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MAŁGORZATA SKÓRZEWSKA-AMBERG[1]

Criminal Liability for So-Called *Cyber Rape* on the Grounds of Article 191a of the Criminal Code

Abstract

In the times of global ICT networks, activities pursued online are not limited by space and time, and the content shared in cyberspace may reach a potentially unlimited audience. Even if access to this content requires some additional conditions to be fulfilled, it is usually not as problematic as to make this access more restricted. The ease of sharing and the illusory sense of complete anonymity online contributes to sharing multimedia materials also featuring content prohibited by law. A highly disturbing and, unfortunately, increasingly common phenomenon is the online sharing of images of people engaged in a sexual intercourse – with these images being shared without their knowledge and consent. Polish criminal law is aware of the significance of the problem, penalising behaviour involving recording and publishing images of nude persons engaged in sexual activity. It seems, however, that the category of punishable acts is too narrow, which shall be subject to criticism. The objective of the discussion presented herein is to make an attempt to analyse the scope of criminalisation regulated under Article 191a of the Criminal Code (hereinafter: the CC) and formulate a set of *de lege ferenda* demands.

Keywords: sexting, cyber rape, sexual activity, nudity, image recording, image publishing

[1] Małgorzata Skórzewska-Amberg, PhD – professor at the Department of Theory, Philosophy and History of Law, College of Law, Kozminski University in Warsaw; e-mail: mskorzewska@kozminski.edu.pl, ORCID: 0000-0002-8498-833X.

Ministry of Science and Higher Education Republic of Poland

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In the times of global ICT networks, the content shared in cyberspace becomes generally available to anyone, without limitations related to space and time. Even if the access to such content requires some additional conditions to be fulfilled (e.g. registering on a given website), it is actually not as problematic as to make this access much restricted. The ease of online sharing (it usually takes one click to send a message – a multimedia message as well – to all the sender's contacts) and the illusory sense of complete anonymity in cyberspace contribute to sharing multimedia materials also featuring content prohibited by law. A highly disturbing and, unfortunately, increasingly common phenomenon is the online sharing of images of people engaged in sexual intercourse – with these images being shared without their knowledge and consent. The consequences of such activities, especially when they result in cybercrime and harassment, can be disastrous, and even lead to the death of the person whose intimate image has been published.

Polish criminal law is aware of the significance of the problem, penalising behaviour involving the recording and publishing images of nude persons engaged in sexual activity. It seems, however, that the category of punishable acts is too narrow, which shall be subject to criticism. The objective of further discussion is to make an attempt to analyse the scope of criminalisation regulated under Article 191a of the Criminal Code (hereinafter: the CC) and formulate a set of *de lege ferenda* demands.

The development and popularisation of mobile phones, and, speaking more specifically, the arrival of an option to send text messages (SMS, *short message service*) marked the beginning of observable exchange of sexually suggestive text messages – referred to as *sexting* (a combination of two words: *sex* and *texting*). As the available technology developed, which included the appearance of an option to exchange multimedia messages (MMS, *multimedia messaging service*), the definition of *sexting* grew wider as well. Nowadays, the term encompasses all forms of electronic exchange of content of a sexual nature – transmitted using ICT media, including mobile phones (SMS, MMS, *iMessage*), e-mails, online messaging services, and social networking services.[2] Although *sexting* is usually a domain of teenagers, studies show

[2] Ł. Wojtasik, *Seksting wśród dzieci i młodzieży*, "Dziecko krzywdzone. Teoria, badania, praktyka" 2014, 13(2), pp. 80–81; K.V. Açar, *Sexual Extortion of Children in Cyberspace*, "International Journal of Cyber Criminology" 2016, 10(2), p. 112; M. Kamiński, *Prawnokarna problematyka sextingu*, "Poznańskie Zeszyty Humanistyczne" 2015, 25, p. 38, http://www.pomost.net.pl/tom_25/ prawnokarna_problematyka_sextingu.pdf (access: 16.07.2018); W.S. DeKeseredy, M.D. Schwartz,

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that while the percentage of those actively involved in *sexting* drops with age, the phenomenon is not limited to young people only.[3]

Sexting as a phenomenon, although possible to be judged differently, as long as it is consensual and the exchanged content remains with the intended recipient only, is not a matter of interest to criminal law. But when the multimedia content of an electronic message (photos, videos) is shared by its recipient with other persons, at least a breach of the exclusive right of the person whose image has been recorded to this image occurs. Considering the fact that sexual content featuring a recorded image of an individual concerns a sphere of life of a very private nature, the consequences of publishing such content go far beyond a violation of the right to image.

