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Deviances of Information Society

About Harassment and Cyber-stalking

Abstract. The fact of harassment is a remarkable step in the complex protection of private sphere, but due to its novelty it is still difficult to adopt in practice. Among the most typical behaviours of harassment, the Criminal Code itself names the commitment through telecommunication tools that—referring to the title—means harassment through internet as an infocommunication system. The modern, digital communication facilities enable an informal communication among participants that hides reality. The single ways of communication (e-mail, chat) only have written basis, other sensors of cognition, perception do not play any role. As a result of the lack of social control, one of the most significant hurdles of aggression, the social distress does not exist. Therefore some emotions (anger, jealousy) or aggression can be directed straight towards the target of the harassor. The internet can be a tool as well that the principal can use in order to gather personal information about the victim to make the subsequent harassment easier. These circumstances provide different opportunities to the harassor, therefore it is worth to deal detailed with this way of commitment. The suggestions and highlights of the study aim to eliminate the difficulties of law interpretation, to define the enforceable concept of private life, and to enable the possible realisation of the facts.

Keywords: cyber-crime, cyber-stalking, deviance, harassment, infocommunication, internet, privacy, stalking

Introduction

The purpose of this study is to introduce the legal regulation of a long-standing phenomenon in a special regard to harassment enabled by infocommunication instruments. The new state of affairs of the Criminal Code, the junctures of delinquency stated in paragraphs 176/A. § (1) and (2) came into effect on 1 January 2008 and 2 February 2009. The action¹ defined in paragraph 176/A. § (1) has never been punished by any criminal act of the Hungarian legal system, the law enforcement practice of interpretation has not been developed yet, therefore its common usage has created several problems, of which I am trying to demonstrate a few.

I. Generally about Harassment and “Stalking”

As per the place, springs and target of action—legally prohibited persecutive behaviours have several different classifications. Accordingly, we can talk about harassment at work or harassment based on sexual, ethnical or personal intentions. Concerning this study, harassment based on personal intention is the most relevant—the so-called “stalking”²—when

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¹ Contrarily, section (2) has raised a conduct previously punished as offence to delinquency level.

² Stalking is an English expression, its Hungarian meaning is: in hunting terms chasing and tiring out the wild.

the principal, mostly according to the commonly used expression “harassment”, does molest his/her victim for a longer time, permanently or frequently.

In those typically western states where the social danger of this conduct has been recognized earlier, several definitions have been created to define the persecutive behaviours called *stalking*. Beáta Korinek—summarizing the legal and academic concept of harassment emerging in the legal system of the USA—defines the following: *stalking is such a phenomenon where the harassor affects a certain person with his/her behaviour in a way that he/she evokes fear and distress by threatening this person.*³ According to another definition *stalking* should be interpreted as a wilful, persistent threat or following that intends to a certain person and when the physical and psychological safety of the aggrieved party gets in danger.⁴

Principals of harassment can have different motivations; the following groups are typically worth to emphasize: a) *rejected partners*, those who are unlikely to accept the end of a former relationship; b) *those searching for nearness of others*, principals being intent on building intimate relationships, those in their otherwise desolated private life only have some kind of contact with their victim; c) *non-compatible suitors*, those who typically aspire only a one-night coition with the aggrieved; d) *offended principals*, those who would like to take vengeance on for their earlier real or fictional grievances; e) *deliberate predators*, those who collect information about their victim typically before committing sexual violation.⁵

Private sphere and the sanctity of private life are social values protected by the state of affairs. Since in the Hungarian legal literature no resources are available to provide adequate help for the law enforcer in interpreting the facts of harassment, I have taken the concepts of a related field of law, namely data protection as a basis in order to understand the concept of private sphere and private life. András Jóri—referring to the research of Ferdinand D. Schoemann and Alan Westin—expounds it as a situation where “*accessing the individual, with all related information, intimate facts, thoughts and body, is limited.*”⁶ Private sphere could mean the general freedom of action for the individual within the system of relations among the “individual” and “others”.⁷ According to László Majtényi “*protection of personal privacy primarily meant the protection of the individual’s private life that usually covered the protection of private and family life, physical and psychological integrity, protection of honour, positive reputation and against exhibiting any fact of private life, protection of personal identity and against observation, protection of verbal communication...*”⁸ The concept of private sphere—with other words *privacy*—can visibly have several approaches; the expression has got newer and wider meaning parallel with the increasing emergence of the individual’s autonomy.

