

## HARASSMENT FROM THE PERSPECTIVE OF THE CURRENT ROMANIAN CRIMINAL CODE

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**Abstract:** The legislator of the Criminal Code resorted to the criminalization of this deed in response to cases that occurred in everyday reality, in which various persons, especially women, are waited for and followed in the street or other public spaces or are badgered via phone calls or messages, all of which are done in such a way as to create a state of fear for the person in question.

**Keywords:** pursuit; surveillance; fear.

### 1. Introduction

The criminal offense of harassment is an absolute novelty of the current Criminal Code, which does not have an equivalent in the previous regulation. Social reality has provided cases where, although the mental freedom of the victim was called into question, they no longer fit the typicality bestowed by the criminalizing texts that protected the victim's mental freedom in the past. The acknowledgment, the regulation, as well as the protection of the individual freedom of the person by means of legal rules are achieved only to the extent that the exercise thereof does not contravene the freedom of the other members of society and the rule of law. There is a close connection, an interdependence of interests between the individual and society, which ensures the balance of social life, individual and general progress, the former being reflected by the status of the individual, finding himself in a state of freedom. Mistaking freedom for the permission to do anything, even things that harm other people, constitutes a false representation of freedom, its opposite. The right to freedom constitutes, together with the right to life, a fundamental right of the person. The right to freedom is guaranteed for everyone, involving comprehensive protection, which concerns not only the freedom of action and movement but also mental or moral freedom.

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## 2. Harassment

### 2.1 Legal content

Art. 208. (1) The act of an individual who repeatedly, with or without a right or legitimate interest, pursues an individual or surveils his/her domicile, working place, or other places attended by the latter, thus causing him/her a state of fear, shall be punishable by no less than 3 and no more than 6 months of imprisonment or by a fine.

(2) Making phone calls or communications through remote communication devices which, through their frequency or content, cause a state of fear to an individual, shall be punishable by no less than 1 month and no more than 3 months of imprisonment or by a fine unless such act represents a more serious criminal offense.

(3) Criminal action shall be initiated on the basis of a criminal complaint filed by the aggrieved person.

### 2.2. The current Criminal Code in relation to the previous criminal law

The criminal offense subject to our analysis constitutes a new criminalization included in the Criminal Code, without equivalent in the Criminal Code of 1968; the new criminalization protects persons in all aspects, entitling them to use their own physical and mental freedom as they please.

### 2.3. Concept and characterisation

The criminal offense of harassment encompasses acts occurring in modern life, by which a person, acting in bad faith, wants to cause a state of fear to the victim, pursues him/her without a legitimate interest or a right, surveils his/her working place, his/her domicile, makes phone calls or uses other means of communication in an abusive manner [1].

This is an act directed against a person's mental freedom, an insidious form of threat. It's another situation that involves an adaptation of criminal legislation to social realities, as it is known that, lately, more and more people have been bullied by phone or electronic messages, or calls, are stalked or pursued, sometimes in a provocative manner, in the proximity of their working place, domicile (dwelling) or in other places they attend, all of these actions they are subjected to having the effect of causing them a state of fear [2].

### 2.4. Pre-existent elements

A. The legal object consists of the social relations relating to the mental freedom of the person, which freedom may be harmed, when actions of harassment are exercised against the victim at home, in the workplace, or in other places he/she attends [3]. The criminalization of harassment is aimed at protecting the individual against

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behaviors that are more insidious than threats, but which, in turn, manage to induce a pronounced state of insecurity, fear, or discomfort [4].

B. The material object. The offense of harassment does not have a material object, given that the action by which is achieved the material element is not directed towards a thing, in the sense of exposing it to danger or damaging it.

There is an isolated opinion in the doctrine [5], according to which, when the material element of the offense is achieved through repeated acts of touching exercised on the victim, the latter's body becomes a material object.

