

UDK 343.436:340.13(497.7)

STALKING – THE CHALLENGES OF NEW INCRIMINATION**Darko Dimovski**Associate Professor
Faculty of Law, University of Nis
E-mail: darko@prafak.ni.ac.rs**Milica Stanković**LL.M., Judge Assistant
Appelate Court of Nis
E-mail: milica.stankovic@ni.ap.sud.rs**Miomira Kostić**Professor
Faculty of Law, University of Nis
E-mail: kosticm@prafak.ni.ac.rs**Abstract**

In recent years, the increasing attention of scientific and expert public are attracted cases of stalking. Amendments to the Criminal Code which came into effect on 01 June 2017 (Republic Serbia, Official Gazette“ No 94/16) for the first time includes the criminal act of stalking in Republic of Serbia legislation, in its Article 138a. Stalking has been included in Chapter XIV, within the group of criminal acts againts citizens rights and freedoms. With this act, Republic of Serbia has joined the family od those European countries which apply Article 34 of the Convention on Preventing and Combating Violence against Women and Domestic Violence, to incriminate such deliberate behaviour, where repeated threats made to another person cause that person’s fear for their safety. The authors in the paper will give analysis of the legal text from two aspects: legal – criminal and crminological. In the next part of this article, the authors will analyse bearing stalking and family violence in terms of the Code on the prevention of domestic violence. Finaly, the authors discuss the inadeqacy of this legislation and the need for further legislative intervention in this area.

Key words: *stalking, crime, Criminal Code, incrimination.*

1. Introduction

Stalking in general, at the same time considered the old and the new phenomenon. Literature, art, movies, news records, comic books, television programs and songs have shown that the incidence of stalking was part of the society than two thousand years ago to the present. Acts

like Dante's Purgatory, Dickinson dark houses, as well as films like *Play Misty for Me*, *Fatal Attraction* or *Prohibited photos* show patterns of behavior that are considered stalking.¹ Mythology Greece and Rome is full of the story of the deities that were different from one another initiative followed, persecuted and harassed. More Justinian Institutions prescribes that the criminal follow a married woman, boy or girl². However, as a criminal phenomenon of modern times, stalking is recognized only after murder of actress Rebecca Schaeffer, 1989 in California. Rebecca was three years persecuted by his murderer³. During the same year, occurred five murders which preceded the stalking. These unfortunate events have caused a lot of public attention to the criminalization of stalking, with the aim of preventing serious forms of violence. Given the fact that the legislators were on a completely new territory, the original text of the offense⁴ was changed several times. After the last update in 1998⁵, Californian solution is now considered one of the most complete and best formulated criminalization of stalking in the United States. After California, within three years, all US states and the District of Columbia, included stalking in their criminal legislation. Follows Canada in 1993, Kvinslend 1994, followed by other Australian state. European countries have introduced the stalking of the criminal law a decade later. This is justified by the view that general terms, such as criminal, force and threats, in combination with the existing legal provisions are sufficient to ensure adequate protection of such behaviors. An exhaustive research on this subject shows that in 2007, just eight EU countries have specific legal norm which defines this phenomenon as prohibited. These are Austria, Belgium, Denmark, Germany, Ireland, Malta, the Netherlands and the United Kingdom.⁶ Analysis showed significant differences in legislative solutions in these countries, both in relation to enforcement action, the intent of the perpetrator and the potential penalty.⁷⁸ Nevertheless by 2010, these countries have joined the Czech Republic, Hungary, Italy and Luxembourg. The adoption of the Convention on Preventing and Combating Violence against women and Domestic violence by the Council of Europe on 11 May 2011 in Istanbul⁹, has significantly increased the number of European countries that adopt national laws criminalize stalking as a criminal offense. In addition to the EU member states, of which 21 now regulates this issue in criminal matters, and other European countries, signatories to the Convention, such as Montenegro, Serbia, Bosnia and Herzegovina, have included in their criminal substantive legislation the crime of stalking.