Literature defines the publishing a sexual image of an individual, including both nude photographs (and other types of visual images) and recordings of sexual activity the individual is involved in (usually consensual and recorded for private use) as *cyber rape* (often also *revenge pornography*, *non-consensual pornography*).[4]

We can see a developing global trend of systematised sharing sexual images of persons without their consent, including especially videos featuring them engaged in sexual activity. It is estimated that there are now currently more than 3,000 websites used to disseminate such content. These materials usually include links to user profiles (*Facebook*, *Twitter*, etc.) of persons whose image has been recorded, which makes it possible to identify such persons instantly. Many such websites

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Thinking Sociologically about Image-Based Sexual Abuse: The Contribution of Male Peer Support Theory, "Sexualization, Media, & Society" 2016, 2(4), p. 3.

3 R. Espejo, *Introduction*, [in:] idem (ed.), *Sexting*, Farmington Hills, MI 2015, p. 7; Power to Decide (former The National Campaign to Prevent Teen and Unplanned Pregnancy), *Sex and Tech. Results from a Survey of Teens and Young Adults*, Washington DC, 2008, pp. 1–5, https://powertodeci de.org/sites/default/files/resources/primary-download/sex-and-tech.pdf (access: 25.07.2018); K.J. Mitchell, D. Finkelhor, L.M. Jones, J. Wolak, *Prevalence and Characteristics of Youth Sexting: A National Study*, "Pediatrics" 2012, 129(1), p. 3 and 5–8, http://pediatrics.aappublications.org/ content/early/2011/11/30/peds.2011-1730 (access: 26.07.2018); YISS-3 report, pp. 55–57 (table 28 and 29); N. Stanley, Ch. Barter, M. Wood, N. Aghtaie, C. Larkins. A. Lanau, C. Överlien, *Pornography, Sexual Coercion and Abuse and Sexting in Young People's Intimate Relationships: A European Study*, "Journal of Interpersonal Violence" 2016, pp. 13–15; Sz. Wójcik, K. Makaruk, *Seksting wśród polskiej młodzieży. Wyniki badania ilościowego*, Fundacja Dzieci Niczyje, 2014, pp. 6–13, http://fdds.pl/wp-content/uploads/2016/05/Wojcik_Makaruk_Seksting_wsrod_pol-skiej_mlodziezy.pdf (access: 28.07.2018); J. Ringrose, R. Gill, S. Livingstone, L. Harvey, *A Qualitative Study of Children, Young People and "Sexting": A Report Prepared for the NSPCC*, London 2012, pp. 53–54; A. Phippen, *Sexting: An Exploration of Practices, Attitudes and Influences*, London 2012, pp. 2–3, https://www.nspcc.org.uk/globalassets/documents/research-reports/sexting-exploration-practices-attitudes- influences-report-2012.pdf (access: 25.07.2018).

4 Cf. D.K. Citron, M.A. Franks, *Criminalizing Revenge Porn*, "Wake Forest Law Review" 2014, 49, pp. 345–391, https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2424&context= fac_pubs (access: 14.08.2018). It shall be emphasised that the notion of cyber rape shall not be equated with a rape in cyberspace.

also offer an option to trade the featured content – with payments being made mostly using cryptocurrencies.[5]

Although the terms of cyber rape or revenge pornography are undoubtedly catchy, they do not fully convey the essence of the phenomenon at issue. Hence the claim to refer to any such acts using a broader-ranging notion of *image-based sexual abuse*. Such abuse therefore describes an act of creation or distribution (or both) of a sexual image of a person, performed with a breach of privacy.[6] It does not matter if the image has been recorded with or without the consent of the person in question if it is shared without the consent of this person.

Sexual abuse involving the use of image is criminalised under Polish criminal law. The Criminal Code, i.e. Article 191a, speaks of two types of punishable behaviour: one involves recording the image of a person who is naked or involved in sexual activity[7] if the recording has been made using violence, an unlawful threat or deceit ("whoever captures the image of a naked person or a person performing sexual act using for such purpose violence against such a person, unlawful threat or a deceit"), and the other – publishing the image of a person who is naked or involved in sexual activity without their consent ("[whoever] publishes an image of a naked person or a person performing sexual act without his or her consent").