C. Subjects of the criminal offense

a) The active subject may be any natural person (individual), male or female. As a result, the active subject is not qualified, since there is no relationship of authority between the person being harassed and the perpetrator. It is also considered in the doctrine that pre-existent relations between the perpetrator and the victim are not relevant, whether they were job-related, friendship, work relations, or other similar relations [6]. The active subject may also be a legal entity when the crime is committed in order to achieve its scope of business or in the interest or on behalf of the legal entity [7]. For instance, such an act may be committed by a legal entity which, through its employees, pursues the victim, who is an employee of a competing company, intending to cause him/her a state of fear.

The deed may also be committed by participation in all its forms.

b) The passive subject is the person who is pursued, surveilled, or who receives phone calls or communications by means of remote transmission. The passive subject is not circumstantiated, meaning that he/she can be any person [8] who is capable of awareness of the fact that he/she is being subjected to a method of mental coercion [9].

## **2.5. The structure and legal content of the criminal offense comprise A. the premise situation; and B. the constituent content of the offense.**

A. The premise situation as such does not exist, the legal content being identical to the constituent content.

B. The constituent content of the offense is made up of: a) the objective side; and b) the subjective side.

a) The objective side has the following components: the material element, essential requirements, the immediate consequence and the causality link.

The material element of the objective side is achieved through the action of harassment, which involves repeated acts committed by the perpetrator to disturb the peace of another person, to bother, to torment somebody, to upset the aggrieved party [10].

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In its simple variant, harassment is committed by pursuing the victim or surveilling his/her domicile, workplace, or other places attended by him/her.

The pursuit of the victim consists of his/her direct surveillance by the perpetrator, by moving along the same routes as the victim. Surveillance is different from the action of pursuit, in that the former involves a "static" activity of the perpetrator who, in this case, does not move along following the victim, but merely observes their activity in an "immobile" manner [11].

The places surveilled by the perpetrator can be the victim's domicile, their workplace, or any other place the victim attends.

The state of fear a person in which a person finds themselves in is a circumstance or situation in which an unpleasant feeling of insecurity, worry, or fearfulness arises with regard to that person or even another person.

In a concrete case [12], the court retains that the aggrieved person B.M., aged 27 years, was, during the period 2016-2018, in a stable relationship with the [male] defendant A.T., but without the two of them living together.

In the second half of the year 2018, the aggrieved person made the decision not to continue the relationship with the defendant, the reason invoked being that A.T. did not have any income and would ask the victim to give him various amounts of money. The defendant did not agree to end the intimate relationship and started pressuring B.M. in various ways, the purpose being to determine the victim to resume the intimate relationship, in the same manner as it had unfolded previously. Although the aggrieved person let the defendant know that she wanted to terminate any kind of relationship with him, as of March 2019, A.T. initiated an intense activity of harassment against B.M., both by physically pursuing her, particularly on the route from her workplace to the building she lived in, and by contacting her by phone or by other means of remote communication.

In the special variant, the material element also consists of an action, which may be performed by two methods: making phone calls or making communications by means of remote transmission.

Making phone calls means making calls from landline, mobile phone, or VoIP (Voice over Internet Protocol) networks (such as WhatsApp, Viber, Telegram, voicemail), as well as calls initiated from internal phone switchboards [13]. As regards communications made via means of remote communication, it should be noted that we take into consideration those cases where communication is achieved using information technology, such as posting on social media, e.g., (Facebook), SMS, e-mail, chat [14].

In the foreign doctrine [15], a classic example is considered to be that of someone who interacts with a hostile person on an online discussion forum. Then, the hostile person starts sending by e-mail repeated vexatious messages. The person is asked to stop, but he/she persists. The person is then included in the e-mail list of blocked

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persons, but he/she starts using another e-mail address to send more vexatious messages.

In a concrete case [16], the court retains that, on the evening of 23 November 2017, around 10.00 p.m., while the plaintiff was at home with his wife and daughter, at some point the minor girl's mobile phone started ringing, and she found that she was being called from the call number... by an unknown person. He asked the minor daughter whether she knew that number, and she told them she didn't know it to belong to a known person. At a given moment, the wife answered a call from that number, but the person at the other end did not go on to have a conversation. Although the wife asked the caller not to call that number again, because it belonged to a minor, on the same night, starting from 10.15 p.m., from the same number that had called earlier that evening, namely..., the daughter received nine SMSs with erotic content, soliciting sexual favors from her.

