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Privacy Crimes in Poland

**Criminalization of privacy intrusions by private parties in Polish
substantive criminal law**

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1. Introduction

This country report provides an overview of how privacy is protected in substantive criminal law in the Poland. Since criminal law is usually considered the *ultima ratio* of legal tools, it provides a particularly focused lens through which to study privacy protection: privacy violations as stipulated in criminal law can be considered the most serious infringements of privacy, and hence to be indicating particularly important elements of privacy that are considered protection-worthy by the legislator.

Since our aim is to better understand the concept of privacy, and to see how it can be protected in the 21st century in light of socio-technological developments, a broad conception of privacy is applied here, discussing criminal provisions that have something to do with protecting aspects of persons and their personal life, and the privacy expectations they have in their property, places, person and data. This potentially covers a large part of criminal law, so that not all privacy violations will be described in detail. Particular emphasis is given to aspects of private life where socio-technological developments raise particular challenges for preserving privacy protection, in light of the law being based on possibly outdated conceptions or assumptions. More detailed attention will be given to the following issues: How are people protected in relation to places? How are computers, data and stored documents protected? How are personal data and the image of people protected? How are people protected against tracking and tracing in public spaces?

Criminal provisions that are not related to one of these main areas of interest will be briefly mentioned, in order to contribute to a comprehensive overview of privacy protection in criminal law, but not detailed or analysed further, except where they contain particular elements relevant for improving our understanding of the concept of privacy as protected in criminal law.

We start with a brief introduction into the Polish Criminal Code, describing the basic elements of the Criminal Code, its structure, the notion of legal goods in criminal law and the concept of privacy as a protected legal good. Subsequently, these criminal provisions are described as relating to property (section 3.), places (section 4.), persons (section 5.) and data (section 6.).

2. General

2.1 Main Elements of the Criminal Code

Polish legal system belongs to the civil law tradition. The formal sources of law are the Constitution, the statutes and the ratified international agreements. The sources of criminal law are the Constitution, which lists the values worthy of protection in criminal substantive law, and sets limits for the actions of law enforcement in criminal procedure, and statutes, the most important which are the Criminal Code (*Kodeks karny*) and the Code of Criminal Procedure (*Kodeks postępowania karnego*). The main source of substantive criminal law is the Criminal Code, which contains the general part and the special part. The special part lists most of the offences criminalised in Poland, but it is not fully codified and other offences are included in several sectoral laws including both substantive and procedural provisions, e.g. the Drug addiction act.

Criminal law in Poland serves the protective, retributive, preventive-educational, preventive safety and compensatory functions. The criminal law is based on a number of important principles. The principle of criminal liability for an act under Art. 1 CC states that criminal liability is triggered only when the perpetrator commits an act prohibited under the threat of penalty in the statute effective at the time of its commitment. The criminal offence is a prohibited act which is unlawful, committed with a guilty mind and harmful to society in a degree higher than negligible. Art. 1 also stipulates the principle *nullum crimes sine culpa*. The principle of individual liability means that perpetrator is subject to criminal liability only for their own act in the boundaries of their own intentionality or negligence. The principle *nullum crimen sine lege scripta* ensures that criminal liability can only be established by written statutory law. The principle *nullum crimen sine lege certa* further specifies this by demanding that the description of the criminal offence must be accurate to the largest extent possible. For this purpose the following statutory elements shall be described:

- Elements of the object (legal good attacked by the perpetrator)
- Objective elements (description of the act and the circumstances)
- Elements of the subject (who is the perpetrator)
- Subjective elements (the mental state of the perpetrator, fault, aim, motive)

Furthermore, the principle *nullum crimen sine lege stricta* mean that the perpetrator can only be liable for the act described in the statute, analogy to the detriment of the perpetrator is inadmissible. Based on the principle of societal harm, the societal harm of an act must be higher than negligible to trigger criminal liability.

The main aim of the criminal procedure is to enforce the Criminal Code and other statutes containing criminal offences. The purpose of the procedure is to identify the perpetrator of the criminal offence and to hold such person criminally liable, combating and preventing commission of criminal offences and consolidating the rule of law and the principles of community life, secure the legally protected interests of the injured party, and to achieve the determination of the case within reasonable time.

2.2 Privacy as a Legal Good protected in the Criminal Code

The right to privacy enjoys constitutional protection in Poland. Art. 47 protects the right to privacy and prohibits the legislator unjustified interferences in the sphere of family and private life.¹ The source of the right to privacy is human dignity, of which privacy constitutes one aspect.² Privacy is understood as the right to live one's own life according to one's own will with only the necessary minimum of external interference, and can also be phrased as the right to be left in peace.³ The right to privacy is directly related to other goods, such as dignity (art. 30), parental rights (art. 48),

¹ K 12/00 TK Judgment 24 October 2000.

² Chalubinska-Jentkiewicz, Korpiuk, *Prawo Nowych Technologii*, Wolters Kluwer, (2015), 8:1.

³ Chalubinska-Jentkiewicz, Korpiuk, *Prawo Nowych Technologii*, Wolters Kluwer, (2015), 8:4.

freedom and secrecy of communications (art. 49), inviolability of the dwelling (art. 50), protection of personal data (art. 51), freedom of religious exercise and conscience including freedom from having to disclose one's religious feelings (art. 53) and freedom from unfair market practices violating privacy (art. 76).⁴ The right to privacy does not only bind the state to respect it in the exercise of its own activity, but also creates positive obligations of the state to protect it from third-parties.⁵ One of the ways in which these positive obligations were translated in the legal system is the criminalization of certain acts interfering with the constitutional rights mentioned above. These privacy crimes are concentrated mostly in Chapter XIX on Crimes against life and health, Chapter XXIII on Crimes against liberty, Chapter XXIV on Crimes against freedom of conscience and religion, Chapter XXV on Crimes against sexual freedom and morality, Chapter XXVI on Crimes against family and care, Chapter XXVII on Crimes against honour and physical inviolability and Chapter XXXIII on Crimes against the protection of information.

3. Things

The interest in protecting personal things in the Criminal Codes is usually manifested in the protection of people's property from various forms of misappropriation. While these forms of criminalization certainly have some connection to privacy, they are not too interesting for the purposes of this reports. The things or property that are perhaps of the highest importance to privacy protection in the 21st century are computers, and for that reason, this section will focus largely on how computers are protected in the Criminal Codes from unauthorized access and other corollary activities. The computer crimes in Polish Criminal Code are situated in the Chapter XIII entitled Crimes against the protection of information. The principal provision can be found in of Art. 267:

“(1) Whoever without authorization obtains access to an information not meant for them, by opening a sealed letter, connecting into a telecommunications network or by breaking or avoiding electronic, magnetic, informatics or other special protection of such network shall be punished by imprisonment of up to two years.

(2) The same penalty shall apply to anyone who without authorization obtains access to the whole or a part of an informational system.

(3) The same penalty shall apply to whoever with an aim of obtaining information to which they are not authorized uses eavesdropping, visual or other tools or programs.

(4) The same penalty shall apply to whoever reveals information obtained by means described in 1-3 to another person.

(5) Offences described in 1-4 are prosecuted upon the request of the victim.”

⁴ P 56/11 TK judgment 25.07.2013.

⁵ OTK-A 2011TK judgment 11 October 2011, nr 8, note.80.