Article 191a was included in the Criminal Code by way of the Act of 5 November 2009 to Amend the Criminal Code, the Code of Criminal Procedure, the Executive Criminal Code, the Criminal and Penal Code and some other acts (Journal of Laws of the Republic of Poland No. 206, item 1589). The adoption of this regulation met with a general approval. The issue discussed the most was the increasing common-

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5 Cf. W.S. DeKeseredy, M.D. Schwartz, op. cit., p. 2. One of the websites offering an option to share content featuring individuals engaged in sexual intercourse (with links to information identifying those individuals) had over 30 million visitors per month, which clearly shows the scale of interest in such content (R.D. Lamphere, K.T. Pikciunas, *Sexting, sextortion, and other Internet sexual offenses* [in:] J.N. Navarro, S. Clevenger, C.D. Marcum (eds.), *The Intersection Between Intimate Partner Abuse, Technology, and Cybercrime: Examining the Virtual Enemy*, p. 148, quoted after: W.S. DeKeseredy, M.D. Schwartz, op. cit., p. 2).

6 Cf. C. McGlynn, F. Rackley, *Image-Based Sexual Abuse*, "Oxford Journal of Legal Studies" 2017, 37(3), pp. 534–538.

7 The Polish Criminal Code defines sexual activity as both sexual intercourse and so-called other sexual acts. Sexual intercourse means physical contact between individuals, involving physical penetration of the body of one person with the use of a part of the body of the other person or an inanimate object (with penetration only concerning sexual organs or their surrogates). Other sexual acts are sexual acts outside the category of sexual intercourse, i.e. not related to body penetration, performed in order to arouse or satisfy one's sexual drive. Cf.: M. Bielski, *Wykładnia znamion "obcowanie płciowe" i "inna czynność seksualna" w doktrynie i orzecznictwie sądowym*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2008, 1, pp. 223–226.

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ness and high incidence of acts subject to criminalisation with insufficient legal protection in this respect, which was addressed by the said amendment.[8]

There is a general agreement in the doctrine regarding the matter that a naked person is a person not wearing any clothes. But doubts have appeared as to whether a person who is partially clothed but has their intimate parts (i.e. genitals, buttocks, female breasts) exposed should be treated as naked.[9] A view that nudity can be complete (no clothes at all) or partial (meaning human intimate parts exposed) seems to be reasonable.[10] It would be hard to substantiate a thesis that the image of a person who is actually naked but e.g. is shown lying in a way that makes their intimate parts covered will be subject to special protection, and that the criminal law will not offer such protection to a person who is clothed with the exception of their intimate parts revealed and exposed.[11] A condition required to consider a recorded image an image of a person is that the image makes it possible to identify the person featured. Also, it is essential that identification be made only on the basis of the face of the person featured. It is enough that the recorded content includes details on the basis of which the person whose image has been recorded can be identified by third parties.[12]

The notion of recording in the Polish language refers to recording and saving sound and image on tapes, discs, and in computer memory – to play them back later.[13] Literature of the subject, however, offers a certain divergence as for the manner of recording. On the one hand, there is an argument that recording may be perfor-

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8 Cf. M. Mozgawa, K. Nazar-Gutowska, *Utrwalanie lub rozpowszechnianie wizerunku nagiej osoby – art. 191a k.k. (analiza prawnokarna i praktyka ścigania)*, "Prawo w Działaniu" 2014, 19, pp. 7–8; M. Mozgawa, *Kilka uwag na temat przestępstwa utrwalania wizerunku nagiej osoby lub osoby w trakcie czynności seksualnej (art. 191a k.k.)*, [in:] A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Leciak (eds.), *Nauki penalne wobec szybkich przemian socjokulturowych. Księga jubileuszowa Profesora Mariana Filara*, Vol. I, Toruń, 2012, pp. 415–416 and p. 430; A. Michalska-Warias, T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warszawa 2012, p. 469; R. Krajewski, *Przestępstwo utrwalania i rozpowszechniania wizerunku nagiej osoby lub osoby w trakcie czynności seksualnej*, "Prokuratura i Prawo" 2012, 5, p. 22; otherwise: M. Filar, [in:] idem (ed.), *Kodeks karny. Komentarz*, Warszawa 2010, p. 921.

9 Cf. J. Lachowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 873.

10 M. Mozgawa, [in:] idem (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 582; A. Zoll, [in:] W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–211 k.k.*, Warszawa 2017, p. 609; M. Mozgawa, K. Nazar-Gutowska, op. cit., pp. 9–10; M. Mozgawa, *Kilka uwag...*, pp. 418–419; B. Filek, *Wizerunek nagiej osoby jako znamię przestępstwa z art. 191a § 1 k.k.*, "Prokuratura i Prawo" 2012, 7–8, pp. 72–73; R. Krajewski, op. cit., pp. 20–40.

