹⁵⁰ these two crimes were repeated in a slightly changed form - in art. 166 and 167 of the penal code. Also, the penal code of the Third Republic of Poland did not bring any changes in this regard. There was still only the unlawful threat penalized in art. 190 of penal code and forcing to specific behavior in art. 191 of penal code¹⁵¹

¹⁴³ Criminal Code of the Republic of Italy from October 19, 1930, <http://www.altalex.com>, access: 17/07/2014

¹⁴⁴ Penal Code of the Grand Duchy of Luxembourg of 16 June 1879, <http://www.legilux.public.lu>, accessed on 17.07.2014

¹⁴⁵ Penal Code of the Czech Republic of 8 January 2009, <http://portal.gov.cz>, accessed on 17.07.2014

¹⁴⁶ Criminal Code of the Kingdom of Sweden of December 21, 1962, <http://www.riksdagen.se>, access: 17/07/2014

¹⁴⁷ Penal Code of the Republic of Poland of June 6, 1997, Dz. U. No. 88, item 553 with later amendments

¹⁴⁸ Journal of Laws No. 60, item 571 with later amendments

¹⁴⁹ Ibidem

¹⁵⁰ Journal of Laws. nr 13, item. 94 with later amendments

¹⁵¹ Journal of Laws. nr 88, item 553 with later amendments

The administration of justice was helpless in the face of acts which did not contain the above mentioned features of these two offenses. Police officers and prosecutors encountered the phenomenon of stalking, but unfortunately they did not have legal tools to counteract. The law of offenses was helpful to some extent. Article 107 of the Code of Petty Offenses states: *who, in order to tease another person maliciously misleads or otherwise maliciously worries*.¹⁵²... The subject of protection in this provision is the peace and normal life of a person. The perpetrator's behavior is to mislead another person or to disturb others. The object of protection and the objective side of an offense coincide with the crime of stalking in Europe. However, the subjective side of this offense is completely different. The Penal Code and the Code of Offenses mention two intentions - direct intention (the perpetrator wants to commit an offense and commits it) and possible intention (the perpetrator predicts the possibility of committing a prohibited act and is allowed to do so¹⁵³). In addition, there are other forms of intention in the science of criminal law, which are direct intention. One of such intentions is the directional intention (*dolus directus coloratus*) with purpose, motive or incentive. In the offense in question, the perpetrator acts deliberately (to tease), and, additionally, he is malicious.

According to the Supreme Court, malicious harassment according to art. 107 of code of offenses raises anxiety, fear and is based on disturbing the peace or other behaviors causing in the victim mental imbalance (e.g. by sending unpleasant letters, dead line, knocking on the door and running away)¹⁵⁴.

In the justification of the sentence the Court observes that the sign of malice means a special attitude of the perpetrator manifested in the desire to annoy, make unpleasantness, and unnerve¹⁵⁵.

In another judgment, the Supreme Court states that the sign of malignancy must bear the characteristic to tease. Assigning to the accused of disturbing the victim of "malicious" *cannot replace the characteristic in the form "in order to tease"*¹⁵⁶.

In the event that the perpetrator maliciously wakes the other person by phone during the night, he will be liable under Art. 107 of the code of offenses. However, if a person in love is calling another person in order to make contact with her, hear a voice, express love, they will not bear such a responsibility. The motive of

¹⁵² The Code of Petty Offenses of May 20, 1971, Journal of Law from 2013, item 482 with later amendments

¹⁵³ See. Art. 9 § 1 of the Criminal Code and art. 6 § 1 of the Code of Offenses

¹⁵⁴ Judgment of the Supreme Court of January 30, 2013. III PC 213/12, LEX No. 1288694, Bulletin of Criminal Law 2013/3 / 31.32.

¹⁵⁵ Ibidem

¹⁵⁶ Judgment of the Supreme Court of 4 September 2013 III PC 275/13, LEX No. 1363022

the perpetrator's action is love, not malice, and the purpose is establishing contact, not bullying¹⁵⁷.

An example from police practice. The incident occurred before 2011. A woman came to the police headquarters and informed that for a long time she had been the fiancée of the X man, but she broke off the engagement and eventually married the man Y. The man X did not accept this fact. Every day, he left a woman a bouquet of flowers with a letter in front of the apartment door or on the car, in which he assured that he would be happier with him. The drama had lasted for about half a year before the woman decided to notify the police. The woman was on the verge of mental exhaustion, no rational arguments reached the stalker. She considered moving to another city with her husband.

The officers were helpless. Stalker did not act maliciously in order to tease, he did not threaten, he did not use illegal threat or violence to induce appropriate behavior of a woman, for example, parting with her husband and living with him. At that time, a woman could only bring a civil trial against a man for infringement of personal rights. According to art. 23 of the Civil Code¹⁵⁸, personal rights of a human being are, in particular, health, freedom, honor, freedom of conscience, name or pseudonym, image, the secret of correspondence, inviolability of a flat, scientific, artistic, inventive and rationalizing work. The catalogue of goods listed by the legislator is open and the court in a specific case may assume that another good, e.g. the person's peace, is a personal good of man. Poland, like many European countries earlier, recognized that the peace of a person, lifestyle and privacy should be protected by means of criminal law. The amendment of the penal code took place on February 25, 2011¹⁵⁹. The penal code added article 190a:

§ 1. Anyone who, through the persistent harassment of another person or another person's next of kin, creates a justified sense of danger or significantly violates the person's privacy, is subject to imprisonment for up to three years.

§ 2. Anyone who pretends to be another person and uses his or her image or other personal data in order to cause property or personal damage is liable to the same penalty.

¹⁵⁷ Cf. M. Bojarski, W. Radecki, *Kodeks wykroczeń. Komentarz*, [Code of offenses. Comment]

Warsaw 2006, p. 638 ; M. Bojarski, Z. Świda, *Podstawy materialnego i procesowego prawa wykroczeń*, [The basis of the material and procedural law of offenses]Wrocław 2000, p. 161.

¹⁵⁸ The Act of 23 April 1964 Civil Code, Journal U. No. 16, item 93, with later amendments

¹⁵⁹ Journal of Law. 2011 nr 72 item. 381

§ 3. *If the act specified in § 1 or 2 results in a suicide attempt of the person, the offender is liable to imprisonment from one to 10 years.*

§ 4. *The prosecution of the offense specified in § 1 or 2 takes place at the motion of the aggrieved party.*

The subject of protection of art. 190 § 1 of the penal code. The crime of stalking is placed in chapter XXIII of the penal code entitled *Crimes against freedom*. The generic subject of protection will therefore be human freedom. However, detailed protected goods by art. 190a § 1 of the penal code are *the dignity of a human being, understood as the space of subjective treatment of a man, resulting from innate and inalienable properties, followed by the well-being of the aggrieved party resulting from freedom from intimidation, the right to privacy and deciding about his life, as well as - in extreme cases - freedom from inhuman treatment. These are the basic values related to the status of an individual, which the Constitution of the Republic of Poland develops in art. 30, 31 § 1 and 2, 40, 41 §. 1 and 47.*¹⁶⁰

The objective side of an offense art. 190 § 1 of the penal code. The essence of the perpetrator's behavior is *persistent harassment*. According to the Polish language dictionary persistent means a repeated, continuous, ongoing, not intermittent¹⁶¹ or hard to remove, long-lasting or constantly repeating, continuous, disruptive¹⁶².

According to the Court of Appeal in Wrocław, persistence in the light of art. 190a § 1 of the penal code is *a special psychological attitude, expressed in the intransigence of harassment, i.e. persist in some kind of stubbornness, despite requests and admonitions coming from the aggrieved party or other people to stop the behavior, on the other hand - a longer passage of time through which the perpetrator undertakes it*¹⁶³. Similarly, jurisdiction of the Supreme Court defined persistence on the basis of art. 207 of the penal code of evasion of the duty imposed on him by court¹⁶⁴.

¹⁶⁰ Sejm printing nr 3553 27.10.2010 – The draft amending the penal code, p. 5. Similarly *Kodeks karny. Komentarz*, [Penal Code. Comment] ed. A. Grześkowiak, K. Wiak, Warszawa 2012, p. 858; M. Budyn-Kulik, *Komentarz do art. 190a k.k.* [in:] *Kodeks karny. Komentarz do zmian wprowadzonych ustawą z dnia 25 lutego 2011 r. o zmianie ustawy. Kodeks karny*, [The Penal Code. Commentary on the changes introduced by the Act of 25 February 2011 amending the Act. the Penal Code] LEX/el., 2011. nr 111327

¹⁶¹ *Słownik Języka Polskiego PWN*, [PWN Polish Language Dictionary] Warsaw 2008

¹⁶² *Uniwersalnego słownika języka polskiego*, [Universal Polish language dictionary] ed. S. Dubisz, Warsaw 2003, p. 1007

¹⁶³ Judgment of the Appeal Court in Wrocław of February 19, 2014., II AKa 18/14, Lex nr 1439334

¹⁶⁴ The characteristic of persistence combines two elements. One of them is characterized by the behavior of the perpetrator from the subjective side, and relies on a special mental attitude expressed in uncompromising, willingness to put on his own, no matter what motivations, maintaining his own position in spite of possible

Harassment is constant tormenting, affliction, anxiety (with something) of someone; teasing someone, not giving a moment of peace¹⁶⁵. In the light of art. 190a 1 penal code harassment is based on repeated, continuous persecution of the victim expressing itself in undertaking various annoying activities¹⁶⁶. Harassment can take many forms. The review of criminal proceedings shows that the most common form of the perpetrator's behavior is an attempt to make a telephone contact, send text messages, send e-mails, track / follow the victim, wait around the place of residence and work.¹⁶⁷

Bearing in mind the characteristics of persistence and harassment make stalking a multi-purpose crime. One behavior is not enough to commit this crime. It seems that the crime can only be committed by action. It is difficult to imagine persistent harassment caused by abandonment¹⁶⁸.

An offense of harassment is a resultant crime. The behavior of the perpetrator must evoke a sense of danger justified by the circumstances or materially violate the privacy of the aggrieved party. The sense of threat is a subjective category. However, just raising the victim's fear is not enough for a crime. The legislator "protects" against hypersensitive people, adding that the sense of danger must be justified by the circumstances. So objectively persistent harassment should lead to a sense of fear in an average, sensible person¹⁶⁹.

In the light of the above, it is worth citing the decision of the Supreme Court - for the behavior to be considered as stalking, harassment by the perpetrator must be persistent, and therefore rely on a continuous and significant violation of the privacy of another person and on arousing in the victim a justified sense of danger. The legislator does not require the behavior of the stalker to bear an element of aggression [...] For the existence of this crime, it does not matter

attempts to change it, e.g. despite the initiation of civil execution, conducting of warning talks, etc. The second, objective element is the lasting of such state of affairs for a longer period of time, for example, withholding payment of subsequent maintenance payments for at least 3 months or paying them irregularly or in amounts significantly lower than due. Uchwała SN z dnia 9 czerwca 1976 r. . VI KZP 13/75, OSNKW 1976, nr 7.8, p. 86, teza nr 9. Zob. także J. Chamernik, *Przestępstwo stalkingu w regulacji kodeksu karnego*, Zeszyty Naukowe Uniwersytetu Przyrodniczo-Humanistycznego w Siedlcach nr 99, 2013, s. 309–310.

¹⁶⁵ *Uniwersalny słownik...*, [Universal Polish language dictionary] ed. cit., p. 1095

¹⁶⁶ *Kodeks karny. Komentarz...*, [Penal code. Comment ...] ed. cit., p. 858

¹⁶⁷ <http://orzeczenia.ms.gov.pl>, access: 19.07.2014. For different forms of harassment, see also M. Staręga, *Stalking jako nowy czyn zabroniony w polskim kodeksie karnym. Aspekt prawny oraz znaczenie społeczne*, [Stalking as a new act prohibited in the Polish penal code. Legal aspect and social significance] Zeszyty Naukowe Uniwersytetu Przyrodniczo-Humanistycznego w Siedlcach nr 94, 2012, p. 195; D. Woźniakowska-Fajst, *Prawne możliwości...*, [Legal opportunities ...] ed. cit., p. 177

¹⁶⁸ Unlike M. Budyn-Kulik, M. Mozgawa, *Prawnokarne i kryminologiczne aspekty zjawiska nękania*, [Criminal and criminological aspects of harassment] Warsaw 2012, p. 10

¹⁶⁹ Cf J. Chamernik, *Przestępstwo stalkingu...*, [Stalking crime ...] ed. cit., p. 310.311; M. Budyn-Kulik, M. Mozgawa, *Prawnokarne i kryminologiczne...*, [Criminal and criminological law ...] ed. cit., p. 11–12.

whether the perpetrator intends to perform his threats. What is decisive here is the subjective feeling of the endangered, which must be evaluated objectively¹⁷⁰.

The crime is not considered as such in case a mentally resilient person does not feel fear even if the remaining conditions are met.

The second consequence of the offense is a significant breach of privacy. This may occur along with a sense of threat or spontaneously. Criminal law does not define the concept of privacy. The right to privacy is one of the basic human rights and is usually defined as the individual's right to shape the sphere of private life, so that it is free from interference and unavailable to others¹⁷¹. On the basis of civil law, privacy is defined by art. 23 of the civil code. In the context of art. 190a § 1 of the penalty code two elements are taken into account: deciding on the flow of information about oneself and the free disposal of one's own behavior¹⁷².

A serious problem may be caused by the fact that the breach of privacy must be significant. This characteristic is vague and judgmental. In practice, prosecution and adjudication it is very difficult to determine when a significant privacy violation occurs, and when it does not. In justifying the amendment to the penal code, the draftsman explains that a significant breach of privacy must be objectified and assessed on this very angle, it must be meaningful for every person who reasonably thinks and makes an objective analysis of the situation. Then, the designer gives the example that leaving a card with a heart behind a car wiper, even several times, should not be assessed in the same way as when there appear vulgar, difficult to remove inscriptions on the glass of the car¹⁷³.

This view is not entirely convincing, because the penalization of stalking was supposed to protect the victims from seemingly innocent behaviors of the perpetrators. It seems that this question should be left to the justice system, which would still assess whether or not there is a negligible degree of social harmfulness (Article 1 § 2 of the penal code)¹⁷⁴.

Subjective side of an offense of art. 190 § 1 p.c. Harassment is a deliberate crime. Due to the persistence characteristic in the provision, which is influenced by the

¹⁷⁰ The Supreme Court's closure of December 12, 2013 III PC 417/13, Lex nr 1415121

¹⁷¹ M. Pryciak, *Prawo do prywatności*, [The right to privacy] Wrocławskie Studia Erazmiańskie, v. IV 2010, p. 212–218.

¹⁷² M. Budyn-Kulik, *Komentarz do art. 190a k.k.*..., [Comment to article 190 a of a penal code] ed.cit.

¹⁷³ Sejm print no. 3553 from 27/10/2010 ..., ed.cit

¹⁷⁴ M. Budyn-Kulik, M. Mozgawa, *Prawnokarne i kryminologiczne*..., [Criminal and criminological law ...], jed. cit, p. 11–12

subject, it should be assumed that persistent harassment must be directly intentional, while the effect in the form of inducing a sense of threat or a significant breach of privacy may be characterized by both immediate and possible intent. The motivation of the perpetrator is irrelevant. This crime can be committed both with a desire for revenge and for love.

Subject. The crime typified in art. 190a § 1 p.c. is a common crime. It can be committed by anyone capable of bearing criminal responsibility (Article 10 of the penal code) In § 2 art. 190a, the legislator penalizes impersonation of another person cyberstalking. The phenomenon of cyberstalking is primarily associated with the Internet. The perpetrators, against the will of the victim, post her photos, descriptions, comments, in which they reveal intimate details about the lives of the victims, create personal accounts of victims on social networks, order unwanted goods at the expense of the victims.

Typically, such behaviors will not be part of the multiple behavior referred to as persistent harassment, since the use of personal data may be a one-off action, which is why the draftsmen decided to criminalize such a negative phenomena separately¹⁷⁵.

The subject of protection of art. 190 § 2 of a penal code. The generic object of protection will be human freedom. The detailed protected goods according to art. 190a § 2 of a penal code is the image and other personal details of the person¹⁷⁶.

The objective side of an offense of art. 190 § 2 of the penal code. The perpetrator impersonates another person. The impersonation concept has not yet appeared in the penal code. To impersonate is to act as someone else, to act as a different person, to make people believe that they are dealing with the right person. The legislator, bearing in mind the phenomenon of cyberstalking, deliberately uses the word impersonate. Impersonating another person in the Internet is extremely easy, while checking the real identity of a person, for example, placing comments, entries, extremely difficult. The perpetrator pretending to be another person uses her image, for example a photo, portrait, video or other personal data.

Commentators agree that personal information should be understood as the meaning of any information about an identified or identifiable natural person. A person identifiable is a person whose identity can be identified directly or indirectly, in particular by reference to an identification number or one or more

¹⁷⁵ Sejm print no. 3553 from 27/10/2010 ..., ed. cit

¹⁷⁶ Ibidem. Cf. M. Budyn-Kulik, M. Mozgawa, *Prawnokarne i kryminologiczne...*, [Criminal and criminological law ...]ed. cit., p. 15

specific factors determining his physical, physiological, mental, economic, cultural or social characteristics¹⁷⁷.

The offense described in art. 190a § 2 of a penal code is a formal crime. The effect does not have to occur. The pursuit of material or personal harm is enough to bear the signs. The content of the damage damage was explained by the Supreme Court in the resolution of 21 June 1995 No. I KZP 22/95 stating that property damage should be understood as damage to property, including actual loss (*damnum emergens*), based on a decrease in assets by loss, loss or destruction of its individual components or on the increase of liabilities, as well as lost profit (*lucrum cessans*), expressed in the thwart of the expansion of property¹⁷⁸.

However, personal injury should be understood through the prism of non-material damage occurring in civil law. It can therefore be assumed that personal injury will be to the detriment of the physical and psychological sphere of man and his creative activity.

Subjective side of an offense art. 190a § 2 of a penal code Cyberstalking can only be committed intentionally with a direct intention. The perpetrator's actions must be intentional - in order to cause material or personal damage. Other behavior of the stalker devoid of this characteristics will not be punished. With a multiple types of this behavior, when the perpetrator will not act deliberately, it will be possible to assign the perpetrator of an offense according to art. 190§1 of a penal code.

Subject. Crime in art. 190a § 2 of a penal code is a common crime. It can be committed by anyone capable of bearing criminal responsibility (Article 10 of a penal code) § 3 art. 190a describes and qualifies forms of stalking. The consequence of the stalker's behavior will be a suicide attempt or suicide of the victim. Therefore, there must be a causal relationship on the side of the subject. According to art. 9 § 3 of a penal code the consequence is unintentional. We will therefore have to deal with the so-called blended fault. The behavior of the perpetrator will be deliberate while its consequence in the form of attacking the victim's life is characterized by the inadvertence of the perpetrator

Stalking crime statistics

According to the National Stalking Resource Center, one in six women (16.2%) and one in nineteen men (5.2%) in the United States have experienced stalking crimes at some point in their lives. During the 12 months of 2005/2006, 1 006 970

¹⁷⁷ Art. 6 of the Act on the Protection of Personal Data, i.e. from 2002. Journal of Law. No. 101, item 926

¹⁷⁸ OSNKW 1995, nr 9–10, item 58

women and 370,000 men fell victim to stalking in the United States. Two-thirds of women (66.2%) were harassed by their current or former partner. The most common forms of stalking were unwanted phone calls and text messages. The 1998 study shows that there is a strong link between harassment and physical and sexual violence. 81% of the victims (women) of stalking were beaten, and 31% were victims of sexual crime¹⁷⁹.

According to estimates, 1.2 million women and 900,000 men fall victim to stalking every year in the UK. 19% of women and 12% of men have experienced harassment or harassment at some point in their lives. Approximately 250,000 victims of this crime are reported to the police each year. The perpetrator in 37% is a life partner, 59% is a person known to the victim, and 7% of cases are a person unknown to the aggrieved party¹⁸⁰.

In Denmark, in 2005, the police issued 1,700 warnings against perpetrators of stalking, and 935 criminal prosecutions were instituted¹⁸¹. In Belgium, in 2000, there were 4,344 reported stalking crimes, while in 2011, 23,909. The highest number of reports took place in 2007 - 26,119¹⁸². In 2013, 3,270 cases of stalking offenses were opened in Germany. Among the suspects there were 31,792 men and 7,478 women¹⁸³. The statistics of stalking crimes in Poland in 2012-2016 are presented in the table below:

The crime of stalking in Poland in 2012-2016

Year	Number of proceedings initiated	The number of proceedings found	Number of convicted persons
2012	4455	2690	549
2013	5327	2925	792
2014	6209	3227	949

¹⁷⁹ National Intimate Partner and Sexual Violence Survey , 2011, <http://www.victimsofcrime.org>, access: 23.07.2014.

¹⁸⁰ <http://www.leics.gov.uk>, access: 23.07.2014

¹⁸¹ *Protecting women...*, ed.cit, p.80

¹⁸² <http://www.polfed.fedpol.be>, access: 24.07.2014.

¹⁸³ <https://www.bka.de>, access: 24.07.2014

2015	6703	3243	1018
2016	7536	3990	1168

Source:<http://statystyka.policja.pl>, access: 02.11.2017;
<https://isws.ms.gov.pl/pl/baza-statystyczna>, access: 02.11.2017

Proceedings initiated are those proceedings in which there was a suspicion of committing a crime. An established crime is an act that was found to be a crime in the course of the preparatory proceedings. The number of convicted persons are people convicted of a crime by a valid sentence for a criminal punishment

The trend in each statistical category of stalking crime from year to year is growing. Too short period of penalizing stalking in the Polish penal code does not allow to make deep conclusions. It seems that this trend is due to the growing social awareness that this act is punishable rather than the increasing threat of this crime. These numbers, however, should not be underestimated, and law enforcement agencies and justice should monitor this phenomenon of crime and counteract.

Magdalena Budyn-Kulik and Marek Mozgawa analyzed 478 prosecutor's files in the first year of the art. 190a penal code¹⁸⁴. The analysis shows that the time of harassment usually ranges from 1 to 6 months - 185 cases, the least often from one to two years - 29 cases, less than seven days - 35 cases, over five years - 11 cases.

The dominant motive of the perpetrator's action was his inability to reconcile himself with his partner - 104 cases, the rarest sense of harm - 2 cases. On a significant scale there was a love theme - 34 cases, marital conflicts - 29 cases, neighborly misunderstandings - 38 cases. 156 perpetrators were unable to determine their motives for action.

The method of committing the acts in the first place was the telephone ringing to the victim - 284 cases, the second place was sending text messages - 171 cases, and on the third - pestering- 73 cases.

From the analysis of 44 cases, which were sent to the court with the indictment (45 accused) it follows that the potential stalker is a person aged 20-40 - 32

¹⁸⁴ M. Budyn-Kulik, M. Mozgawa, *Prawnokarne i kryminologiczne...*, [Criminal and criminological law ...]p.27 and later

defendants. Among the defendants there were 41 men and 4 women. In 32 cases, the accused was a known victim.

Summary

Approximation of criminal law systems in the EU is a desirable phenomenon, but it must take into account the legal culture of a Member State. The analysis of penalization of stalking in the EU shows similarities as well as differences resulting from the cultural conditions of a given country. The most perceptible differences are the penalty for the crime.

Extending the sphere of human security with the help of criminal law must be accompanied by extreme caution. As indicated in the above text, many of the stalker's behavioral signs are not sharp and graded. This may lead to unjustified accusations from alleged victims. Ultimately, the notice and proceedings are judged by the prosecution and the court, and many cases result in refusal to initiate or discontinue the investigation. Therefore, we should remember about the alleged perpetrator, whose involvement in the criminal process is also a violation of his freedom.

With many shortcomings, certainly criminalization of stalking was needed and filled the gap in penal law. Other branches of law, in particular civil law, did not guarantee the actual protection of the victims of this crime.

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