The legal good in Art. 267 according to Adamski is computer security and the protection of information. Three main features of information security are protected: the confidentiality, integrity and availability.⁶ Until relatively recently, only confidentiality of information was protected, but not its integrity. Mere access without obtaining information did not fall under the provision, since only the information protecting in the system and not the system itself was protected.⁷ The insertion of paragraph 2 in the Art. 267 significantly extended criminalization to all unauthorized access to computer systems, even where no security measures were breached. Adamski expresses concern that this will lead to overcriminalisation (Adamski opinia), since the law enforcement authorities are given *de facto* discretion to label minor acts as offences and prosecute them.⁸ Sakowicz considers the legal good in Art. 267 to be a widely understood right of disposing with information,⁹ which considers this right to rely on two pillars: exclusivity of access and secrecy of communications. The security of information transfers is essential for maintaining a private sphere of individuals.¹⁰

The concrete objects of protection are information not meant for the perpetrator in telecommunications networks in paragraph 1, information systems in paragraph 2 and information to which the perpetrator is not authorized in paragraph 3. Since the first and to a large extent the third paragraph mostly concern protection of information in the context of communication (see section 5.6.2.), in this section we will focus mostly on the second paragraph, and only to a lesser extent on some of the aspects of the other two.

In defining an information system protected in Art. 267(2), Polish doctrine refers to the definition in the Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, which defines an information system as “any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of computer data, as well as computer data stored, processed, retrieved or transmitted by them for the purposes of their operation, use, protection and maintenance”.

Unauthorised access is an ambiguous term, not legally defined and opening up a great deal of flexibility.¹¹ Access to an information system is not dependent on any specific method of obtaining it. It simply means taking over the control of the information system.¹² This control enables the

⁶ Adamski, Andrzej, ‘Cybercrime Legislation in Poland’, National Report for the International Congress on Comparative Law (2015), p. 8. Available at:

https://www.researchgate.net/profile/Andrzej_Adamski2/publication/279191115_CYBERCRIME_LEGISLATION_IN_POLAND/links/558d662b08aed6ec4bf34d73.pdf?origin=publication_list

⁷ Adamski, Andrzej, ‘Cybercrime Legislation in Poland’, National Report for the International Congress on Comparative Law (2015), p. 9.

⁸ Adamski, Andrzej, ‘Cybercrime Legislation in Poland’, National Report for the International Congress on Comparative Law (2015), p. 9.

⁹ Sakowicz, Andrzej, ‘Art. 267’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 435.

¹⁰ Sakowicz, Andrzej, ‘Art. 267’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 435.

¹¹ Adamski, Andrzej, ‘Cybercrime Legislation in Poland’, National Report for the International Congress on Comparative Law (2015), p. 10.

¹² Adamski, Andrzej, *Opinion on the draft law no. 458 amending the Criminal Code*, Biuro Analiz Sejmowych (2008), p. 6.

perpetrator the possibility to view, copy, block, delete or otherwise use the information stored in the system, but it is not relevant whether they undertake any of these actions, the mere possibility to do so constitutes access.¹³ Access to the whole information system is not necessary, access to a part of it suffices to constitute the offence.¹⁴ Similarly, obtaining information, the key element of *actus reus* in paragraphs 1 and 3 is defined as obtaining the freedom to dispose with the information, whether by controlling the physical device in which it is stored or by copying it or simply by learning its content.¹⁵

The requirement for the entry to be unauthorized in computer trespass is expressed with wording such as ‘without authorization’ or ‘not intended for the perpetrator’. Authorization can either stem from a special law¹⁶ or the lack of it can simply be implied by the security measures put in place to prevent access of others. The Polish Art. 267(2) is rather exceptional in criminalizing the gaining of unauthorized access to a computer system even in the absence of security measures. Such regulation has been formally justified by the necessity to cover cases where computer are infected by malicious programs aiming to take over the control of a computer. It seems, therefore, to be motivated by practical consideration, such as the usefulness as a legal weapon against the distributors of spyware and other malicious software.¹⁷

Breaking or avoiding security measures is a requirement in the first paragraph criminalizing access to telecommunications networks. Breaking means overcoming all kinds of constructions preventing or making more difficult the access to information, or suppressing its effect for a time. If there is a way of gaining the information without breaking the measures, it will not be criminal to do so even when the perpetrator is aware of the will of the authorised person to protect the information.¹⁸ Avoiding security measures is different from breaking, it includes for example the gaining the key or the password by deceit or in another way. Also taking advantage of a bug in the security measure.¹⁹

The Criminal Code includes a number of further provisions protecting various aspects of computers. Art. 268 protects the integrity of information, the ability to dispose of it, and the protection of integrity of the storage of information, its completeness and correctness:²⁰

“(1) Whoever without authorization destroys, damages, removes or alters records of certain information or in another way makes it impossible or significantly more difficult

¹³ Sakowicz, Andrzej, ‘Art. 267’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 439.

¹⁴ Sakowicz, Andrzej, ‘Art. 267’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 442.

¹⁵ Sakowicz, Andrzej, ‘Art. 267’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 439.

¹⁶ Sakowicz, Andrzej, ‘Art. 267’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 439.

¹⁷ Adamski, Andrzej, ‘Cybercrime Legislation in Poland’, National Report for the International Congress on Comparative Law (2015), p. 10.

¹⁸ Sakowicz, Andrzej, ‘Art. 267’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 440.

¹⁹ Sakowicz, Andrzej, ‘Art. 267’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 441.

²⁰ Adamski, Andrzej, *Przestępczość w cyberprzestrzeni*, Dom Organizatora (2001), pp. 28-29.

for the authorized person to learn its content shall be punished by fine, a punishment of limitation of liberty or deprivation of liberty of up to 2 years.

(2) If the act in paragraph 1 relates to a record on an informational data carrier, the perpetrator shall be punished by imprisonment of up to 3 years.”

The penalty is even higher when the perpetrator cause significant property damage. This offence is also prosecuted upon request of the victim. Art. 269 has a similar wording but relates to information subject to special public interests, such as defence of the country or functioning of public administration. As such, it carries a penalty of up to 8 years of imprisonment. Interfering with the operation of a computer system by transmissions, damaging, removing, destroying or altering data is criminalized in Art. 269a.

Lastly, preparatory crimes to commit the acts mentioned in this section are criminalized in Art. 269b. These preparatory actions consist of creating, obtaining, selling or making available tools or programs, passwords, access codes or other data allowing to access information stored in computer systems or networks.

4. Places

The main privacy interest in places protected in the Criminal Code is the protection of the peace of the home. Inviolability of the dwelling is one of the elements of privacy protected in the Constitution.²¹ Criminalisation of breaking it can be found in the oldest codes of law such as the Code of Hammurabi, or Roman and Greek laws, which were punishing violations of the home on religious grounds based on the cults of gods as protectors of the home and the family.²² While the justifications have changed over time, the interest in protecting private homes from interference has been preserved in most legal cultures today. In constitutional Polish doctrine, inviolability of the dwelling (art. 50) is a classic personal liberty of a person serving especially her mental integrity and having a close connection to her dignity. Inviolability of the home is an extension of the inviolability of the person.²³ In Polish criminal law, this interest is expressed in the criminalization of home trespass in Art. 193 of the Criminal Code:

“Whoever encroaches into another person’s house, apartment, premises, rooms or a fenced area, or despite a request by the authorized person does not leave such place, shall be subject to a fine, a penalty of restriction of liberty or deprivation of liberty up to one year.”