11 Broader on the matter: B. Filek, op. cit., pp. 70–75.

12 More: ibidem, pp. 63–70; A. Zoll, op. cit., pp. 608–609; R. Krajewski, op. cit., p. 26; M. Mozgawa, K. Nazar-Gutowska, op. cit., pp. 9–10.

13 M. Szymczak (ed.), *Słownik Języka Polskiego*, Warszawa 1988, Vol. III, p. 633; https://sjp.pwn.pl/szukaj/utrwalać.html; cf. also M. Bielski, [in:] W. Wróbel, A. Zoll (eds.), op. cit., p. 800.

med using only technical means of image capturing (e.g. a video, a photo).[14] On the other, recording an image may also be performed using a pencil, a brush, etc. (taking the form of a portrait, sketch, or drawing).[15] It seems that the second view is correct as it does not appear reasonable to acknowledge that an image of a naked person or person involved in a sexual act, recorded e.g. in the form of a sketch or drawing is something significantly different from a photograph. It should be stressed that recording of partially (e.g. topless) or even completely naked persons who are found in public places, where other people can see them, is not a crime within the meaning of Article 191a CC, but disseminating their image without their consent – is such a crime.[16]

It is beyond any doubt that the criminalisation of acts specified in Article 191a of the CC is absolutely justified, but we should not ignore certain issues that may give rise to doubt, especially on account of the fact that they actually narrow down the range of actions that should not be permitted.

Two issues need to be considered here. First, a limitation of the punishable recording of images only to a situation of resorting to violence, unlawful threats or deceit. Second, the abolition of liability of a person who has only shared a recorded image with others, without disseminating it further to others.

Recording an image of a naked person or a person engaged in a sexual act is criminalised only when the perpetrator resorts to violence against the victim, to an unlawful threat or deceit in order to record the image of the victim, and, in addition, if violence means using force against the victim. An unlawful threat is both a threat of committing a crime to the victim's disadvantage (if the threat makes the victim rightly concerned that it may be materialised) and a threat of initiation of criminal proceedings or spreading news humiliating the threatened person – with the risk of this threat materialising does not have to be objectively real. Deceit involves misleading the victim or taking advantage of the victim's mistake regarding the circumstances being the basis of or affecting the decision they have made (deceit involves the application of any measures eliminating one's resistance or disabling one's ability to make conscious decisions, including intoxicating the victim without their knowledge). But it is not necessary for violence, unlawful threats or deceit to be simultaneous with the act of image recording.

Unlike Article 197 CC, which reads: "whoever, by force, illegal threat or deceit subjects another person to sexual intercourse" (§ 1) or "submit to other sexual act or to perform such an act" (§ 2), Article 191a reads as follows: "whoever captures the

14 M. Mozgawa, [in:] idem (ed.), op. cit., p. 584; A. Zoll, op. cit., p. 608.

15 J. Lachowski, op. cit., p. 874; M. Filar, M. Berent, [in:] M. Filar (ed.), op. cit., p. 1188.

16 M. Mozgawa, [in:] idem (ed.), op. cit., p. 583.

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image of a naked person or a person performing sexual act using for such purpose violence against such a person, unlawful threat or a deceit (...)".

Hence, whereas in the case of an act under Article 197 CC violence means using force against the victim, or another person the victim is trying to protect, or an animal or an object – to affect their decision-making process,[17] in the case of an act under Article 191a of the Criminal Code violence may be used only against the victim, precluding an option to acknowledge that this violence was targeted at another person or a person through the use of objects.[18]

It shall be acknowledged that the existing regulation *de lege lata* needlessly narrows down the spectrum of punishable acts specified in Article 191a CC, and it would be reasonable to at least remove the words reading "against such a person" referring to violence, unlawful threats or deceit (the regulation could read as follows "Whoever uses violence, unlawful threats or deceit and captures...").[19] It requires reflection whether any other considerations determining the punishability of acts involving recording an image of a naked person or a person engaged in sexual activity should be taken into account. It seems that the only factor that can make such an act of image recording not punishable is the consent of the person who has their image recorded. After all, there are no grounds to exclude the act of recording of an intimate image of a person – especially including a person engaged in sexual activity – without their knowledge and consent from the catalogue of punishable acts, even if it is not made with the use of compulsion, an unlawful threat or deceit (and e.g. with the use of a telephoto lens). The legal interest holder's consent shall be particularly significant and required in this case, and the limitation of criminalisation of recording an intimate image of a person to certain specific acts only, particularly those directed only against the victim, may be regarded as specific consent to the recording of such an image in another way, not covered by Article 191a of the CC.

