

SOME COMMENTS ON THE CRIMINALIZATION AND THE INVESTIGATION OF THE CRIME OF HARASSMENT IN THE ROMANIAN LAW

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Abstract: *Starting from the provisions of Article 208 of the Romanian Criminal Code, which refers to the crime of harassment, the article proposed to analyze the crime of harassment both at the national and international level by means of Directive 2011/92/EU on combating sexual abuse on children, sexual exploitation of children and child pornography and the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse.*

The article also presents and analyzes issues related to the criminalization and the investigation of the new forms of harassment carried out through information and communications technology.

Key words: *harassment, cyberspace, investigation, criminalization, cyberbullying, cyberstalking.*

1. Introduction

The offence of harassment is provided by the Article 208 of the Romanian Criminal Code in a standard version and a mitigated version.

We note that the standard version, according to paragraph (1) of the Article 208 of the Romanian Criminal Code refers to the act of the person who, repeatedly, without right or without a legitimate interest, follows a person or supervises his home, workplace or other places frequented by him, thus causing a state of fear. The act stipulated in the first paragraph is punishable by imprisonment from three to six months or a fine.

In paragraph (2) from the Article 208 of the Romanian Criminal Code the mitigated version is stipulated, which refers to making telephone calls or communications by means of remote transmission, which, by frequency or content, cause fear to a person.

According to the Article (3) of the Romanian Criminal Code the criminal action is initiated upon the prior complaint of the injured person. The deed stipulated in the second paragraph of the Article 208 of the Romanian Criminal Code is punishable by imprisonment from one month to three months or by a fine, if the deed does not constitute a more serious crime.

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With the development of the Internet and especially the use of social networks, new forms of harassment and abuse have appeared, such as: cyberstalking and cyberbullying.

Cyberstalking is a form of harassment through computer systems of adults, young people and children through electronic mail, discussion groups, instant messaging, which involves a physical threat that produces a feeling of fear in the victim. Cyberbullying is a form of harassment through computer systems only of minors (Holt, Turner, Lyn Exum, 2014, p.347-355).

Since cyberstalking and cyberbullying are not expressly provided for in the legal instruments in the field of cybercrime at the level of the European Union, the member states of the European Union have begun to develop specific regulations to criminalize the two forms of harassment or to develop provisions to include certain forms of harassment carried out through electronic communications alongside traditional forms of harassment (Kokkinos, Antoniadou, Markos, 2014, p.204-214).

We point out that the Romanian legislators adopted the Law no. 221/18.11.2019 for the amendment and completion of the National Education Law no. 1/2011, which defines in the Article 1 (6) for the first time expressly the phenomenon of bullying committed in real space, as well in cyberspace.

Article 1 (6) of the Law no. 221/18.11.2019 provides: "bullying is the action or series of physical, verbal, relational and/or cyber actions, in a social framework that is difficult to avoid, carried out with intention, which involves an imbalance of power, have as a consequence the prejudice of dignity or the creation of an intimidating, hostile, degrading, humiliating or offensive atmosphere, directed against a person or group of persons and aimed at aspects of discrimination and social exclusion, which may be related to belonging to a certain race, nationality, ethnicity, religion, category social status or to a disadvantaged category or beliefs, gender or sexual orientation, personal characteristics, action or series of actions, behaviours that take place in educational institutions and in all spaces intended for education and professional training".

2. The pre-existing conditions

2.1. The object of the crime of harassment

The special legal object of the offence of harassment refers to the social relations that ensure the mental or moral freedom of the person, in the sense of the freedom to move unhindered and to live her private life without any interference.

We emphasize that the crime of harassment has no *material object*.

2.2. The subjects of the crime of harassment

The active subject of the crime of harassment can be any person who meets all the conditions to be criminally liable.

The criminal participation in the case of the crime of harassment is possible in all its forms: co-author, instigation, and complicity.

The passive subject of the crime of harassment can be any person who is monitored or who receives telephone calls or communications by means of remote transmission.

Also, *the passive subject* of the crime of harassment can be any person who is in a position to realize that she is under some form of mental coercion.