According to what has been stated in decree No. 56/1994 (10 November) of the Constitutional Court “*the right to dignity of the human being is one of the definitions of the*

³ Korinek, B.: A stalking. In: Korinek, L.–Kóhalmi, L.–Herke, Cs. (ed.): *Emlékkönyv Irk Albert egyetemi tanár születésének 120. évfordulójára* (Book in honour of the 120. anniversary of university professor Albert Irk). Pécs, 118.

⁴ Voß, H.-G. W.–Hoffmann, J.: Zur Phänomenologie und Psychologie des Stalking; *Polizei und Wissenschaft* 2002. Introduction. Cited by: Korinek, B.: *Ibid.* 119.

⁵ Korinek, B.: *Ibid.* 123–124. The author refers to the researches of Paul Mullen.

⁶ Jóri, A.: *Adatvédelmi kézikönyv* (Data Protection Handbook). Budapest, 2005, 12.

⁷ *Ibid.* 15. The author refers to the thoughts of László Sólyom.

⁸ Majtényi, L.: *Az információs szabadságjogok* (The information liberties). Budapest, 2006, 68.

so-called “general personality right”, i.e. „ancestor law” of personality rights, that in the modern constitutions and in the practice of constitutional courts appears named as the “right to the free emergence of personality”, the “right to the freedom of autonomy”, “general freedom of action” or “the right to private sphere” [8/1990. (23 April) decree AB]. The constitution does not mention “the right to private sphere” as a concrete, subjective basic right, however the right to the freedom of private life is definitely a basic right that serves the protection of individual’s autonomy and originates from the congenital dignity of the human being...”.

Concepts of the system of private sphere and private life could include several interpretation levels, therefore considering the legal state of affairs of harassment and the aim of the legislator, I find the broad interpretation of this concept appropriate. Private sphere, private life covers the single person, the connection system of the person’s family or household and the wider, freely chosen social network. In case of accepting the three-level system of private sphere, the conducts violating the private sphere also affect through one of the above-listed system elements, layers.

As the legal subject of harassment is a right connected to the dignity of human being and to the respect of private sphere, therefore the law enforcer has placed it among the delinquencies against dignity of human being within the Criminal Code. In consideration of its personal nature it is a delinquency that is to be prosecuted for private proposal.

II. Perpetrative conducts of harassment

The act defines the persecutive actions of paragraph (1) under the common name “disturbance”, in everyday life most frequently occurring affair of these is when the principal frequently aims to establish relationships—through a telecommunication tool⁹ or personally. No relationship needs to be established, any effort intent to it is sufficient, i.e. any person who frequently and disturbingly rings the telephone of the aggrieved and then hangs up or aims to establish relationship with him/her using different network applications (Msn, Skype) commits harassment. The arbitrariness of interventional intention means that it dispenses with any legal authorization or any approval of the aggrieved. Further premise of facts is the purpose and that the disturbance happens frequently or persistently.¹⁰

Principal of harassment defined in section (2) point a) is the person who “in order to evoke fear threatens another person or his/her relative with committing any personal violence or indictable offence causing public danger”. Before 1 January 2008, the principal of this action could be amenable for offence of dangerous threat.¹¹ The act has raised point a) of the fact of offence to delinquency level and compared to harassment stated in section (1) punishes it more seriously, with up to 2 years of imprisonment, communal work or penalty. According to paragraph 138 of the Criminal Code, threatening is prospecting of a serious disadvantage that can raise drastic fear in the threatened person. This phrase of harassment

⁹ Besides telephone calls, sending text messages, e-mails and voice messages can also be mentioned here.

¹⁰ Complex DVD Jogtár commentary to § 176/A of the Criminal Code.