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17 Cf. ibidem, p. 607; M. Bielski, [in:] W. Wróbel, A. Zoll (eds.), op. cit., p. 679; V. Konarska-Wrzosek, [in:] eadem (ed.), op. cit., pp. 894–895; J. Piórkowska-Flieger, [in:] T. Bojarski (ed.), op. cit., p. 564; A. Michalska-Warias, *Wybrane problemy przestępstwa zgwałcenia*, [in:] A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Leciak (eds.), op. cit., p. 402; cf. also the Court of Appeal in Kraków's judgement of 14 September 2016 (II AKa 99/16, KZS no. 11/2016, item 55), where it is argued that violence may be directed directly against the victim or another person close to the victim; similarly, the Court of Appeal in Gdańsk in its judgement of 8 April 2009 (II AKa 294/16, LEX no. 2341089) argued that "taking the laptop and the phone used by the victim away from her, keeping her closed inside her home, depriving her of access to television" are acts of violence aimed to break the victim's resistance and force her to succumb to the offender's will.

18 M. Mozgawa, K. Nazar-Gutowska, op. cit., pp. 11–12.

19 Similarly: ibidem, p. 12, footnote no. 25; J. Kosonoga, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2017, p. 1146.

Disseminating the image of a naked person or a person performing sexual activity without this person's consent is penalised, regardless of how the image has been recorded. It is of no importance either whether the person has given their consent to being recorded or not. The only crucial factor from the point of view of punishability of the offender is the existence or absence of the person whose image has been recorded to have this recoded image disseminated. Such consent may not be presumed. The absence of opposition may not be treated as consent to dissemination.

On the grounds of the views offered in the doctrine and of the interpretation adopted in the case law, dissemination (*rozpowszechnianie* in Polish; here: also publishing/distributing/sharing) – involves making something available to an indefinite audience.[20] There is a view according to which "publishing referred to in Article 191a of the Criminal Code may not be equated only with making an image publically available, although it is exactly how the notion of publishing is understood in the light of Article 202 of the Criminal Code, which concerns presenting, producing and disseminating pornographic material. (...) disseminating the image of a naked person or a person performing a sexual act is also making it available even to one person or a small group of people. (...) A different interpretation of the notion of dissemination is thus illegitimate as it would be an indication of a narrowing interpretation, made against the *ratio legis* of a regulation that is to offer individuals the broadest possible scope of protection against the abuse in the area in question. It seems, actually, that if the legislator wanted such a narrowing, they would express it explicitly, as in the case of, for instance, Article 241 of the Criminal Code, which prohibits public dissemination of information from preparatory proceedings, making it clear that it was not any dissemination, but made exactly in public. Therefore, if the legislator did not provide for it in Article 191a of the Criminal Code, it is necessary to acknowledge that it is to mean any forms of dissemination".[21] It is hard to agree with the presented view, though. The quoted interpretation is an example of a broad interpretation, made against the interpretation of the notion of "dissemination" adopted on the grounds of the Polish criminal law. The invoked Article 241 CC also speaks of public dissemination ("whoever publicly disseminates, without permission"), and so "publicly" is only a specification to dissemination, and it does not determine the spectrum of persons whom the disseminated content reaches. Dissemination is understood as making information generally available,

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[20] Cf. J. Kosonoga, op. cit., p. 1145; M. Mozgawa, K. Nazar-Gutowska, op. cit., p. 14; M. Królikowski, A. Sakowicz, [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część szczególna, Tom I, Komentarz, Art. 117–221*, Warszawa 2017, p. 610; J. Lachowski, op. cit., p. 875.

[21] R. Krajewski, op. cit., pp. 27–28.