3. The constitutive content of the crime of harassment

3.1. The objective side

The material element of the offence of harassment consists of repeated acts committed by the offender with the aim of annoying, upsetting or disturbing the injured person. Although the activity of harassment is not expressly defined in the criminal legislation from Romania, this illegal action refers to any behaviour that threatens the security and peace of the victim (Dobrinioiu, Pascu, Hotca, Chiş, Gorunescu, Neagu, Dobrinioiu, Sinescu, 2014, p. 118).

We note that in the standard version of the crime of harassment, the objective side of the crime is carried out by following the victim or by monitoring the victim's home, workplace or other places frequented by her.

The action of following refers to moving in someone's footsteps or running after someone, regardless of whether these actions are performed on foot or by any means of transport. The action of surveillance of the home or workplace or other places frequented by the victim involves observing or spying on these places, regardless of whether the harassed person is in these locations or not.

In the specialty literature (Dobrinioiu, Pascu, Hotca, Chiş, Gorunescu, Neagu, Dobrinioiu, Sinescu, 2014, p.118-119), it has been appreciated that for the existence of the crime of harassment in the variants contained in the Article 208 from the Romanian Criminal Code, two conditions must be met.

The first condition refers to the fact that the act of harassment must be committed repeatedly, as an isolated act of stalking the victim's home or workplace has no relevance for Romanian criminal law. Thus, the constitutive elements of the crime of harassment are fulfilled only if the act of harassment has a repeated character and if the illegal act caused to the person being followed or supervised a state of fear.

We are of the opinion that for the crime of harassment to exist, it is necessary to produce at least two acts of harassment at reasonable lapses that can generate a state of fear, because the fewer the incidents are and the longer the lapse between the incidents is, the more difficult it is for the judicial authorities to establish the connection between them and ultimately the existence of the crime of harassment.

The second condition regarding the existence of the crime of harassment refers to the fact that it must be committed without right or without a legitimate interest. For example, the justification of tracking or surveillance of a person can only be done by the judicial bodies for the purpose of preventing, detecting and investigating crimes, and the legitimate interest can be justified in the case of investigative journalists or in the case of private detectives who must be free to carry out their activities. The investigative journalists or the private detectives must also prove that their actions were reasonable at all times.

The objective side of the crime of harassment can also be carried out by making phone calls or communications by means of remote transmission, which by frequency or content cause fear to a person. This mitigated variant includes the use of text messages, e-mails, as well as any other means of remote transmission.

The commission of the crime of harassment has as an *immediate consequence* a state of fact contrary to the one that would have resulted from the normal development of social

relations regarding the mental freedom of the person. All actions of the offender must cause the victim a state of fear, without which the crime of harassment will not exist. We underline that, between the activity of the offender and the immediate consequence caused must be a causality link that results from the materiality of the offence.

3.2. The subjective side

Criminals commit acts of harassment under the form of guilt of direct intent, as well as indirect intent. Harassers must know that stalking, surveillance, or making phone calls or remote communications is intimidating, puts the victim in a state of fear, and occurs against the victim's will at all times. Thus, in any of the variants of the crime of harassment, the offenders foresee the results of their acts, expressly pursuing their production by committing the acts or accepting the possibility of producing the results of their acts (Dobrinioiu, Pascu, Hotca, Chiş, Gorunescu, Neagu, Dobrinioiu, Sinescu, 2014, p.120).

4. The forms of the crime of harassment

In the case of the crime of harassment, *the preparatory acts* and *the attempt* are not incriminated by the Romanian Criminal Code, and therefore not sanctioned.

The consumption of the crime of harassment occurs when the second act of harassment is carried out, when the consequence required by law is achieved due to the action of the harasser, that is, the appearance of a state of fear.

Exhaustion of the crime of harassment takes place at the moment when the last act of harassment criminalised by law occurred.

We note that the offence of harassment can be committed in continuous form.

5. Modalities

The offence of harassment presents the following normative modalities, according to the provisions of the Article 208 from the Romanian Criminal Code: following, without right or without a legitimate interest a person, or surveillance of the home and workplace of the victim, making telephone calls or communications by means of remote transmission. We highlight that to these normative modalities may correspond various fact modalities.

6. Regulation of the crime of harassment at international level

The development of the Internet and information and communication technology has generated the appearance of new forms of harassment and abuse, such as cyberstalking and cyberbullying. Cyberstalking refers to the use of the Internet, email, or other electronic communication devices, in order to create a criminal level of intimidation, harassment and fear to one or more victims (Reyns, 2012, p.6). Moreover cyberstalking also refers to intrusive, unwanted and repeated behaviours, as a result of which the victim experiences a feeling of fear, physical harm, moral harm, or emotional stress (Roberts, 2008, 272).

Cyberbullying refers to the use of information and communications technology or other electronic communication devices by a person for the purpose of harassing, intimidating, threatening, humiliating or causing harm to the persons targeted by this illegal behaviour (McQuade III, Colt, Meyer, 2009, 21). Cyberbullying uses electronic information and communication devices such as e-mail, instant messaging, text messages, blogs, cell phones, pagers, instant messaging, and defamatory Web sites for the purpose of harassing a minor or a group of minors through personal attacks or other means (Siegel, 2012, 532). The phenomenon of cyberbullying can target both a child and several groups of children. We emphasize that cyberbullying does not involve adults who want to intimidate and harass minors. If the offenders are adults, then we are of the opinion that we are no longer in the presence of the phenomenon of cyberbullying, but of cyberstalking.

First, we highlight that the Romanian legislators have chosen to regulate not expressly the phenomena of cyberstalking and cyberbullying within the framework of the Article 208 of the Romanian Criminal Code, which refers to the crime of harassment. The Romanian legislators adopted Law no. 221/18.11.2019 for the amendment and completion of the National Education Law no. 1/2011, which defines in the content of the Article 1 (6), for the first time expressly, the phenomenon of bullying committed both in real space and in cyberspace.

At the level of the European Union, the text of Article 208 of the Romanian Criminal Code has been adapted to the provisions of Article 3 of the Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography, entitled offences concerning sexual abuse, and to the provisions of Article 4 of the Directive 2011/92/EU, entitled offences concerning sexual exploitation. The text of Article 3 of the Directive 2011/92/EU also refers to issues related to the commission of acts of harassment, especially in paragraph 6 of the article.

We emphasize that the text of Article 4 of the Directive 2011/92/EU refers to aspects related to the commission of acts of harassment in cyberspace, especially in paragraphs 5 and 6 of this article. At international level, the text of the Article 208 of the Romanian Criminal Code has been adapted to the provisions of the Article 18 of the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, entitled sexual abuse.

Harassment offences are investigated in the procedural phase of the criminal prosecution by the judicial bodies within the local prosecutor's offices, and the jurisdiction of these offences in the first instance belongs to the courts. If acts of harassment are committed in cyberspace, judicial bodies will apply the forensic investigation methodology of cybercrimes (Moise, Stancu, 2017, 246-277).

7. Conclusions

Considering the text of the Article 208 of the Romanian Criminal Code, we noticed that the Romanian legislator left outside the scope of criminalization acts of harassment by neighbors that disturb the use of the victim's home (throwing various objects into the victim's yard or organizing repeated parties at inappropriate hours), sending of

unwanted gifts to the victim or annoying the victim by ordering unwanted taxis on behalf of the victim.

We believe that in the near future the Romanian legislators must modify the text of Article 208 of the Romanian Criminal Code and complete it with the aspects related to the criminalization of acts of harassment by neighbors that disturb the use of the victim's home and with the other aspects mentioned before, because at the present time the text of Article 208 criminalizes only the acts of tracking or surveillance of the victim or the places where she moves.

We noticed that the text of the Article 208 of the Romanian Criminal Code corresponds to the provisions of the Article 3 (offences concerning sexual abuse) and of the Article 4 (offences concerning sexual exploitation) of the Directive 2011/92/EU on combating sexual abuse of children, sexual exploitation of children and child pornography, as well as to the provisions of the Article 18 (sexual abuse) of the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse.

We believe that legislators at the national, European and international level must start taking steps as quickly as possible so that the phenomena of cyberbullying and cyberstalking will be expressly criminalized in their criminal legislation.

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