¹¹ Before the 1 January 2008, according to § 151 of Act LXIX/1999 perilous threatening was committed by the person “who a) seriously threatens another person in order to evoke fear of committing such crime that is intended against the life, corporal integrity or health of the threatened person or his/her relative b) seriously threatens another person to evoke fear of widely publicizing facts, that are capable for defamation of the threatened person or his/her relative.”

also premises the intention that the principal threatens the aggrieved party or his/her relative in order to develop fear in this person. Threat has to be qualified, only threatening with personal violence or indictable offence causing public danger is to be punished. So this paragraph does not concretely define which behaviours are to be considered as threat but point a) of section (9) in § 261 of the Criminal Code can be of assistance to us since in relations to terror action it lists what is reckoned among personal violence, offence causing public danger or weapon-related delinquency.¹²

Harassment defined in point b) section (2) is committed by the person who “*aims to suggest that an action occurs that threatens or violates the life, physical integrity or health of the aggrieved party or any (of) his/her relatives.*” The new definition was introduced by the already mentioned Act LXXIX/2008 effective from 1 January 2009. The perpetrative behaviour of this definition of harassment is a sort of veiled threat. In case of concrete threat, the principal is amenable (to law) according to section (2) point a). It is difficult to define the expression “aim to suggest” since suggestion can include all behaviours that make the aggrieved party believe that a non-occurring event has a real possibility to occur. Therefore it means a pretending behaviour that refers to the inchoation of an event either by the principal or another person, or to its occurrence independent from any person. Cases of adapting facts are expected to be highly influenced by practice of law enforcers adjusting them to the behaviours of real-life, which is worrying because behaviours that the legislator wishes to punish can not be clearly selected.

Harassment is a subsidiary delinquency. Determination of phrase stated in section (1) is only possible if through certain behaviour—i.e. in case of formal aggregation—no more serious delinquency has been committed at the same time. However—as per the commentaries—the act only refers to the alternative nature of harassment stated in section (2). Of course, realization of formal aggregation is possible.

III. Cyber-stalking

Among the most typical behaviours of harassment, the Criminal Code itself also names the commitment through telecommunication tools that—referring to the chapter—means harassment through internet as an infocommunication system. Internet and mobile technology create two basic cases—considering the relationship between the principal and his/her victim. On one hand access from a distance—i.e. his ability to reach his/her victim wherever he/she is; on the other hand permanent access—irrespectively of the location of his/her victim. Therefore it is worth to deal a bit more detailed with this way of commitment.

¹² Cases of personal violence, offence causing public danger or weapon-related delinquency are homicide [§ 166. section (1) and (2)], battery [§ 170. section (1) to (5)], wilful endangering committed in the exercises of their activity [§ 171. section (3)], violation of personal freedom (§ 175), kidnapping (§ 175/A), criminal offence on security of traffic [§ 184. section (1) and (2)], endangering of railway, aerial or aquatic traffic [§ 185. (1) and (2)], violence against official person (§ 229), violence against a person performing public task (§ 230), violence against a supporter of an official person (§ 231), violence against internationally protected person (§ 232), causation of public danger [§ 259. section (1) to (3)], disturbance of public service facility [§ 260. section (1) and (2)], get mastery over aerial, railway, or aquatic public road transport or trucking vehicle (§ 262), misuse of blasting agents or explosives (§ 263), misuse of firearms or ammunition [§ 263/A. section (1) to (3)], smuggling of weapons (§ 263/B), misuse of radioactive substances [§ 264. section (1) to (3)], misuse of weapon prohibited by international agreement [§ 264/C. (1) to (3)], crime committed against infocommunication system and data (§ 300/C), damaging (§ 324) and robbery (§ 321).

The communication facilities provided by the internet enable an informal communication among participants that hides the reality. Its speciality is that the single ways of communication (e-mail, chat) only have written basis, other sensors of cognition, perception do not play any role. All these circumstances provide different opportunities to the harassor. As a result of the lack of social control, one of the most significant hurdles of aggression, the social distress does not exist. Therefore on one hand some feelings, emotions, desire (anger, jealousy, bitterness, thirst for possession and control) or aggression can be directed straight towards the target of the harassor; on the other hand with the possibility of the emergence of different fantasies, the victim can become the focus of the harasser's imagination.¹³