¹ Ristanović Nikolić V.; Lepojić Kovačević I., *Porganjanje: pojam, karakteristike i društveni odgovori*, Temida br. 4, Viktimološko društvo Srbije, Beograd, 2007, p. 3.

² Sanders, T.C., *The Institutes of Justinian*, Longamus, Green and Co, London, 1865, p. 26.

³ Robert Bardo sent a lot of letters Rebecca Schaeffer, that are not contained threats of violence The idea of how to approach her received from an article about an obsessive stalker who tried to kill the actress Theresa Saldana. Bardo hired a private detective, to discover where Rebekah lived, and soon killed, firing guns on the doorstep of her house, <https://abcnews.go.com/2020/video/rebecca-schaeffer-murdered-home-stalker-part-62368621>, Accessed 29 May 2019.

⁴ Art. 646.9 of the California Penal Code from 1991.

⁵ Art. 646.9 (a) of the California Penal Code from 1998.

⁶ Modena Group of Stalking, *Protecting women from the new crime of stalking: A comparison of legislative approaches within the European Union*, University of Moderna and Reggio Emilia, Moderna, 2007, p. 123.

⁷ Van der Aa, S, *New trends in the Criminalization of Stalking in the EU Member States*, Tilburg University, Tilburg 2017, p 111.

⁸Ibid.

⁹ Convention on Preventing and Combating Violence against women and Domestic Violence, URL= <https://www.humanrights.ch/en/standards/ce-treaties/violence-against-women/>, Accessed 29 May 2019.

2. Definition

The term stalking originates from the English word meaning stalk, to sneak, chase, pursue. Although, originally used to refer to prosecute animals and hunting in which the hunter follows, stalking and eventually kills the animal.¹⁰ The late twentieth and early twenty-first century begins to be used in the sense of stalking of human beings¹¹. In his book criminologist Nicol believes that the stalking of metaphorical expression used to refer to systemic harassment in terms of the behavior of a person who pursues a different person, like a hunter waits patiently and tendentious prosecute animal they planned to kill or use for food or clothing. Stalking is defined as "mode of behavior directed to a particular individual which includes the repetition of the method of providing a visual or physical proximity, communication without consent or verbal, written or implied threats, or a combination of those processes, that would cause the basic fear in other persons".¹²

The Legal Dictionary, is defined stalking as a criminal behavior consisting in the repetition of tracking and stalking another person. For example, sending flowers, writing love letters, taken as an independent not constitute criminal behavior. However, when these procedures are under taken with the intention of the other person to cause fear or harm, then representing the behavior of the criminal.

The complex nature of the stalking, it makes it difficult to precisely define. One definition defines it "as an act by which a person consciously and persistently followed, harassed or threatened by another person."¹³ Another group of authors defines it "unusual or long-term pattern of behavior that consists of making threats or harassment directed towards a particular person".¹⁴ Stalking will exist when "person follow and often tries to make contact with another person who is the subject of her obsessive thoughts".¹⁵ Stalking is a "euphemism for the phenomenon that occurs when a person of love and/or a sex motive constantly monitored and harassed another person".¹⁶ Also, interesting is the following definition "it is one or more of a set of actions that are repeated in are directed towards a specific person (ie. the target) that person experiences as unwanted and cause fear and insecurity".¹⁷ As we can see, there is still no single definition of stalking.

3. Differences in the criminalization of stalking

The national legislation which prescribes stalking as a crime observed numerous differences. We will consider some common characteristics in the legal definition. Most of the

¹⁰ Van der Aa, S, *Stalking in the Netherlands. Nature and Prevalence of the Problem and the Effestive od Anti-Stalking Measures*, Makly, Antwerpen, 2010, p. 23.

¹¹ Ristanović Nikolić *et al.*, *op cit.*, note 2, p. 4.

¹² Reid, Sue T., *Crime and criminology*, New York. 2005, p. 221.

¹³ Fremouw W.J.; Westrup D. Pennypacker J.; *Stalking on Campus: the Prevalence and Strategies for coping with Stalking*, 42J. Clinical SCI, 1997, p. 661.