Essential requirements. For the criminal offense of harassment to exist, within the meaning of Art. 208 of the Criminal Code, two essential requirements must be met, namely:

1. The pursuit or surveillance action should be committed recurrently. This means that an isolated act of pursuit of the victim or surveillance of their domicile, working place, or other places attended by him/her is not relevant under criminal law. However, the recurrence of the act is likely to lead to meeting the constituent elements of the criminal offense of harassment. It is not required that the harassment acts be similar on each occasion [17]. Since the text itself requires a recurrent nature, it results that the offense is a habitual one [18]. According to a contrary opinion [19], the Romanian criminal law requires the recurrence of the act of pursuit or surveillance several times and on sufficient occasions to cause a state of fear without thereby turning this offense into a habitual one.

2. The pursuit or surveillance action should be committed without right or a legitimate interest. In fact, a lot of legitimate activities can determine a person to feel harassed, but they are not prohibited by legal provisions. The justification for the pursuit or surveillance of a person can be, for instance, in the case of judicial bodies, the prevention, establishment, or investigation of crimes. The legitimate interest can be justified, for instance, by investigative journalists, private detectives, or debt collectors, who are professionals that should be allowed to freely exercise their activity [20].

The immediate consequence of the harassment offense causes consists of a state of danger for the mental freedom of the person, due to the induced state of fear [21].

The causality link. The objective side of this offense cannot be achieved unless there is a causality link between the action representing the material element of the offense and the immediate consequence of that action.

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b) The subjective side. In the specialized literature, two opinions emerge. According to the first opinion, the subjective element consists of direct intent, because the perpetrator takes action to know the acts and facts of the aggrieved person [22]. According to the second opinion, the perpetrator's mental attitude is characterized by the existence of guilt in the form of direct or indirect intent [23]. This involves the perpetrator's awareness of the fact that the surveillance or pursuit or making of phone calls or communication by other means are intimidating, vexatious, hostile and occur against the will of the victim, with the perpetrator expressly aiming at or accepting this fact [24].

## 2.6. Forms. Methods. Sanctions

### A. Forms

In the case of the criminal offense under study, the preparatory acts and the attempt are not criminalized and, consequently, they are not punished. The consummation of the offense occurs, as a rule, when the second harassment action is performed, at which time, as a result of the perpetrator's action, the consequence required by law has happened, namely the creation of a state of fear, or, in other words, the moment when the aggrieved person perceives the dangerousness of the messages and is afraid as a result [25]. The criminal offense will be exhausted when the last act of harassment is committed.

### B. Methods

#### a) Regulatory methods

The criminal offence of harassment comprises a simple method, enshrined in Art. 208 par. (1), which refers to the pursuit or surveillance of the domicile, working place, or other places attended by the victim, and a special method, enshrined in Art. 208 par. (2), in cases where the perpetrator makes phone calls or communications by means of remote transmission which, through their content or frequency, cause fear in a person [26].

b) Factual methods are numerous, depending on the concrete circumstances of committing the deed.

### C. Sanctions

In the typical variant, the offense is punished by imprisonment for no less than 3 months and no more than 6 months or a fine, whereas for the special method imprisonment for no less than one month and no more than 3 months or a fine is stipulated, if the deed does not constitute a more serious offense.

## 2.7. Procedural aspects

Criminal action is set into motion upon the prior complaint of the aggrieved person, and criminal prosecution is carried out by the judicial police bodies under the supervision and command of the prosecutor; the first instance court is the local court.

## 2.8. Relationship to other criminal offenses

With regard to the relationship to the criminal offense of sexual harassment, it must be pointed out that, despite the homonymy of the two crimes, it is not hard to distinguish between the two, because the name is the only thing they have in common. The two deeds are different, first of all, in the light of the social value they are protecting, given that harassment refers to the protection of the mental freedom of a person, whereas sexual harassment refers to the protection of the sexual freedom of a person. Secondly, the deeds are fundamentally different. Thus, in terms of the execution act, in the case of harassment, it consists of the pursuit or surveillance or making of phone calls, whereas in the case of sexual harassment, the criminalized behavior consists of the repeated soliciting of sexual favors as part of the labor relations [27].