J. Reid Meloy also believes that the internet can play a role in the course of harassment in many ways. However his thoughts are only theoretic in many cases, these possibilities should also be taken into account in a few sentences. In the first case, the internet is a tool that the principal can use in order to gather personal information about the victim to make the subsequent harassment easier.¹⁴ An attribute of the trend marked as *web 2.0*¹⁵ of the internet-usage is that the users build communities—such as iwiw, myvip, facebook and other services—when the users provide data—in most cases unconsidered. All this can be considered as an informational goldmine for a stalker during preparation. In the second case the internet is a medium or communication channel, through which the principal threatens his/her victim and communicates his/her desire, feelings to him/her. In the third case Meloy attributes a big role to the psychical role of astonishment since electronic messages can be send anytime to anyone, the message can exist timeless until the victim discovers it that depending on the timing can make the target person to feel that his/her harassor is in his/her near anywhere, anytime.¹⁶ Anonymity increases the subjection of the victim for the reason that he/she is not aware of who his/her harassor is, therefore will suspect anyone in his/her environment.

According to Bran Nicol one of the characteristics of our modern culture is that the motivators of persecutive behaviours become examples to follow. Under this Nicol means the following: accepted and supported is the conviction that from one hand we gather information about anyone, even foreigners and build intimate relationship with them; on the other hand the opposite of this is that we share even our most secret desire with everyone.¹⁷ We live in a world where the border between the individual and others has dangerously obliterated therefore harassment itself has occurred as a symptom and unavoidable product of our culture.¹⁸ Permanently attracting attention and the constant desire to belong to celebrities both indicate that our conception about privacy has changed. The surrounding digital culture pushes us into a constant, accepted harassment. The internet itself plays such a transmitting role, through which on one hand harassment is possible as a result of the action of the victims or by using the data published by themselves; or on the other hand

¹³ Meloy, J. R.: *The Psychology of Stalking*. In: Meloy, J. R. (ed.): *The Psychology of Stalking Clinical and Forensic Perspectives*. London, 1998, 11.

¹⁴ *Ibid.* 10.

¹⁵ The expression web 2.0 is a collective noun for such second generation internet services that are based on communities, so the users create content together or share each other's information. Contrarily, in earlier services—generation 1 and 1.5—the content was maintained by the service provider. http://hu.wikipedia.org/wiki/Web_2

¹⁶ Meloy: *Ibid.* 12.

¹⁷ Nicol, B.: *Stalking*. London, 2006, 8.

¹⁸ *Ibid.* 8.

through the persecutive “services” mentioned by Nicol as examples. Nicol mentions examples of websites like CelebFanMail.com or Gawker Stalker¹⁹ that informs us about the e-mail address and actual place of residence of nearly any celebrity based on the information published by the “everyday” people who spot them. In addition, a speciality of the functioning of the internet is that the anonymity provided is only illusory. Numerous traces arose in course of the services employed by the users that can be gathered by experts; the popularity of phishing nowadays is beyond doubt.

Within this chapter it is worth to mention a few words about the agreement that was signed in February 2009 by 17 larger internet companies in contribution with the Committee of the European Union in order to strengthen the security of users under 18 of social network websites. Parties of the agreement plan to roll back such undesired phenomenons like online harassment with the following tools: a) placing an easy to use “notification of misuse” button on the user interface, that is suitable to notify with a single click that the behaviour of another user is undesirable, b) personal data of users under 18 are not public by default, c) personal data of the users are not searchable the search engines, d) functions serving the protection of privacy are visible and easily accessible all the time, e) registration of users under 13 must be encumbered. However all these actions presume the sensitivity and awareness of users regarding personal data; this is not confirmed by the perceptible trends in Hungary—that for the lack of Hungarian expressions can only be described with new foreign keywords like cyberbullying, sexting. Cyberbullying is such a rude joke or teasing when members of age groups of 13–17 years disfigure each other on different platforms. In possession of a camera mobile phone any accident or unpleasant incident—irrespectively where it happened—can be watched by crowds on one of the popular websites already the same evening. Sexting is a phenomenon when young users publish pornographic, erotic or similar photos of themselves on social network websites. These two trends refer to the disappearance of private sphere, while cyberbullying is the ignorance of someone else’s private sphere, and sexting means the complete opening of the user’s own private sphere.