¹⁴ Zona M.; Sharma K.; Lane J., *A comparative study of erotomaniac and obsessional subjects in a forensic sample*, Journal of Forensic Sciences, 38, 1993, p. 896.

¹⁵ Guleke J.; Sorrel T., *Violation of privacy and law: the case of stalking, Ethic and Philosophy*, 2016 (4), Warwick, The University of Warwick, p. 41.

¹⁶ Royakkers L., *The Dutch Approach to Stalking Laws*, Berkeley Journal of Criminal Law Vol (3), Iss (1), 2000, p. 36.

¹⁷ Westrup D., *Applying Functional Analysis to Stalking Behavior*, The Psychology of Stalking, Clinical and Forensic Perspective, 1998, p. 271.

countries that have criminalized this offense gave him adequate terminological determinant – stalking. Croatian lawmaker calls it *intrusive behavior*¹⁸. However, the country's by way of Ireland, Malta and England defended the view that the actions that constitute this offense can be attributed to the criminal offense of harassment. There is no doubt that harassment as a general concept that incorporates and stalking, but these terms are not synonymous. Owens well noted that stalking has serious connotations of harassment. In practice, victims of stalking are often left unprotected because the crime of stalking in most countries there is only, if the victim told the subjective element in the form of fear of violence. The basic harassment is often some form of threats of violence, as with the stalking doesn't have to be the case. The stalking is in itself violence, psychological pressure, fear of all present stalkers whose perfidious idea is almost impossible to legally established. Hence it is not surprising that foreign media called "*the most out of control time of our time*."¹⁹

Stalking is a crime that doesn't make a single action. Most countries in the legal definition of this crime prescribe action that "repeats" or "continuous", "rebellious" or going "over a longer period of time". However, legislative solutions do not even give approximate answers to the question of how many times the action must be repeated, not even what is considered a longer time period. Some authors suggest that the actions constitute the crime of stalking must be repeated at least twice a week for at least six months.²⁰ Moulin et al argue that stalking consists of at least ten separate actions attempt to establish communication with the victim for a period of at least four weeks²¹. The answer to this question is best appreciated on a case-by-case basis, in the context of the circumstances of the case and relationships of the offender and the victim. Also, legislative solutions countries differ in the technique of prescribing the acts of stalking. Some countries have chosen a true indication of possible enforcement actions, according to the principle of *lex certa*, while others have preferred a general definition and enforcement actions are listed as examples. The first method is justified by the need to protect the principle of legality and legal certainty. On the other hand, many authors point out that the stalkers are very creative in finding ways to avoid the blame in a situation where the act of limited. This is particularly limiting prosecution pursuers in the case of the use of new technologies, which contribute to the development of new tactics of stalking. Countries in which the need for legal certainty prevailed in relation to the need for flexibility are Austria, the Czech Republic, Romania, Spain, Sweden, Slovenia and Malta.²²

The question of whether the victim's side there must be a subjective feeling of fear for the safety, anxiety, agitation or anxiety, that there was stalking, is still controversial among authors. There are those that believe that the sense of fear in the victim is the basic element of stalking. Without this element, certain behavior could qualify as harassment, but not as a stalking. The basic concept of stalking is the experience of the person who is the object of unwanted attention, that this behavior is disturbing and that is fear.²³ On the other hand, many authors believe that prescribing fear of the victim as an element of the offense, a significant number of victims would remain unprotected. In a survey of 1430 respondents who considered

¹⁸ Art 140 Croatian Criminal Code, Official Gazzete No 125/11, 144/12, 56/15, 61/15, 101/17, 118/18.

¹⁹ Owens, J. G., Why definition matter: *Stalking victimization in the United States*, Journal of Interpersonal Violence, 31 (12), 2016, p. 2220.

²⁰ Royakkers L., *op.cit*, note 4, p. 40.

²¹ Mullen, P., Pathe, M., Purcell, R., *Stalkers and their Victims*, Cambridge University Press, London, 2000, p. 167.

²² *Ibid*.

²³ Owens., *op. cit*, note 2, p 2220.

themselves the victims of stalking, only 36% said that they experienced subjective feelings of fear. