

THE OFFENCE OF IMPERSONATING ANOTHER PERSON (ARTICLE 190A § 2 OF POLISH CRIMINAL CODE)

1. Since June 6, 2011 the Polish criminal law has penalized the act of impersonating another person (Article 190a § 2 of the Criminal Code – henceforth referred to as: CC). This decision of the law-maker seems to be fully rational. As it had been stressed in the justification of the project, the penalization would thus cover the phenomenon of «appropriating» the victim's identity, in whose case criminalization should take place before its consequences are fully materialized.

2. Analysis of the justification leads to the conclusion that the ratio legis of the analyzed provision was to provide the protection of the freedom to decide how to use information about one's own private life, which is perfectly correlated with the right to the protection of private life. As the authors of the justification claim: «It was decided not to place the new misdemeanor in the statute from August 29, 1997 on the protection of personal data (the unified text: Official Journal from 2002, No 101, position 926 with modifications), mainly because the newly constructed provision describes an offence that is common in its nature and can be committed by any person, unlike most of the offences described by criminal provisions of that statute, which are individual in nature and most commonly penalize the acts of personal data administrators or of persons processing personal data. The protected value of these misdemeanors is first of all the proper circulation of data contained in data filling systems functioning on the basis of that statute. The intention of the project-makers in the case of Article 190a § 2 CC was, however, to provide the protection of the freedom to decide about using the information about one's own private life, which is in full correlation with the right to protection of private life». It is worth mentioning that an opinion appeared among law scholars according to which it might have been better to place the new offence described in Article 190a § 2 CC in Chapter XXXIII («Offences against the protection of information»), since the offence seems to infringe mainly the protection of information. According to M. Budyn-Kulik one could also consider placing the analyzed provision among the offences against honor and bodily inviolability since – according to that author – the fulfillment of the statutory features of the offence from Article 190a § 2 CC may typically infringe the honor and good name of the victim. The right to the image of a given person seems to be the individual protected value. It is pointed out by the criminal law doctrine that one might also consider assuming that it is the right

to identity. Because of the purpose of the offender (causing material or personal loss to the victim) one may assume that the victim's interests (both material and personal) are the accessory protected value.

3. Article 190a § 2 CC refers to a specific type of fraud based on the impersonation of another person by using his/her image or other personal data in order to cause material or personal damages. As it is justly underlined by the criminal law doctrine «this act completes the penalization of the phenomenon of stalking in whose case the offender often maliciously spreads pieces of information which are made to look as if they were coming from the stalked person in order to cause additional discomfort to the victim, to be oppressive or to cause damages, quite often the Internet serving as the means, e.g. by spreading matrimonial offers, erotic announcements or notoriously commissioning goods and services in the victim's name».

Undoubtedly the term «personal data» is the same as in the definition from the statute on the protection of personal data from August 29, 1997. According to Article 6 section 1 of that statute the term personal data means all pieces of information referring to an identified or identifiable physical person. The identifiable person is a person whose identity can be established directly or indirectly, especially by referring to an identification number or one or a few specific elements describing that person's physical, physiological, mental, economic, cultural or social features (Article 6 section 2 of the statute on the protection of personal data).

The term «impersonates» - according to its language meaning – signifies falsely pretending to be another person, while «misusing» (as it is used in Article 190a § 2 CC) should be understood as «using something in order to obtain a purpose, profit». In the opinion of A. Zoll, the statutory features of impersonating are fulfilled by a behavior consisting of undertaking by the offender some actions as another person and this must happen without the knowledge and consent of the person who is impersonated by the offender. As far as the term «image» is concerned, the Polish Dictionary indicates two possible meanings: «somebody's likeness on a drawing, picture, photograph and so on» and «the way in which a given person or object is perceived and presented». It should be accepted that for the purposes of Article 190a CC both meanings of image should be employed. It should be stressed that the law-maker has employed the expression «his/her image or other personal data» and not the expression «image or personal data», therefore it is unquestionable that the image is a component of personal data. Also according to A. Sakowicz, «it can be inferred from Article 6 section 2 of the statute on the protection of personal data that the image can be treated as a component of personal data». It is worth noticing that the legal regulations referring to the spreading of image are grouped in art. 81 of the statute from February 4, 1994 on copyright law and similar laws (yet, this provision refers to image understood as the likeness of a person). The image is also protected on the basis of regulations referring to the

protection of personality (Article 23 and 24 of the Civil Code).

The offence of impersonating another person is a formal one (no consequences are part of the statutory features); it is completed at the moment when the impersonation, i.e. falsely claiming to be the victim takes place, accompanied by the use of the victim's image or other personal data. For the existence of the offence it is irrelevant whether the damage intended by the offender materializes or not. Otherwise than in the cases of the offence described by Article 190a § 1 CC, the behavior of the offender described by Article 190a § 2 CC does not have to be repeated; the features of the offence are fulfilled by a single misuse of the image or other personal data.

It should be emphasized that there are some doubts about the use of the expression «material or personal damage». A more fortunate term «harm» could have been used to describe the personal damage, yet since the term damage has extensive meaning (both in criminal and civil law), it does not seem likely that the expression used in Article 190a CC will cause additional interpretation problems referring to the statutory features of that offence (or that it will create new, thus far unknown doubts on the ground of these provisions which employ the term «damage»).

4. The offence described in Article 190a § 2 CC is a common one and it may be committed only with directional intention (*dolus directus coloratus*). It may be, however, questioned whether it was justified to narrow the sphere of penalization to acts committed with directional intention («in order to cause damage»). Why keep immune from criminal responsibility the person who uses the image or other personal data of another person and only accepts that his/her behavior will cause the victim some damage (material or personal). One should also remember how difficult it is to prove the *mens rea* (and especially the directional intention) during trial. *De lege ferenda* one should propose the modification of the provision by replacing the expression «in order to» with the expression «with the intention». It should be noticed that the offences from Article 190a § 1 – 3 CC have not been included in the catalogue of forbidden acts for which a collective entity can be held responsible, nor do they belong to the group of offences indicated in Article 10 § 2 CC whose commission may be the basis of criminal responsibility of juveniles (who are at least 15 years old). Therefore a juvenile who commits a forbidden act described in Article 190a § 1, 2 or 3 may be held responsible only on the basis of the statute on proceedings in juvenile cases.

5. The aggravated type (described in Article 190a § 3 CC) refers both to the offence of stalking (Article 190a § 1) and the offence of impersonating another person (Article 190a § 2). The aggravated type is characterized by the presence of a consequence of the act (from § 1 or 2) in the form of a suicide attempt by the victim. Therefore an additional (accessory) protected value: human life appears in Article 190a § 3 CC. It is a material offence in whose case the consequence is the suicidal attempt by the victim (either successful or not). The

conditions of the offender's responsibility are: from the *actus reus* point of view – establishing a causal connection between the stalking or impersonation and the suicidal attempt of the victim, from the *mens rea* point of view – establishing the recklessness of the offender as far as the suicidal attempt is concerned. It is an offence characterized by the so called combined guilt.

6. The offence from Article 190a § 2 CC may occur in a proper cumulative concurrence with the provisions referring to offences against the protection of information (Article 265-268a, 269a CC), against the credibility of documents (Article 270 CC – the substantial falsification of documents, Article 272 CC – obtaining the confirmation of untruth, Article 273 CC – using a document certifying untruth, Article 275 CC – using the document of another person. In practice the cumulative qualification of the provision of Article 190a § 2 CC with Article 49 of the statute on the protection of personal data may undoubtedly also appear, as well as with Article 115 section 1 of the statute on copyright laws (mainly in the context of causing confusion about authorship).

7. The offence from Article 190a § 2 CC is punished with deprivation of liberty from 1 month to 3 years, and the aggravated type from Article 190a § 3 – with deprivation of liberty from 1 year to 10 years. If the imposed deprivation of liberty does not exceed 1 year its execution can be conditionally suspended (for probation time from 1 to 3 years, and in the case described in Article 70 § 2 CC – from 2 to 5 years). It is possible to apply to the offender guilty of the offence from Article 190a § 2 CC the conditional discontinuance of criminal proceedings, as well as the institution described in Article 37a CC (alternative sanction) or Article 37b (mixed punishment). If the offender is convicted for one of the offences described in Article 190a CC, the court may impose the following penal measures: interdiction to stay in certain environments or places, interdiction to contact certain persons, to approach certain persons or to leave a certain place of abode without the court's permission, as well as injunction to temporarily leave the place of abode occupied together with the victim (Article 41a CC), deprivation of public rights – Article 40 CC (when the offender is punished with deprivation of liberty of at least 3 years committed with motivation deserving special condemnation), interdiction to occupy certain professional positions or to perform a given occupation (Article 41 CC), making the sentence publicly known (Article 43b CC). In some cases it may be possible to impose the forfeiture of objects (Article 44 CC) or of proceeds stemming from the offence (Article 45 CC) or the obligation to compensate for damages (Article 46 CC).

8. The offence from Article 190a § 2 CC is prosecuted on the victim's motion, while its aggravated type from Article 190a § 3 CC is prosecuted *ex officio*.