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making it possible for larger and indefinite audiences to become familiar with it, and "public" describes as if the sphere in which it takes place. Dissemination becomes public when an offender's behaviour, given the place or the circumstances and the nature of their activity, is or may be available (noticeable) to an indefinite number of persons.[22]

In the event an image of a naked person or a person performing sexual activity is made available, the only relevant factor should be whether the privacy of the person whose image has been recorded is breached. It shall be also stressed that the category of privacy in this case concerns a particularly sensitive sphere, related to human sexuality, and it should not matter how many third parties have become familiar with such an image. After all, if such an image is shared in cyberspace, unless it is protected and available only to a specific number of persons, such an act of sharing will become an act of dissemination. But if the sharing party e.g. sends the recorded content to several other persons, their action will not be classified as dissemination. It seems that the *ratio legis* behind Article 191a would call for substituting the element of dissemination with "sharing", which would dispel the doubts as for the scope of protection guaranteed under this article.

De lege ferenda it is also possible to consider adopting a model of aggravation – if the consequence of an act under Article 191a is the victim's attempted suicide.[23]

An amended Article 191a could have the following wording:

"§ 1. Whoever captures or publishes the image of a naked person or a person performing a sexual act without their consent shall be subject to the penalty of the deprivation of liberty for a term of between ... and ... .

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22 Cf. M. Mozgawa, [in:] idem (ed.), op. cit., p. 746; A. Herzog, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2017, pp. 1539–1540; R.A. Stefański, *Przestępstwo rozpowszechniania wiadomości z postępowania karnego (art. 241 k.k.),* "Prokuratura i Prawo" 2001, 5, p. 15.

23 Similarly: R. Krajewski, op. cit., p. 39; A. Kilińska-Pękacz, *Karnoprawna ochrona dziecka przed rozpowszechnianiem jego nagiego wizerunku podczas czynności seksualnych na podstawie art. 191a kk*, "Dziecko Krzywdzone. Teoria, Badania, Praktyka" 2014, 13(2), p. 51.

There are quite many cases of attempted (and mostly successful) suicides across the whole world occurring as a result of content containing sexual images of individuals becoming published – and this concerns both minors and adults, cf. C. Schilling, *Women commit suicide over horrific 'cyber rape' trend*, 2016, https://www.wnd.com/2016/09/women-commit-suicide-over-horrific-cyber-rape -trend/#WHfZXXwtuKwv7tPP.99; https:// www.cbsnews.com/news/corey-walgren-suicide-sex-tape-dilemma-for-schools-chicago/; https://www.connectsafely.org/teens-suicide-over-sexting; https://protectyoungeyes.com/snapchat-suicide-social-media-killing-our-kids; http://www.puresight.com/Real-Life-Stories/hope-witsell.html; http://www.amandatoddlegacy.org/about-amanda.html (access: 13.08.2018).

§ 2. If the act specified in § 1 results in an attempted suicide of the injured person, the perpetrator shall be subject to the penalty of the deprivation of liberty for a term of between ... and... .

§ 3. The prosecution shall occur at a motion of the injured person."

The doctrine is conflicted about the positioning of Article 191a CC. On the one hand, there are opinions opting for placing it in chapter XXIII, which deals with offences against liberty,[24] and on the other, there are views that see it more suitable for chapter XXV, which concerns offences against sexual liberty and decency.[25]

An image of an even partially naked person usually carries a sexual tinge (although it is possible to give contrary examples – like classical or Renaissance sculptures). But the category in question deals with nudity involving exposing mainly human sexual organs, which focuses obviously on human sexuality, and so the protection of such images falls rather into the category of the protection of sexual liberty and decency than that of the protection of liberty. The case is similar with an image of a person performing a sexual act, which surely falls within the framework of the sexual sphere of human life. Thus, the right to decide whether such an image can be revealed – and how and to whom – belongs to the area of sexual liberty and decency.

Despite the fact that in the case of recording an image of a naked person the interest under attack is one person's from having to cope with a state caused by the other person's behaviour involving violence, unlawful threats or deceit being in gross violation of the sphere of private and intimate life, in most cases, the interest under attack belongs to the category of sexual liberty and decency, which call for, among others, respecting individuals' and the society's right to protection in the sphere of sexuality. It therefore seems that the regulation at issue shall be included rather in the chapter dealing with offences against sexual liberty and decency than in the chapter concerned with offences against liberty.

[24] Cf. A. Zoll, op. cit., p. 607; J. Lachowski, op. cit., pp. 872–873; M. Filar, M. Berent, op. cit., pp. 1187–1188; R. Krajewski, op. cit., p. 39.

[25] J. Kosonoga, op. cit.; M. Mozgawa, K. Nazar-Gutowska, op. cit., p. 14; M. Mozgawa, *Kilka uwag...*, pp. 417–418; idem, [in:] idem, op. cit., p. 582.

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