IV. Remarks

1. To paragraph 176/A section (1) of the Criminal Code

Section (1) of paragraph 176/A in the Criminal Code can only be committed with direct intent. The aim is to threaten others or to arbitrarily encroach on someone else’s private life, everyday life. It is difficult to interpret the same behaviour as aim and perpetration within the same state of affairs—when the principal with the aim to arbitrarily encroach on someone else’s private or everyday life, arbitrarily encroaches on someone else’s private or everyday life, e.g. disturbs someone else—therefore the defence of the principal can easily be successful as it explains the disturbing behaviour with unintentional but still likely and possible reasons.²⁰ For this reason I think a redefining of legal wording would be more appropriate to the effect that—by dispensing the aim—it makes perpetration with indirect

¹⁹ *Ibid.* 9.

²⁰ It’s hard to deny the—not unprecedented—defence of the suspected which states that the aim of the suspected was to prepare for thievery by getting information through frequent overnight telephone calls whether the aggrieved was at home. According to the fact that preparation for thievery is not to be punished, and for lack of aim harassment defined in section (1) is not facts-like, the prosecutor has to decide on the abolition of the investigation during the phase of investigation.

intent also punishable. Proof is nearly impossible, when the principal—that is often in a bad relationship with the aggrieved—in order to retrieve their previous disagreements or financial arguments, or to interpret its anger or attraction to the aggrieved, aims to build such a relationship, that although results in the disturbance of the aggrieved but its aim is not the legally defined aim.

Because of the uncertainty of the concept of private life, the case when the suspected person disturbs the aggrieved through his/her relatives needs to be interpreted.²¹ According to the broad approach of (the concept of) private sphere, arbitrary encroachment can hurt the individual's right to the undisturbed everyday life through all the three system elements mentioned. According to the commentary of the act that also underpins the above, “the following behaviours can be considered persecutive: the persistent twenty-four-hour—even anonymous—phone calls at home and at work; the often offending, obnoxious or threatening messages left on the answering machine or sent by e-mail or SMS; frequent attendance in front of the victim's flat, workplace, etc.; shadowing the victim to public places. *This can include the close relatives and friends of the victim.*”²²

The concept of “disturbance” is a subjective expression that—besides the opinion of the aggrieved—requires assessment of the law enforcers. László Korinek's thoughts about sexual harassment are sound since he is stating that it is difficult to do empirical research in this subject because the perpetrative behaviours—especially the sensitivity of the aggrieved parties or individuals are reasonably different. The problem is that it has to be decided by the law enforcers—in an individualized and consistent way—which impacts experienced as disturbance are to be considered as disturbance.

Qualification of the case when the harassor disturbs the aggrieved exclusively through an infocommunication system, e.g. by sending e-mails or text messages, has not been clarified either. The question in this case is that if the aggrieved had the possibility to keep out the impact of the principal and does not take an advantage on it, is a criminal sanction necessary to be applied as an *ultima ratio*.²³ The Criminal Code does require certain precautions from the aggrieved party in other cases, too—and only guarantees criminal law protection in case of their existence. An example for this is the state of affair stated in section (1) § 300/C of the Criminal Code, i.e. unauthorized access to an infocommunication system that can only be committed by bypassing the arrangement ensuring the security of the system. Meloy also disputes that the principal could be amenable to law only based on online harassment; he believes that in a persecutive state of affairs online conducts can only be subconducts of harassment.²⁴

2. To point a) of paragraph 176/A. § (2) of Criminal Code

Repeal of point a) section (1) of § 151 in the Offence Act and shifting it to section (2) of § 176/A of the Criminal Code that the place of act coming into effect meant that dangerous threatens committed before the 1st January 2008 could not be punished from the 1st January 2008 on. According to § 4 of Act LXIX/1999 “*actions has to be judged based on the laws*

²¹ In cases when the relatives of the aggrieved are indirectly inclined to actions that does not harm their own privacy, but harms the privacy of the aggrieved.

²² Complex DVD Jogtár commentary to § 176/A of the Criminal Code.

²³ An example for this is the case when a love-letter sending admiring user can be disabled by the aggrieved with a single button click on the social networking site called *iwiw*.

²⁴ Meloy: *Ibid.* 11.

being in force at the time of commitment. If—according to the laws being in force at the time of judgement—the action is not considered illegal or is to be punished lighter, the new law has to be applied.” Retrospective adaptation of section (2) of § 176/A of the Criminal Code is also impossible due to § 2 of the Criminal Code therefore a gap of law enforcing has arisen that makes the intention of legislator to punish the persecutive and threatening behaviours more strictly impossible.

The commitment mostly happens in a verbal environment; its tools are words and phrases that can mediate different contents depending on culture and degree of education. In some subcultures accepted practice of cursing is often naturally accompanies the communication among those belonging to the community. However it names violence against persons, it cannot be considered as a dangerous action or a serious threat for the society under all circumstances only because of its common nature. Such cursings are the expressions referring to torture of others by variable traditional methods. The metacommunicative way of threatening—e.g. showing a cutting finger move in front of the neck or playing funeral march on the phone—also needs interpretation.

The new state of affairs tie down large resources of the detective authorities, their proof is rather difficult. The reason for difficulties among others is that usually there is no impartial witness available besides the aggrieved and the suspected parties or e.g. in case of harassments committed via telephone, the call list acquired from the operator does not include the conversation itself, only the time and length of the calls.

V. Investigation of Harassment and its Control

In case of harassment committed through a telecommunication tool, according to the data storage obligation regulated by § 159/A of Act C/2003 about electronic communications, the call lists of the aggrieved and the suspected parties have to be acquired through request from the communications operators in order to prove the fact of communication. Having the call list, both the suspected and the aggrieved party has to declare the content of phone calls made on certain days at certain times since besides getting informed about all external circumstances of action this is the way to conclude to the aim of the principal. On the other hand, the parties often know each other, and in many cases the aim of the defendant to communicate is not against the will of the aggrieved but because of the nature of the existing contractual relationship, relation or argument between them. For example, in order to keep in touch with the common child, the defendant as ex-husband can often call the aggrieved—if this really aims to keep and maintain the relationship with the child and not to encroach into the life of the aggrieved. Only in case of communications beyond the above aim and of late-time phone calls can we talk about the phrase of harassment defined in section (1) but understandably it cannot be identified based on the number of phone calls.

Phone calls, text messages documented and written by the aggrieved that are no longer available electronically, in their original form must be handled under protest; but the number of communications can be determined based on the call lists. Evidences—carried by these data that are mostly stored in infocommunication systems—can be considered durable and in order to secure them and to keep them authentic Act XIX/1998 about prosecution also specifies certain procedures, e.g. inspection and search of premises. For the sake of the unequivocal proof we should not only accept the statements of the aggrieved regarding the content of the communication since in this case text messages are the basis of the aim of arbitrary encroachment. Often unintelligible and unrealistic is the action of aggrieved parties when they delete these messages that are obvious and direct evidences and then report an offence.

In case of harassment committed by using mobile phone—since the phone is the instrument of commitment—the proposal to confiscate the device owned by the aggrieved party according to point a) section (1) § 77 of the Criminal Code can seem a negligible sanction but because of legal regulation it cannot be ignored either.

When analysing the behaviour of the principal, the possible influence of the victim has to be estimated and according to what has been outlined above the motivations of deviancies of information society should also be considered. The aggrieved who publishes several erotic photos of himself/herself on a popular social network website and therefore opens his/her private sphere to almost everyone—according to the rules of rational thinking—has to face the fact that with his/her behaviour as an “instigator” he/she almost authorizes the other users to aim to build an intimate relationship with him/her by entering his/her private sphere. In certain cases all these can be considered as mitigating circumstances.

Summary

The fact of harassment is a remarkable step in the complex protection of private sphere, but due to its novelty it is still difficult to adopt in practice. The law enforcers are facing a big challenge when they have to fill words like private life or everyday lifestyle with appropriate meanings that decisively determine the adaptability of the facts, or when the actual intention of the principal has to be resolved based on the evidences available. Therefore the suggestions and highlights of this study aim to eliminate the difficulties of law interpretation, to define the enforceable concept of private life, to enable the possible realisation of the facts and to widen the aggravating circumstances.