



**WYDZIAŁ PRAWA
i ADMINISTRACJI**
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**Unlawful recording or dissemination the image of a naked person or
a person engaged in sexual activity
(art. 191a sec. 1 of the Criminal Code)**

***Bezprawne utrwalanie rozpowszechnianie wizerunku nagiej osoby albo
osoby w trakcie czynności seksualnej (art. 191a§ 1 k.k.)***

SUMMARY

A doctoral dissertation prepared
at The Department of Executive Criminal Law
under the supervision of prof. Grzegorz Wiciński

Łódź 2022

Nowadays, it is easy to observe the manifestations of the pictorial culture phenomenon. As its clear exemplification should be considered activities in the Internet media, the essence of which is the posting or sharing of photos and images. Social media are especially part of this trend. The use of this form should be treated as a form of realizing the freedom of speech, beliefs, and (in some cases) also having one's own image. More and more often and more willingly, people share their life events on the Internet with the aid of a photo from a holiday or a birthday celebration. However, there is a group of recordings which are usually commonly perceived as belonging to the intimate sphere and therefore strictly controlled by the person whose image was recorded. It seems that even in an intuitive way it is possible to concretise which type of content refers to the image of a person in a state of nudity or a person engaged in sexual activity. Along with the development of technization and technology, cases get to appear when a third party acts against the will of the holder of the legal good, by dissemination this type of recordings. The legislator noticed this problem in the justification to the government bill introducing art. 191a of the Criminal Code and therefore it was claimed that unlawful recording or dissemination of the image creates the need to protect participants of sexual contacts against the abuse of their trust by another of them.

Irrefutably, the entry into force of the regulation contained in art. 191a of the Criminal Code resulted in introducing a new quality into the criminal law order. So far, in the history of Polish criminal legislation, no provision has served to protect the intimate sphere of a person to the extent that the legal structure which is the subject of this study does. Its structure indicates that the legislator placed particular emphasis on the need to protect the image of a person in a state of nudity and the image of a person engaged in sexual activity in association with its exploitation (recording and dissemination). That is, in situations that are generally regarded by society as belonging to the intimate sphere.

It is a breakthrough in the terms of the Criminal Code structure, because, as mentioned above, it is impossible to indicate a direct prototype for this legal provision. Before the passing of art. 191a of the Criminal Code, the holder of a legal good could claim rights only in the framework of civil law proceedings - in the field of protection of personal goods or protection of the right to image with regard to copyright law. However, practice has shown that certain types of acts are so acute for the aggrieved party that the

path of protection under civil law, especially due to the extent of the harm caused, seems to be insufficient. Moreover, the inclusion of this provision in the Criminal Code is a response to the postulates appearing in the scientific discourse regarding the lack of adequate regulation in the matter of securing the rights of an individual with regard to the recording or dissemination of an image of a person who has been registered in the state of nudity or engaged in sexual activity, yet it does not fulfill the characteristics of included e.g. in art. 202 of the Criminal Code.

This work is an attempt to present the structure of the offence of unlawful recording or dissemination of the image of a naked person or a person during sexual activity in terms of art. 191a of the Criminal Code. The author used the dogmatic method for this purpose.

In the historical part of the dissertation, the regulations in the laws of the partitioning states were described. This choice was caused primarily by the similar nature of the protected legal goods to that which reflects the meaning of the object of criminal law protection of the provisions of art. 191a of the Criminal Code.

Next, the presented views on the generic and individual object of criminal law protection of the regulations under art. 191a § 1 of the Criminal Code, as well as the relationship between it and sexual freedom and the meaning of dignity due to the analyzed legal regulation. Thanks to this, it was possible to standardize the scope and nomenclature for the legal good, which is the object of protection resulting from the structure of the mentioned provision. As a result, the content of the individual object of criminal law protection, i.e. freedom from unlawful interference in shaping the sphere of intimacy, required definition.

In the next part of the chapter, the individual features of the described offence are scrutinized. The problem of determining the scopes of the features "image of a naked person" and "image of a person engaged in sexual activity" with particular emphasis on their effective use regarding art. 191a § 1 of the Criminal Code. Also for the purposes of this regulation, the scopes of the features "recording" and "dissemination" have been further specified. This process has particular practical importance for conducting a correct evidentiary assessment. Moreover, the observations contained within the study are determined by suggestion that is need to help find a balanced relationship between

the possibly effective and adequate protection of the protected legal good and the establishment of criminal liability of the perpetrator of the act.

The next part of the study concerns the behaviours as the means used by the perpetrator to recording or disseminate the image. These methods were presented due to their generally accepted understanding within the Criminal Code, then the resulting conclusions were transferred to art. 191a § 1 of the Criminal Code. Due to the specific nature of the analyzed offence, it was necessary to define the scope of the designata of the term "violence". Moreover, the diversity of the judicature and views presented in relation to the term "deception" required that its content be determined. The presented interpretations of individual features take into account the specificity of this offence and include a discussion of cases or situations that may be considered as raising doubts as to their assessment in connection with the use of violence, unlawful threat or deception by the perpetrator.

Furthermore, the next chapter of dissertation is dedicated to define the scope of human consent, whose image is disseminated, with particular emphasis on its place in the structure of the analyzed offence and the resulting consequences. Moreover, the problem of the relevance of the consent of a minor in the context of this regulation has been resolved.

Then, the stages of committing an offence and the forms of cooperation in committing an offence were categorized also taking into account the conditions resulting from the content of the analyzed regulation, and for the first time in the literature, the scope of them was indicated in connection with the designata of art. 191a § 1 of the Criminal Code.

Moreover, the dissertation characterizes the subject of an offence and the subjective features in terms of the specific characterization of the "model" perpetrator of the offence.

Further considerations concern concurrence of statutory provisions with reference to art. 191a § 1 of the Criminal Code.

The chapter closing the considerations on the subject of this work contains content on the practical and empirical dimension of the problem. The displayed research results indicate that pursuant to the object of criminal law protection is updated in

a situation where a minor is acting as a crime victim in reference to art 191a § 1 of the Criminal Code. This object is the proper psychophysical development of a minor. Its content has been specified in the dissertation. In addition, attention was drawn to the functional dimension of violence, unlawful threat and deception as a measure used by the perpetrator in the behavior undertaken in the context of art. 191a § 1 of the Criminal Code. In addition, this chapter presents examples from the judicature and the press showing the practical dimension of this offence. Attention was also paid to the upward trend that can be observed over several years with regard to the number of convictions for committing this offence.

The content of the end of the study focuses in particular on the conclusions that follow from the analysis. It also includes *de lege lata conclusions* and *de lege ferenda* postulates, whose task is to optimize the effectiveness of the application of art. 191a of the Criminal Code with regard to its place in the criminal law order. By listing only some of the issues raised, it is worth paying attention to the incorrect use of the "or" functor in the structure of the regulation, the issue of having the image of a person in a state of nudity or a person engaged in sexual activity by another person without his consent, the relevance of the consent expressed by a minor in the context of art. 191a § 1 of the Criminal Code, as well as determining the scope of feature of the "image of a naked person" regarding the protective function of criminal law.

10.11.2022. Kordiana Witek