

E-ISSN: 2360 – 6754; ISSN-L: 2360 – 6754

European Journal of Law and Public Administration

2017, Volume 4, Issue 2, pp.50-57

<https://doi.org/10.18662/eljpa/13>

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Covered in:

CEEOL, Ideas RePeC, EconPapers, Socionet,
HeinOnline

Published by:

Lumen Publishing House

On behalf of:

Stefan cel Mare University from Suceava,
Faculty of Law and Administrative Sciences,
Department of Law and Administrative Sciences

How to cite: Lamasanu, D.I. (2017). Consideration Regarding Harassment Offence. *European Journal of Law and Public Administration*, 4(2), 50-57. <https://doi.org/10.18662/eljpa/13>

CONSIDERATION REGARDING HARASSMENT OFFENCE

Daniela Iuliana LĂMĂȘANU¹

Abstract

Harassment represents an ex novo charge in the Romanian criminal law. It is a consequence of the present day life in which some individuals are unnecessary being put under surveillance, are being stalked in the streets, are being intimidated or scared through the means of modern mass media devices. This fact instills the individuals psychic discomfort, fears and worries.

Keywords:

harassment, individual's freedom, ex novo charge, individuals under surveillance, psychic discomfort, worry

CONCEPT AND CHARACTERIZATION

The personality of the individual finds virtually the measure of his affirmation, in the right to freedom regarded as supreme value, inalienable and sacred right of the man, on whose basis the constitutional guarantees stand [1: p. 13; 2: p. 156]. Freedom of the person has several forms of manifestation, namely the physical freedom embodied in the movements and actions of the individual and the psychic freedom represented by the individual's ability to decide, without any constraints or pressures exerted upon him.

In the literature it was expressed the view [3: p. 518] that the notion of freedom can be seen from two main angles, namely a *philosophical* one, which sees the man predominantly in himself, who wants to understand his intimate spirits, regarding the freedom of asking whether the man has truly of it, if the feeling of freedom is not altered by the internal struggles of each individual, if the man needs the other to be free, etc. and a *legal* one, which

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assumes that man only exists as a social man, that freedom can only be a freedom – relationship [3: p. 520]² and can only look at it materially, as the maximum of faculties and possibilities to choose left to individuals.

Thus, the right to liberty represents, alongside the right to life, to body integrity and health, a fundamental right of the person. It is therefore up to each State to guarantee the freedom of the person, by specific means providing effective safeguards for its protection, including by means of criminal law, in cases where violations of this right are of greater gravity and require the intervention of the criminal legislator to enact rules of incrimination by whose precept to prohibit those external manifestations that affect the freedom of the person.

The protection of social values by criminal law rules remains the last solution (*ultima ratio*) only if it is necessary in a democratic society and only if the measure is proportionate to the situation that caused it [4: p. 174].

Criminal law criminalizes the facts that affect the freedom of the person, as follows: art. 205 - Unlawful deprivation of liberty; art. 206 - Threat; art. 207 - Blackmail; art. 208 - Harassment.

If in the case of an offense of unlawful liberty deprivation (Article 205) the object of criminal protection is the freedom of movement and action, in the case of infractions of threat (Article 206), blackmail (Article 207) and harassment (Article 208) the legislator expressed mainly the protection of the psychic (moral) freedom of the person.

Harassment is an *ex novo* incrimination in Romanian criminal law, imposed by the situations in the objective reality, where some people are prosecuted without right or without justification, awaited on the street or in other places frequented by them, or are trampled or thunderous through distance means of communication [5: p. 156], creating psychic discomfort, fear or worry.

² The author points out that regardless of whether freedom is conceived as *freedom - autonomy* or *freedom - participation*, it is a **freedom - relationship**, that is, a freedom that does not assert the human individual in himself, but the relationships in which he enters. Freedom-autonomy arises from the ban imposed on the governors to overcome certain limits, to move into a sphere reserved for the individual, so that it becomes a freedom-relationship that does not concern the individual, but the individual in relation to the public power. It is a *negative-freedom* because it results from a state's refusal to interfere in certain individual behaviours and a *partial freedom* because it does not signify the individual's ability to do what he wants but only that there is a range of intangible individual rights for authority. In the case of freedom-participation, freedom is perceived as a co-optation of the individual in the exercise, the establishment and maintenance of public power.