With regard to the relationship to the criminal offense of violation of privacy, it must be specified that the offense of harassment ought to be distinguished from the offense of violation of privacy. We must point out that, in the case of a victim's surveillance by the perpetrator, surveillance does not only cause prejudice to privacy but also prejudice to mental freedom, by causing a state of fear. If the activity of surveillance of the victim has caused prejudice to his/her privacy right, as well as a state of fear, the criminal offense of harassment may be retained concurrently with the criminal offense of violation of privacy [28].

Finally, about the relationship to the criminal offense of threat, we must emphasize that, unlike threat, the consequence of which is a state of danger, harassment has a result as an immediate consequence. There is a natural distinction between the two, because in the case of threat, the message of danger is explicit, whereas in the case of harassment, the message of danger is only suggested and it only becomes harmful in cases where persistence causes a state of fear.

## 2.9. Comparative law aspects

In the Criminal Code of the Czech Republic, the criminal offense of harassment is classified under Division 5, which refers to crimes that disturb the social cohabitation of people. Section 354 of the aforementioned code provides that harassment is the deed of a person who pursues another person, over a long period of time: threatening him/her to bodily harm him/her or to cause other serious prejudices to that person or another person close to him/her; seeks his/her presence or pursues him/her; persistently contacts him/her by means of electronic communication, in writing or by other methods; uses his/her personal data in an unauthorized manner in view of obtaining personal contacts, thus causing him/her a reasonable state of fear for his/her life or the life of persons close to him/her, is punishable by imprisonment for up to one year or the prohibition of the exercise of activity. The perpetrator will be

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punishable by imprisonment for no less than six months and no more than three years if he/she commits one of the aforementioned deeds: against a minor child or a pregnant woman, by using a weapon, or with at least two persons.

In the Criminal Code of Finland, in Chapter 24, titled Offences against Privacy, Public Peace and Personal Reputation, in Section 1 (2), harassment via means of communication is criminalized. Thus, a person who, with the intention to disturb, repeatedly sends messages or makes telephone calls to another person, so that the deed leads to causing a considerable disturbance or to an injury, is punishable for harassment via means of communication to the payment of a fine or imprisonment for up to six months. The same criminal code, in Chapter 25, titled Offences against Personal Liberty, Section 7 (a), criminalizes harassment. Thus, a person who repeatedly threatens, contacts in a similar manner, without justification, another person, so that this act leads to causing anxiety to the harassed person is sentenced to the payment of a fine or imprisonment for up to two years.

Finally, the Criminal Code of Hungary criminalizes harassment in Chapter XXI, titled Crimes against Human Dignity and Fundamental Rights, in Section 222. Thus, the deed of the person who engages in conduct intended to intimidate another person, to disturb the activity, or to bother or cause emotional distress to another person in an arbitrary manner, or who regularly bothers another person constitutes a misdemeanor and is punishable by imprisonment for up to one year.

### Conclusions

An individual's personality virtually finds the measure of its self-assertion, first of all, in the right to freedom, which is regarded as a sacred and inalienable human right, and secondly, taking into account the danger posed by violations of freedom of any kind, the rule of law combats them by criminalizing deeds that breach such social values. However, there are people, and unfortunately, not a few of them, who believe that their freedom allows them to do anything they like, even to dangerously and seriously disregard the freedom of others, thus putting in jeopardy the balance of social life as a whole. This extremely perilous reality justifies and has imposed the intervention of criminal law by enshrining as a criminal offense an act such as harassment. Freedom is not an absolute possibility for a human being, not conditioned by anything, by society, law, conscience, or reason. It is not an absolute value, but a relative one. Individual freedom is and must be not only a right and an attribute of the person but also a limitation, the measure of all his/her actions. It is not permissible for somebody's freedom to be based on the lack of freedom of another person, nor for the individual who, through his acts, considered by the law to be criminal offenses, prejudices another person's freedom, to remain unpunished.

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