²¹ Sakowicz, Andrzej. *Prawnokarne gwarancje prywatności*, Wolters Kluwer (2006), p. 346.

²² Bojarski, Tadeusz, *Karnoprawna ochrona nietykalności mieszkania* jednostki, Uniwersytet Marii Curie-Skłodowskiej (1992), p. 24.

²³ Sakowicz, Andrzej. *Prawnokarne gwarancje prywatności*, Wolters Kluwer (2006), p. 351.

4.1 Legal Goods Protected in Home Trespass

Home trespass is one of the Offences against liberty in Chapter XXIII of the Criminal Code. The concrete object of protection is usually referred to as peace of the home understood as the right to undisturbed use of a house, flat (...) and to do in these places whatever the person disposing of it wishes to do, unless it is illegal.²⁴ *Mir* (peace) in Polish language is connected with respect, deference, recognition. In older laws the word was used to describe special protection of some categories of persons (noblemen, royalty) and places (manors, castles). Domestic peace contains two elements: tranquility and respect of the home.²⁵ Only the authorised person is authorized to decide which other persons, when and on what terms can dwell in those places.²⁶ Peace as the object of protection has been consistently stressed since (at least) 1934. The various aspects of the peace of the home are the right to dispose of it, the right to free and exclusive use of the spaces according to one's own will, freedom from interference with the right to dispose of it and the right to a calm dwelling (verb). The protection of peace of the home allows a creation of the private sphere of every individual, it is an expression of privacy protection that is enabled by the creation of a secluded sphere within which the individual creates their own personality, decides about personal matters, both physical and psychological.

4.2 Delineation of Protected Space in Home Trespass

The Polish provision protects another person's house, apartment, premises, rooms or a fenced area. Dwelling is defined as a room or a set of rooms separated by permanent (solid) walls within a building, designated for permanent dwelling (verb) of people, which together with utility premises serve to satisfy housing needs of the dwellers. The separating walls cannot be just provisional.²⁷ This definition seems to exclude movable property such as caravans, since a building is legally defined by being permanently attached to the ground, as well as tents, since the walls need to be permanent and solid, excluding provisional separations, such as textile walls.²⁸ Premises are to be understood as utility premises.²⁹

The fenced of area appears to be similar in meaning to the German term *befriedete Besitztum*. The borders of the land must be clearly delineated, signs or notices informing about ownership of the property are not sufficient, if the borders of the land are not visible.³⁰ However, the fence does not have to make the property inaccessible as long as it clearly indicates the borders of the property.³¹ Case law seems to suggest that the will of the right-holder to exclude others needs to be indicated

²⁴ Królikowski, Michał, Andrzej Sakowicz 'Art. 193' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 569.

²⁵ Sakowicz, Andrzej. *Prawnokarne gwarancje prywatności*, Wolters Kluwer (2006), p. 347.

²⁶ Królikowski, Michał, Andrzej Sakowicz 'Art. 193' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 570.

²⁷ Królikowski, Michał, Andrzej Sakowicz 'Art. 193' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 576.

²⁸ Królikowski, Michał, Andrzej Sakowicz 'Art. 193' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 576.

²⁹ Mozgawa, Marek, 'Naruszenie miru domowego' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), pp. 534-535.

³⁰ Królikowski, Michał, Andrzej Sakowicz 'Art. 193' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 576.

³¹ Królikowski, Michał, Andrzej Sakowicz 'Art. 193' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 576.

by barriers that go vertically upwards from the ground. Examples mentioned are fences, a walls, railings, barbed wire, while trenches are specifically exclude as proper delineations of the borders.³²

In Poland, majority opinion in the literature considers public premises to be outside of the scope of the provision, since protection of public premises would be based on considerations quite different from ‘personal liberty’. However, the opinion is contrasted by the 1990 Supreme Court decision which extended the interpretation of the provision to include premises of legal entities and even public bodies. This has been heavily criticized in doctrine as being inconsistent with the legal goods protected by the criminal code provision, since we cannot talk about personal liberty of institutions, just as we cannot talk about their right to health, or freedom of religious belief.³³

4.3 Unauthorised Access

The act of home trespass is committed by entering into a place protected within the right to privacy against the will of the person authorized to dwell there.³⁴ This means that the perpetrator can be anyone except a person authorized to live there. It can be also the owner of the property, if they have delegated the holding right to another person.³⁵

The provision is elastic, in the sense that it does not prescribe specific acts that fulfill the definition of encroaching in. The means of getting in are not relevant, only entering against the will of the dweller is. This can be done with or without knowledge of the authorized person.³⁶ Encroaching in, in the context of home trespass is to be understood as any means of physical interference into another person’s place protected in this provision, in violation of the explicitly formulated or implied will of the authorized person. Primarily, this will include breaking barriers other than the physical ones, since that would usually, although not necessarily, fall under Art. 279 Theft by burglary (see end of this section). It includes any means directed towards overcoming obstacles meant to prevent entry of other persons against the will of the dweller, such as violence, deceit, false pretense or threat. As opposed to burglary, encroaching in does not only include overcoming physical obstacles, but also overcoming someone’s will by entering a place without legal basis.³⁷

³² III KK 73/13 Supreme Court Decision – Criminal Chamber, 9 July 2013.

³³ Sakowicz, Andrzej. *Prawnokarne gwarancje prywatności*, Wolters Kluwer (2006), p. 357.

³⁴ Królikowski, Michał, Andrzej Sakowicz ‘Art. 193’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 572.

³⁵ Królikowski, Michał, Andrzej Sakowicz ‘Art. 193’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 572.

³⁶ Królikowski, Michał, Andrzej Sakowicz ‘Art. 193’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 573.

³⁷ Królikowski, Michał, Andrzej Sakowicz ‘Art. 193’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 573.

Older doctrine considered partial entry to be sufficient to trigger criminalization, for example placing a hand inside, or a foot in the door to prevent closing. Contemporary doctrine leans towards not accept partial entry as a completed offence, but it could qualify as an attempted offence.³⁸

Entering through open door is not an offence under Art. 193, when the fact that they are open indicates that the authorized person does not preclude entering. If the will of the authorized person is clear in not allowing entry, even entering through an open door would constitute an offence. Excessive knocking, ringing the bell, etc. does not qualify as breaking in, but could be seen as attempt. Such disturbances would more likely fall under Administrative law, specifically Art. 51 of the *Kodeks wykroczeń* which places sanctions on the so called malicious harassment.³⁹

The offence is not only committed by breaking in. The second alternative criminalizes the perpetrator who does not leave the place despite explicitly expressed will of the authorized person, regardless of the entry being lawful or unlawful. The will has to be expressed in an unequivocal and clearly readable manner, in other words available and understandable, for the one to whom it is addressed.⁴⁰ The form and the means of communication are not relevant. Expression does not need to be verbal, it could be written, telephoned, emailed or simply gestured. It also does not matter whether the victim is present in the dwelling at the time. According to Mozgawa, even when currently no one lives in the dwelling it is nevertheless protected by art. 193,⁴¹ however, this appears strange since the protected interest in those cases would be much closer to protection of property than peace of the home.

In both alternatives, house trespass is a continuous offence, but the length of intrusion is not necessary for criminalisation, although it could be relevant for determining the penalty.⁴²

Perhaps one of the most relevant elements that needs to be clarified is the determination of who is considered to be an authorized person. Another person's dwelling is a place to which the dweller has an exclusive authorization or a higher authorization than the perpetrator.⁴³ Generally, it is an individual who is legally entitled to dwell in the specified place. This status can also be derived from legally accepted factual state, such as possession. Authorization can be based on ownership, possession, usage, lease, supervision, or being a person giving rise to presumption that they act according to the will of the host. This can for instance be a neighbour tasked with supervision.⁴⁴

There can be more than one authorized person, for example if more individuals share the same dwelling, regardless of property relations between them. According to Mozgawa, if there are more

³⁸ Mozgawa, Marek, 'Naruszenie miru domowego' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), pp. 529.

³⁹ Mozgawa, Marek, 'Naruszenie miru domowego' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), pp. 529.

⁴⁰ Mozgawa, Marek, 'Naruszenie miru domowego' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), pp. 531.

⁴¹ Mozgawa, Marek, 'Naruszenie miru domowego' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), pp. 532-534.

⁴² Mozgawa, Marek, 'Naruszenie miru domowego' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), pp. 532.

⁴³ Królikowski, Michał, Andrzej Sakowicz 'Art. 193' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 575.

⁴⁴ Sakowicz, Andrzej. *Prawnkarne gwarancje prywatności*, Wolters Kluwer (2006), p. 354.

than one authorized person, they each enjoy equal protection of the law. However, in cases of conflict between their wills, unclarity arises. Principally, lack of consent of one of them should be enough to exclude others from access, however, that might not apply to the whole dwelling, but only to the rooms or premises that are dedicated for their personal use. Thus, in Poland, authorization can only apply to a part of the protected place. For example, separated couples who still share the same apartment may have different rooms assigned for their disposal. Each person then has exclusive authorization over their own room and they share the authorization over the common areas.⁴⁵ Whereas in most cases, access to private rooms is only possible through the common areas, this may lead to situations where a person is permitted to allow visitors in their own room, but has to ask permission from the other person to let these visitors into the common areas. The literature does not go as far as to consider this possibility. It is also not clear whether adolescents can decide to not allow their parents into their room. The doctrinal account mentions this option, but only in the form of a rhetorical question, perhaps implying this would be going too far.⁴⁶ The persons who regularly occur in the dwelling, yet do not have any rights to it, such as maids or babysitters, certainly cannot override the rights-holder decisions on access, but can represent the right-holder towards third-parties. If, however, they are assigned a room to live in, they also gain authorization to control access to this room, unless specifically agreed otherwise.⁴⁷

4.4 Other Criminal Offences with a Spatial Dimension

A criminal offence having a strong spatial direction is theft by burglary criminalized in Art. 279. Although the primary object of protection is property, the provision also protects the means of securing property. In this context, the dwelling, or other places can function as containers that secure the property from theft. This provides a particularly focused discussion on how the wall of the home can function as a boundary protecting values hidden inside, and even though in this context the privacy relevance is not high, the discussion of what constitutes as breaking in can still reveal valuable insights into the functions of the home and other protected spaces.

The provision protecting from theft by burglary was until recently entitled ‘audacious theft’. The legal understanding of breaking in in Poland differs from the ordinary understanding of the word. The former is understood the use of intensive physical force, but the latter focuses on how the property is secured and the aim of securing it. While formerly, symbolic ways of securing the property, which were unlikely to make it more difficult for the perpetrator to access the property would not be considered breaking in, in current doctrine the dominant opinion is that even such symbolic security obstacles are sufficient, if it is clear that their aim was to clearly indicate the will of the authorized person to exclude others from access. However, what would not constitute breaking in, is for instance unlocking the door with a key that was left in the keyhole or if the tool keeping the door closed is of such character that anyone can open it, for example a chain without

⁴⁵ Mozgawa, Marek, ‘Naruszenie miru domowego’ in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), pp. 533.

⁴⁶ Mozgawa, Marek, ‘Naruszenie miru domowego’ in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), pp. 533-534.

⁴⁷ Mozgawa, Marek, ‘Naruszenie miru domowego’ in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), pp. 533-534.

lock Getting in through an open window would not constitute breaking in either.⁴⁸ Stealing from a fenced off plot of land is also not breaking in, except if it is fully fenced, the fence constitutes a real obstacle, breaking in consists of breaking a lock or destroying the fence⁴⁹, and the stolen property is of such nature that it could not be removed without destroying the fence or breaking the lock on the gate.⁵⁰ Importantly, the action of breaking in does not necessarily refer to places, breaking into safes, locked drawers, etc. also constitutes the offence under Art. 279.⁵¹ Although doctrinally complicated⁵², breaking into a car to steal the car itself also counts as theft by breaking in.⁵³ Electronic security (codes, etc.) is considered equivalent to physical ways of securing property.⁵⁴

5. Persons

5.1 Body

The primary interests in protecting the body of individuals is the protection of their life and health. These values are protected by a number of provisions in the Criminal Code, which however only indirectly protect privacy, through the protection of bodily integrity, and will not be detailed in this report. The most interesting criminal offence relating to the human body is the one criminalized in Art. 217:

“(1) Whoever hits another person or violates their bodily inviolability in another way shall be punished by a fine, restriction of liberty or deprivation of liberty of up to a year.

(2) If the violation of bodily inviolability was caused by a provocative action of the victim or if the victim retaliated by violating the perpetrator’s bodily inviolability, the court may desist from imposing a penalty.

(3) The offence is subject to private prosecution.”

The legal good protected by Art. 217 is honour and bodily inviolability of physical persons, and the protection of the bodily sphere of every individual. In this way, inviolability of the person, dignity, liberty and personal safety are protected.⁵⁵

⁴⁸ Wilk, ‘Art. 279’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom II. Komentarz do artykułów 222–316*, C.H. Beck (2013), pp. 550-551

⁴⁹ Not simply jumping over.

⁵⁰ SN 24.6.2010, KK 388/09, OSNKW 2010, Nr. 9, poz. 82.

⁵¹ Wilk, Leszek, ‘Art. 279’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom II. Komentarz do artykułów 222–316*, C.H. Beck (2013), p. 555.

⁵² Theft by burglary generally refers to breaking into a place or container to steal something contained inside. Technically this is not the case of car theft, since the car is the container and the object of theft at the same time.

⁵³ Wilk, ‘Art. 279’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom II. Komentarz do artykułów 222–316*, C.H. Beck (2013), pp. 556-557

⁵⁴ Wilk, ‘Art. 279’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom II. Komentarz do artykułów 222–316*, C.H. Beck (2013), p. 558.

⁵⁵ Długosz, Joanna, ‘Art. 217’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 840-841.

As opposed to assault, no physical consequences are required here.⁵⁶ Therefore, permission of the victim precludes criminal liability.⁵⁷ Hitting is defined as interfering with the body of the other person with a hand, other body part or even a tool such as a stick. Other means of interfering with the body include things like hair pulling choking, tripping, spitting on someone, removing glasses or a hat, pinching, throwing objects at someone, or spraying them with something.⁵⁸

An aggravated instance of the same offence is criminalized in Art. 217a. Hitting someone or otherwise interfering with their body in connection to victim's interventions in protecting safety of people or public order carries a harsher sentence under this provision.

Physical and psychological abuse of prisoners and persons deprived of liberty is criminalized in Art. 247. Especially harsh sentence is placed upon such actions when they are committed with excessive cruelty.

Protection is even to the human body even after death under Art. 262. Such protection and requirement of respectful treatment of a dead human body stems from the protection of human dignity.⁵⁹

5.2 Image, visual observation and recording

Related to the protection of the body, but not based on bodily inviolability, is the protection of people's image. Polish criminal law protects the intimate image of people, that is the image of their naked body or their body during sexual activity in Art. 191a. Additionally, by criminalizing visual surveillance of people with intention to obtain information to which one is not authorized in Art. 267(3), the Criminal Code potentially extends the protection to other situations in which people have an expectation of privacy.

Art. 191a contains two separate criminal offences: the creation of voyeuristic images and the dissemination of such images:

“(1) Whoever records the image of a naked person or a person during sexual activity, using against her force, unlawful threat or deceit, or whoever disseminates the image of a naked person or a person during sexual activity without her permission shall be punished by imprisonment from 3 months to 5 years.

(2) The offence is prosecuted upon request of the victim.”

⁵⁶ Długosz, Joanna, ‘Art. 217’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 843.

⁵⁷ Długosz, Joanna, ‘Art. 217’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 841.

⁵⁸ Długosz, Joanna, ‘Art. 217’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 843.

⁵⁹ Michałska-Warias, Aneta, ‘Art. 262’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom II. Komentarz do artykułów 222–316*, C.H. Beck (2013), p. 373.

The first criminal offence in Art. 191a, creation of images, protects a legal good that is an emanation of the freedom from force, threat or deceitful action in deciding how and if at all one's intimate image is to be captured. The second one, non-consensual pornography, protects the freedom to dispose of one's intimate image and how it is presented to others. Furthermore, sexual freedom is protected as a secondary object in both instances.⁶⁰

The definition of the concrete object of perpetrator's action is common for both versions of the offence: naked person or a person engaged in sexual activity. There is some disagreement in literature as to what constitutes a naked body: some authors consider it sufficient that some naked body parts are visible with private parts not fully exposed or blurred⁶¹, while others think that at least some private parts (genitals, buttocks, female breasts) must be clearly visible⁶². Body painting does not preclude nakedness and a person without clothes standing sideways or covering their private parts with hands is a naked person for the purposes of the provision according to Warylewski.⁶³ However, people in their underwear, based on available case law, would not be considered naked.⁶⁴ Since the provision speaks of a naked person, not just naked body, the doctrine interprets this as a requirement for the person to be identifiable. Both requirements (nudity and identifiability) are satisfied if any part of a naked human body that allows for identification of that person is shown in the image, although, as observed, some authors consider some private parts need to be visible. (filek) It should be noted that the standard of identifiability is relatively low: if at least one person other than the victim can identify her on the image⁶⁵, based on any characteristic trait typical to the victim's body⁶⁶, the identifiability requirement would be satisfied. Thus, a recording does not necessarily need to include the face of the victim or any personal data.

What the doctrine is more or less in agreement in, and this agreement is supported by a lower level case law⁶⁷, is that the images do not have to serve a sexual purpose and they can also be recorded with the intention of ridicule, showing ugliness or generally interfering with the private sphere of the person by harmful depictions.⁶⁸

⁶⁰ Królikowski, Michał, Andrzej Sakowicz 'Art. 191a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 554

⁶¹ Królikowski, Michał, Andrzej Sakowicz 'Art. 191a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 556; Mozgawa, Marek, 'Utrwalanie wizerunku nagiej osoby lub osoby w trakcie czynności seksualnej albo rozpowszechnianie takich treści' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), p. 487.

⁶² Filek, Bartłomiej, 'Wizerunek nagiej osoby jako znamię przestępstwa z art. 191a §1 k.k.' *Prokuratura i Prawo* 7-8 (2012), pp. 68-75.

⁶³ Mozgawa, Marek, 'Utrwalanie wizerunku nagiej osoby lub osoby w trakcie czynności seksualnej albo rozpowszechnianie takich treści' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), p. 487.

⁶⁴ II K 497/13 (District Court) WYROK 14 kwietnia 2015 r. Sąd Rejonowy w Świdnicy.

⁶⁵ Filek, Bartłomiej, 'Wizerunek nagiej osoby jako znamię przestępstwa z art. 191a §1 k.k.' *Prokuratura i Prawo* 7-8 (2012), pp. 70.

⁶⁶ Filek, Bartłomiej, 'Wizerunek nagiej osoby jako znamię przestępstwa z art. 191a §1 k.k.' *Prokuratura i Prawo* 7-8 (2012), pp. 2012, 67.

⁶⁷ II K 497/13 (District Court) WYROK 14 kwietnia 2015 r. Sąd Rejonowy w Świdnicy.

⁶⁸ Królikowski, Michał, Andrzej Sakowicz 'Art. 191a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 556.

The recording of the image is to be understood as any activity leading to the capture of the image, be it temporary or permanent. It also extends to live transmissions.⁶⁹ However, only technical means of capturing image are covered. Therefore, drawing, painting or other artistic means with the exception of photography are excluded from criminalization.⁷⁰

The Polish provision on capturing images further narrows the criminalization of recording nude or sexual images to a sub-category of non-consensual situations by requiring some form of force, unlawful threat, or deceit. Force is understood as physical force, while unlawful threat is a threat in the meaning of Art. 190 of the Criminal Code. Deceit is understood as an activity of the perpetrator leading to obtaining the image of the person without their permission. It should be understood broadly as any interference with the autodetermination of the person in relation to their intimate image.⁷¹ It can for example be installing secret cameras in rooms knowing there will be guests.⁷² This is a broader definition of deceit which includes action that not only manipulates the victim to agree to something, but also that prevents the victim from being able to express their will at all. In this wider sense, it is not necessary that the victim knows about being recorded, and therefore all covert forms of recording will qualify as deceitful.⁷³ Fake castings of models on the other hand would not qualify since they agree to the making of images freely, just not the context of making them, although further publishing of such images without consent would as the second offence.⁷⁴ The literature seems to suggest that private spaces are more protected, for instance filming someone nude without their knowledge on a beach, even using zoom on the camera, would not qualify under Art. 191a according to Warylewski.⁷⁵

The alternative version of the offence requires publishing, understood widely as making accessible to others, of such images without consent. Here, it is irrelevant whether the perpetrator made the images themselves or got them from third-parties, it is the lack of consent that is relevant. The consent cannot be in the form of a general license to do whatever one wishes to do with the pictures, but has to be given for concrete forms and instances of making the images public.⁷⁶

⁶⁹ Mozgawa, Marek, 'Utrwalanie wizerunku nagiej osoby lub osoby w trakcie czynności seksualnej albo rozpowszechnianie takich treści' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), p. 491.

⁷⁰ Mozgawa, Marek, 'Utrwalanie wizerunku nagiej osoby lub osoby w trakcie czynności seksualnej albo rozpowszechnianie takich treści' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), p. 492.

⁷¹ Królikowski, Michał, Andrzej Sakowicz 'Art. 191a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 555.

⁷² Mozgawa, Marek, 'Utrwalanie wizerunku nagiej osoby lub osoby w trakcie czynności seksualnej albo rozpowszechnianie takich treści' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), p. 488.

⁷³ Mozgawa, Marek, 'Utrwalanie wizerunku nagiej osoby lub osoby w trakcie czynności seksualnej albo rozpowszechnianie takich treści' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), p. 488.

⁷⁴ Mozgawa, Marek, 'Utrwalanie wizerunku nagiej osoby lub osoby w trakcie czynności seksualnej albo rozpowszechnianie takich treści' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), p. 490.

⁷⁵ Mozgawa, Marek, 'Utrwalanie wizerunku nagiej osoby lub osoby w trakcie czynności seksualnej albo rozpowszechnianie takich treści' in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), p. 491.

⁷⁶ Królikowski, Michał, Andrzej Sakowicz 'Art. 191a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 555-556.

Visual observation can also intrude upon other privacy-related values, such as secrecy. Poland, in addition to the nudity offence contains a more general provision protecting people from unlawful visual surveillance is the provision of Art. 267(3) which reads as follows:

“The same penalty shall apply to whoever with the aim of obtaining information to which they are not authorized uses an eavdropping, visual or other device or program.”

As is apparent from the wording of the provision, it does not require any harm to truly occur. Mere attempt to obtain the information by using a technical device is criminalized. These devices would not only include visual recording devices, but also devices which enhance human perceptions, e.g. binoculars. Thus, not only recording, but also technically enhanced observation is criminalized here.

Naturally, no offence is committed by obtaining information to which one is authorized.⁷⁷ The determination whether someone is authorized to some information or not is largely subjective. The confidential nature of the information does not, as a rule, depend so much on the content of the information, but rather on the will of people taking part in it to keep it so. This would certainly include the image and sound from private meetings between people⁷⁸ and most likely other situations in which people have legitimate expectations of privacy, such as private life in the home. Nevertheless, prevalence of civil case law on visual invasions of the home seems to suggest that such violations are in practice solved by means of civil litigation.⁷⁹

5.3 Thought and Mind

5.3.1 Thought

Although protections against technical forms of reading the content of people’s thought and brain processes has not yet found its translation in criminal law, some more traditional criminal offences do protect through proxies. This is an example of Art. 251 which protects secrecy of voting, since learning the contents of someone votes speaks to their political preference and allows inferences to be made of their preferences and values in the political realm. Another example of protecting the freedom of people not to reveal their thoughts is the protection from torture in the exercise of public power expressed in Art. 246 which protects individuals from being forced to issue testimonies, statements, information or explanations. While the provision primarily protects the legal goods related to proper and lawful exercise of public power, in a secondary manner it protects the bodily integrity, liberty, honour, dignity and privacy of individuals.⁸⁰

⁷⁷ A. Bojańczyk: Glosa do wyroku SN z dnia 10 maja 2002 r., WA 22/02, Palestra 2003, z. 7-8.

⁷⁸ III KK 265/15 (Supreme Court) Sąd Najwyższy 2016.04.27

⁷⁹ E.g. I C 1126/15 Sąd Rejonowy Gdańsk – Północ w Gdańsku I Wydział Cywilny 18.02.2016; I ACa 184/14 Judgment of the Appeal Court in Cracow (28 May 2014 r.)

⁸⁰ Zalewski, Wojciech, ‘Art. 246’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom II. Komentarz do artykułów 222–316*, C.H. Beck (2013), p. 240.

5.3.2 Causing mental disturbance, fear or incapacitation; stalking

Another type of interferences with the mind that needs protection is the freedom from fear and other mental disturbance. Article 190 of the Criminal Code protects individuals from unlawful threats of committing criminal offences causing harm to them or their closest persons. This provision protects freedom of individuals in a psychological sense, specifically freedom from fear or worry caused by such illegal threats, since the fear and discomfort of being threatened directly decreases the quality of life of the victims.⁸¹

A criminal offence emerging in the last decade in many jurisdiction is the offence of stalking. In Poland, stalking was not criminalized until relatively recently, and civil law remedies were used instead, in addition to administrative delicts such as ‘malicious harassment’ in Art. 107 of the Administrative Delicts Code.⁸² The current Criminal Code has been amended in 2011 to include the criminalization of Stalking in Art. 190a:

“(1) Whoever, through persistent harassment of another person or her close person gives rise to circumstances that create a justified feeling of insecurity or significantly violates her privacy shall be subject to the penalty of deprivation of liberty for up to 3 years.

(...)

(3) If the act described in 1 or 2 leads to the victim’s attempt to take their own life, the perpetrator shall be punished by imprisonment of up to 10 years.

(4) Prosecution of acts in 1 and 2 shall be upon request of the victim.”

Stalking is a direct attack on the dignity of the person and also freedom from threats, right to privacy and personal autonomy, and in extreme cases also freedom from inhuman treatment. What is also at stake is the potential humiliation of the victims, destruction of their reputation and position in the society, especially considering the new possibilities that the modern forms of communications allow and the changing nature of individual’s participation in society. It causes similar moral suffering of the victim as physical or mental bullying.⁸³ Psychological well-being is therefore one of the protected legal goods as well.⁸⁴ The protection of individual’s dignity requires the protection of an exclusive personal zone where the person is not exposed to “being with others”, sharing her experiences and intimate life with them. This protection includes private information related to the individual which guarantees the informational autonomy. It also includes

⁸¹ Królikowski, Michał, Andrzej Sakowicz ‘Art. 190’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 533.

⁸² Mozgawa, Marek, ‘Przestępstwa stalkingu (nękania) i podszywania się’ in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), p. 435.

⁸³ Królikowski, Michał, Andrzej Sakowicz ‘Art. 190a’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 539.

⁸⁴ Mozgawa, Marek, ‘Przestępstwa stalkingu (nękania) i podszywania się’ in Warylewski, Jarosław, *Przestępstwa przeciwko dobrom indywidualnym*, C.H. Beck: Warszawa (2012), 439.

freedom of communications, which includes not only correspondence, but all interpersonal contacts.⁸⁵

The provision is intended to cover unwanted interference with privacy and interference with the feeling of safety of the victim and is also be described as emotional assault.⁸⁶ The conduct that is covered is not specified, not even in the form of examples. Doctrine mentions some examples, such as intrusions into private sphere, use of means of communication, unwanted contacts, including those using new information and telecommunication technologies⁸⁷, such as excessive texting or emailing⁸⁸, as well as persistent commission of petty offences. The conduct can be directed towards the victim or her close relations. The key defining feature is the persistent nature of those actions, it is usually the recurrence of the actions that causes harm to the victim. This harm is manifested in feelings of threat, changes in the usual way of life fear and discomfort which does not allow the victim to live freely.⁸⁹

The criminalized conduct is defined by its consequences: permanent state of stress, fear for one's safety or safety of close persons or the changes in the usual way of life. This is objectivized by requiring these feelings to be 'justified', since the ability of different people to deal with psychological distress varies.⁹⁰ It is, however, not fully objectivized, fear is justified if an average person of comparable personal traits as the victim, psychological profile, intellect and mentality would evaluate the situation in a similar way as the victim.⁹¹

Harassment is defined as behavior that can objectively result in distress, fear, domination, humiliation or similar negative sensations. It has a combined, multi-action, character, which includes actions of different types and degrees of seriousness. These actions often only qualify when taken together and may be relatively innocent on its own.⁹² These actions only qualify as harassment when they are conducted against the will of the victim, which has to be communicated to the perpetrator or objectively evident.⁹³ The victim needs to sufficiently clearly communicate

⁸⁵ Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), pp. 539-540.

⁸⁶ Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 538.

⁸⁷ Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 538.

⁸⁸ II AKa 18/14 (Court of Appeal) Wyrok Sądu Apelacyjnego we Wrocławiu z dnia 19 lutego 2014 r.

⁸⁹ Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 538.

⁹⁰ Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 540.

⁹¹ Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 543.

⁹² Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 541.

⁹³ Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 541.

her lack of will and also it needs to be established whether the perpetrator could not act mistakenly with regards to the lack of will.⁹⁴

Persistence is defined by the amount of actions, it has to be a larger number of actions over a longer period of time and with a certain attitude of the perpetrator.⁹⁵ Persistence is defined as continuous and serious.⁹⁶

The conduct must be intentionally directed towards a concrete person or close relatives of that person.⁹⁷ The criminal code does not define the intensiveness of the fear requirement, nor does it require any specific motivation of the harassment, whether it's love or hate or revenge, or simple teasing.⁹⁸

An alternative result requirement to the fear requirement is the violation of privacy can be fulfilled e.g. by recording, photographing, filming, publishing of image, offering companionship or other interference in the physical personal zone.⁹⁹ It is not restricted to some places, such as home or dwelling, but refers to the sphere of personal autonomy related to everything in personal life and to avoiding everything that violates personal goods such as health, liberty, honour, name, image or correspondence.¹⁰⁰ The requirement that the harassment violates privacy is not entirely clear. It should be interpreted as the violation of the inner sphere of privacy, referring to the German Sphären Theorie, and must be especially intrusive.¹⁰¹ However, some authors hold an opinion that each violation of privacy is significant due to the significance of privacy as a legal good itself.¹⁰² This has been confirmed in a Supreme Court judgement which stated the following: "*Privacy itself, regardless of its specific sphere being violated, is a good so significant, that each violation of it is significant.*"¹⁰³ Nevertheless, a higher threshold is set for public persons,¹⁰⁴ and for instance searching through garbage thrown in the public trash bin by a known person to see how they nourish will not amount to a significant privacy violation.¹⁰⁵ On the other hand filming and photographing a victim and her children, while on their own property and its vicinity despite their

⁹⁴ Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 544.

⁹⁵ Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 541.

⁹⁶ III KK 417/13 (Supreme Court) *Postanowienie* Sądu Najwyższego z dnia 12 grudnia 2013 r.

⁹⁷ Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 542.

⁹⁸ III KK 417/13 (Supreme Court) *Postanowienie* Sądu Najwyższego z dnia 12 grudnia 2013 r.

⁹⁹ Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 543.

¹⁰⁰ Explanatory report to the Bill of 25 February 2011 amending the Criminal Code, Nr. 3553.

¹⁰¹ Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 543.

¹⁰² Budyn-Kulik M., *Kodeks karny. Komentarz do zmian wprowadzonych ustawą z dnia 25 lutego 2011 r. o zmianie ustawy - Kodeks karny.* (LEX 2011) para 34.

¹⁰³ IV KK 196/15 (Supreme Court) WYROK 12 stycznia 2016 r. Sąd Najwyższy.

¹⁰⁴ Królikowski, Michał, Andrzej Sakowicz 'Art. 190a' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 544

¹⁰⁵ Mozgawa M. (red.), Budyn-Kulik M., Kozłowska-Kalisz P., Kulik M., *Kodeks karny. Komentarz.* Wolters Kluwer (2015).

categorical objections constituted violation of their privacy in the meaning of art. 190a § 1 k.k., despite the fact the the images were not further distributed.¹⁰⁶

5.3.3 Obscenity offences

Obscenity and similar disturbances of public order are another category of acts which might interfere with the peace and tranquility of the mind of people present in public or semi-public places. The Polish Criminal Code contains a number of provisions protecting against these types of interferences with public order and peace. For instance, Art. 195 criminalizes malicious disturbance of religious ceremonies or services. Art. 200 criminalizes presentation of pornography to minors younger than 15, and Art. 202 the public presentation of pornography in a way that may expose people to it, who do not wish to be exposed to it. Disturbing people in their exercise of assembly rights or gatherings is criminalized in Art. 260 and insulting or defaming a memorial or another place commemorating or celebrating historical figures in Art. 261.

5.4 Autonomy

The most extreme restriction of liberty and autonomy is the trade in human beings criminalized in Art. 189a. This provision protects not only liberty, but also dignity of people. In this context, freedom is not limited to freedom of movement, but to the protection of dignity of the person as a holder of rights. It is considered unacceptable that a person would be held in such a state which allows it to be treated as property. Article 189 criminalized restrictions of freedom in the context of freedom of movement. Forcing people to act in a certain way or to neglect acting in a way they would wish to is criminalized in Art. 191.

5.5 Identity, Reputation and Honour

Polish criminal law contains rather extensive criminalisations of various attacks against the honour, reputation and good name of individuals. Hitting a person criminalized in Art. 217 has already been discussed in section 5.1., this section will briefly outline the criminalization of non-physical offences against honour and reputation, which compared to other jurisdictions might appear overly extensive and open to criminalization of rather trivial or harmless expressions.

Art. 212 criminalizes slander or persons, groups of people, institutions, legal entities or organizational units, by attributing it such acts or attributes which can harm their reputation among the public. While in general, the offence is not subject to imprisonment, if such acts committed by means of mass media imprisonment can result in imprisonment of up to one year. Personal honour is a legal good that is hard to define, since it is a fluid concept depending on historical, societal and cultural context. Its meaning in criminal law is close to the concept of good name, which is not necessarily something inherent, but also something a person or an organization builds

¹⁰⁶ IV KK 196/15 (Supreme Court) WYROK 12 stycznia 2016 r. Sąd Najwyższy.

throughout life. That, however, does not mean that certain people, due to their specific history, can be excluded from the protection of their honour.¹⁰⁷

Part of the literature is of an opinion that the provision applies not only to factual statements, but also expressions of opinion.¹⁰⁸ The provision also applies when the slanderous statements do not originate from the perpetrator and have been expressed by someone else already or are already widespread among the public.¹⁰⁹ The provision appears to have a very extensive scope, and is not limited to individuals, but also legal entities. As an exception, permissible criticism is not criminalized, but it is also hard to define.

Importantly, Art. 213 provides another exception from criminalization, by allowing the proof of truth to be presented by the perpetrator. The offence in Art. 212 is not committed, if the statement which is made non-publicly is truthful. Furthermore, even truthful statements made publicly are not criminalized, if they relate to activities of public officials in the exercise of their function or serve the protection of justified public interest. However, if such statements refer to private or family life, the proof of truth can only be presented, if it is necessary for the protection of life or health of a person, or to prevent the danger of demoralization of a minor. The truth requirement refers to objectively truthful statements at the time they are expressed,¹¹⁰ however a conviction of the perpetrator that the statement is truthful could also exclude criminal liability based on the mistake in facts exception in the Art. 29 of the general part of the Criminal Code. As noted, the burden of proof in this case has been shifted to the perpetrator.¹¹¹ It should also be noted, that even a successful proof of truth, excluding liability based on Art. 212, does not preclude liability for insult,¹¹² which is criminalized in Art. 216.

Under Art. 216 of the Criminal Code, whoever insults another person, even if the other person is not present if it is done publicly or with the intentions that the insult reaches the victim, commits a criminal offence. As with slander, the offence only carries a prison sentence, if done by means of mass media. In case the insult resulted from provocative behavior of the victim or if the victim reacts by physically attacking the perpetrator, the court may waive the punishment. The difference in comparison to slander is that it only protects natural persons. At the same time, in the case of insult, proof of truth, or proof of public interest cannot be performed, since it is irrelevant. Insult is usually committed by expressing offensive words or offensive gestures,¹¹³ sexual harassment or

¹⁰⁷ Długosz, Joanna, 'Art. 212' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 800.

¹⁰⁸ Długosz, Joanna, 'Art. 212' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 804.

¹⁰⁹ Długosz, Joanna, 'Art. 212' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 805.

¹¹⁰ Długosz, Joanna, 'Art. 213' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 818.

¹¹¹ Długosz, Joanna, 'Art. 213' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 821.

¹¹² Art. 214 Criminal Code.

¹¹³ Długosz, Joanna, 'Art. 216' in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 825.

general ridicule.¹¹⁴ Insulting a public officer or a person performing public duties in connection to the exercise of that function or duties carries a harsher penalty under Art. 226.

Offending religious feelings of other people by publicly insulting the object of religious belief or a place dedicated for religious exercise is criminalized in Art. 196. Public insults directed towards group of people for reasons of their ethnicity, nationality, race, religion or lack of it are criminalized in Art. 234 of the Criminal Code.

Other related provisions criminalize false accusations, testimony and expert statements (Art. 233 and Art. 234), falsifying evidence (Art. 235), hiding evidence of innocence (Art. 236) and a false crime report (Art. 238).

5.6 Protection from interference with relations between persons

5.6.1 Interferences with family life (including decisional privacy)

Criminal offences most closely related to family life are concentrated in Chapter XXVI entitled Crimes against family and care.

These offences include those that restrict certain decisions of people in establishing intimate relations, such as the Art. 201 prohibition of incest not only between blood relatives, but also adoptees and adopted parents, and the prohibition of bigamy in Art. 206.

Physical or psychological abuse of close persons, other dependent persons, helpless persons or minors is criminalized in Art. 207. Persistent avoidance of the legal duty to care for someone that leads to inability of the victim to satisfy basic life needs is criminalized in Art. 209 and child neglect in Art. 210.

Taking a child or a helpless person from the care of the person authorized to provide such care is criminalized in Art. 211 and organizing adoptions of children with the aim of obtaining monetary profit in Art. 211a.

5.6.2 Communications privacy

The key provision protecting the privacy and secrecy of communications is the Art. 267 of the Criminal Code. The first paragraph of the provision covers only mediated forms of communication and paragraph 3 is broad enough to cover non-mediated conversations as well:

“(1) Whoever without authorization obtains access to an information not meant for them, by opening a sealed letter, connecting into a telecommunications network or by breaking

¹¹⁴ Długosz, Joanna, ‘Art. 216’ in Michał Królikowski, Robert Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, C.H. Beck (2013), p. 830.

or avoiding electronic, magnetic, informatics or other special protection of such network shall be punished by imprisonment of up to two years.

(...)

(3) The same penalty shall apply to whoever with an aim of obtaining information to which they are not authorized uses eavesdropping, visual or other tools or programs.

(4) The same penalty shall apply to whoever reveals information obtained by means described in 1-3 to another person.

(5) Offences described in 1-4 are prosecuted upon the request of the victim.”

The provision covers various aspects of computer trespass and visual observations and has already been discussed in section 3. and section 5.2. (see for a more detailed discussion of the provisions). Just as those aspects of privacy, communications are also protected indirectly by protecting information. Paragraph 1 protects information contained in sealed letters and information transmitted through telecommunications networks. Protection extends not only to information in transit, but also stored information resulting from past communications, for example the contents of an email service mailbox.¹¹⁵

Paragraph 3 protects information to which the perpetrator is not authorized. The technical eavesdropping devices contain any devices which allow the perpetrator to obtain the information expressed by sound (speech or recordings), thus covering both recording and overhearing with technical aids.¹¹⁶ Examples mentioned in the case law include directional microphones, tape recorder, voice recorder and dictaphones.¹¹⁷ The extent of protected information is also quite broad. The confidential nature of information is determined not by its content, but by the will of the of the people taking part in a meeting or a conversation and it is therefore based on a consideration of a subjective element.¹¹⁸

The creation, obtaining, selling or making available to other persons tools that are to serve the commission of the criminal offence in Art. 267 are criminalized in Art. 269b.

6. Data

The principal criminal offence against personal data has been recently inserted in the criminal code in Art. 190a(2)¹¹⁹, criminalizing identity theft, defined as pretending to be another person by using their image or other personal data with the aim to cause material or personal harm to that person. The aim of harming the victim has to be aimed at a specific person. Therefore, for example a woman who copied random photos from the internet to set up a fake account on a gay dating

¹¹⁵ VII Ka 1181/14 WYROK 4 lutego 2015 r. Sąd Okręgowy w Olsztynie.

¹¹⁶ II K 16/10 (District Court) Wyrok Sądu Rejonowego w Oławie z dnia 9 lutego 2010 r.

¹¹⁷ III KK 265/15 (Supreme Court) Sąd Najwyższy 2016.04.27.

¹¹⁸ III KK 265/15 (Supreme Court) Sąd Najwyższy 2016.04.27.

¹¹⁹ In the same Article as the criminalization of Stalking.

website aiming to make contact with her partner to test his sexual preferences was acquitted in court, since her aim was not to harm the persons depicted on those photographs.¹²⁰ The criminalization of identity theft therefore seems rather restrictive, since it would not cover assumed identities that aim to mislead or cause harm to someone else than the person whose identity was taken, and the requirement of specific intent is rather narrow.

7. Final Remarks

On paper, Polish criminal law contains strong protections of individual's privacy from interference by other private parties. In some aspects, the criminalization of privacy intrusions is especially extensive, arguably even too broad. Especially the criminalization of unauthorized access to computers even without overcoming of security measures is questioned in the literature. Furthermore, protection of reputation and honor, from insults and slander appears very extensive, potentially interfering too much with the freedom of expression of others.

Protections from visual observation, recording and publishing of private depictions are extensive as well. Naked people and people during sexual activities are protected from covert photographing and unauthorized publication of their intimate images. At the same time, a more general provision protects from all visual recording, or technically mediated observation of private life. The latter provision also covers aural interceptions and eavesdropping.

The criminalization of stalking, usually subject to a fear requirement, is in Poland extended to conduct that interferes with privacy in a substantial way. Part of the doctrine holds that privacy is a value so important that all interferences with it are substantial.

A gap in protection exists in relation to privately kept documents. Sealed letters are protected, as are documents stored electronically, however, explicit protection of other privately kept documents having physical form is not found in the Criminal Code.

¹²⁰ II K 497/15 (District Court) WYROK 21.07.2015 r. Sąd Rejonowy w Olsztynie w II Wydziale Karnym.