LEGAL CONTENT

According to art. 208 par. (1), harassment is the act of the person who repeatedly pursues a person without right or without a legitimate interest, or supervises his or her place of residence, work or other places, thereby causing a state of fear.

In par. (2) of the same article, it is incriminated to make telephone calls or communications by means of remote transmission which, by frequency or content, causes fear to a person.

PREEXISTING ELEMENTS

The legal object is the social relations relating to the person's psychological freedom, which may be harmed by the pursuit or supervision of the job or other places he or she is attending, as well as, in the case of telephone calls or communications means of remote transmission whose recipient is and which extend beyond the sphere of communication within the limits of existing social usage.

The offense of harassment is not material, since the perpetrator's action is not directed and does not make any changes to a physical material entity (work or person).

Criminal doctrine uses the term *offensive* to designate that capacity of action or inaction to harm social values protected by criminal law according to the principle of *nullum crimen sine iniuria* [6: pp. 268-341], [7: 192-238].

THE SUBJECTS OF THE OFFENSE

The active subject of the harassment offense can be any person who meets the general conditions of criminal liability.

Criminal participation is possible in the form of incitement or complicity. Co-authorship is not possible because harassment is usually a criminal offense and therefore, it is not possible to commit in co-authorship.

The **passive subject** of the harassment offense is the person who has been frightened by house, work supervision or other attendance activities or as a result of making phone calls or communicating by means of remote transmission, regardless of the relationship existing between the perpetrator and the victim or the age of the latter.

The legal structure and content of the harassment offense is not a precondition, so it is identical to the constituent content.

CONSTITUTIVE CONTENT

The **objective side** includes the material element, the essential requirements, the immediate follow-up and the causal link.

a) The **material element** has alternative ways of achievement, namely by **following** the victim or by **supervising** the dwelling, the workplace or other places attended by the victim.

To follow a person means going, moving, running after someone or someone's footsteps [8: p. 2128], whether walking is done on foot, with a personal or shared transport means [9: p. 121].

To supervise the home, work or other places frequented by a person is to keep an eye on, carefully watch, and carefully monitor [8: p.1939] these locations belonging to the victim, whether or not the harassed person is in these locations [9: p. 121].

In the case of the assimilated form, the material element is made by making *telephone calls* or by means of remote transmission.

Making phone calls means calling the victim by the offender by any means of fixed or mobile telephony, including phone calls from the Internet - for example, the "*WhatsApp*" system.

Remote communication means any type of exchange of messages (talks between the perpetrator and the victim) regardless of the means of communication used (mail, electronic, SMS, Facebook, WhatsApp, Skype, Instagram etc.).

b) **Essential requirements**

In the form provided by par. (1), pursuit or surveillance must be carried out ***without right*** or ***without legitimate interest***. These activities are legal (ie under a right) if they are performed on the basis of the authorization ordered by a magistrate. They will also be performed to protect a legitimate interest whenever it is aimed at an interest recognized and protected by the law or the norms of social cohabitation. For example, the parent who pursues his or her minor child on the school-to-home route or oversees the places attended by him, performing these activities by virtue of the legitimate interest in exercising parental authority.

Victims' follow-up, home, job or other attendance activities ***must be repeated***, a requirement that renders the offense a usual character [12: p. 24] and the impossibility of committing it in a continuing form.

In the case of an attenuated form, telephone calls or communications by means of remote transmission must have a certain *frequency*, repetitiveness, to cause the victim to be afraid, or if they are not repetitive or frequent, their *content* must cause the victim a state of fear.

c) Immediate following implies the violation of the person's freedom, the victim being trampled, troubled or in a state of discomfort in carrying out the activities that he has proposed [10: p. 143].

For both forms of crime, the immediate consequence is the state of fear caused to the victim.³ If, in the case of the pursuit or supervision of the dwelling, workplace or other places visited by the victim, the state of fear is caused by the perpetrator's activity, in the case of attenuated form the victim's state of fear is caused either by the content of the telephone calls or the communication or by their frequency (even if they themselves do not contain messages generating panic or fear).

d) **Causal link** In order for the act of surveillance or prosecution of a person to constitute the harassment offense it is necessary to verify the causal link between the victim's fears and the perpetrator's activity. As it has been shown, fear is a state of fear, fear of a person in relation to a particular situation or circumstance. It is a survival mechanism that appears as a man's response to a concrete, usually negative, threat [8: p. 765].⁴

In order to achieve the objective aspect of the attenuated form provided for in paragraph (2), the fear of the victim must be caused or determined by the frequency or content of telephone calls or messages. If the state of fear is caused by other behaviours or attitudes of the perpetrator, the objective content of the harassment offense will not be achieved.

If in the case of the threat (Article 206 from Penal Code) the immediate consequence is the occurrence of a state of fear on the passive subject as a result of the threat of committing a crime or a degrading act against him or another person, in case of harassment the state of fear is the consequence of tracking or surveillance, or frequent phone calls or content that creates a state of fear or panic.

If the perpetrator threatens the death of the victim and, in order to carry out the threat, makes telephone calls that mention the matter or

³ **Fearing** is fear or fright, worry or anxiety. **Fear** is a state of deep anxiety and disorder, tense, alarmed waiting, caused by real or imaginary danger.

⁴ Fear depends on the person and can vary from prudence to phobia and paranoia. It is related to several states, including care, anxiety, terror, paranoia, horror, panic. **Phobia** is a fear of an extreme, persistent intensity, as the subject is considered irrational. It is determined by the presence or just the anticipation of an object, a life or a situation. - Wikipedia, [https // ro. Wikipedia.org](https://ro.wikipedia.org)

communicates the threat by any means, its activities, even if they have caused a state of fear, will circumscribe the content of the threat of threat because they represent only the means of achieving it, and not the harassment offense (Article 208) which has a subsidiary character (Article 208, paragraph 2, final sentence, Penal Code).

SUBJECTIVE SIDE

The subjective element of the harassment offense is the direct intention [4: p. 324]⁵ of the perpetrator acting in the ways enumerated by the legislator (tracking, surveillance, making frequent phone calls or communications) to know the program, the acts or the facts of the injured person [10: p. 143].

The subjective side of the harassment offense has no essential requirements. There is no criminal relevance to the mob or the purpose pursued by the perpetrator (impressing the victim, expressing obsessive feelings, revenge, jealousy, etc.). These will constitute circumstantial evidence and will be relevant to the choice of the applicable criminal sanction and the way in which it is individually enforced.

FORMS. WAYS. SANCTIONS.

The harassment offense necessarily implies that the action constituting the material element, namely the pursuit or oversight, takes place *repeatedly*, so that it is usually a criminal offense and, therefore, the attempt is not possible, and there is no *iter criminis*. If the perpetrator commits a single act of tracing or victim surveillance or a single telephone call, it remains legally irrelevant.

The act of following or supervision is consumed, respectively, as an offense, when the activity in question was repeated and the immediate following occurred, ie a fear was created for the victim [11: p. 93] and *the moment of exhaustion* will be the one corresponding to the last act of execution.

The incrimination of the harassing act contains a basic form provided by art. 208 par. 1 and which is carried out by repeatedly pursuing, without right or without a legitimate interest of a person, the supervision of the house, the place of work or other places attended by him, if they have caused a state of fear. In art. 208 par. 2 is attested a mitigated form of the

⁵ Under the subjective view, the offense can usually be committed only with direct intent.

harassment offense consisting in making phone calls or communication by means of remote transmission, which by frequency or content, causes a person to fear.

The sanction in the case of the harassment offence in the basic form is 3 to 6 months imprisonment or fine, and for attenuated form, imprisonment from one month to 3 months or fine.

PROCESS ISSUES

The initiation of criminal proceedings for the harassment offense is governed by the principle of availability, subject to the prior complaint being made by the injured party. According to art. 296 par. 1 of the Penal Procedure Code, the preliminary complaint must be filed within 3 months, from the day when the injured parsonage learned about the perpetration of the deed. Since harassment is usually a criminal offense, which involves repeating in time the activities incriminated by the legislator, we appreciate that the 3 month period runs from the time of consumption.

The competence to conduct criminal prosecution for the harassment offense belongs to the criminal investigation bodies of the judicial police under the supervision of the prosecutor within the prosecutor's office attached to the court.

As regards the jurisdiction in the first instance, it belongs to the court.

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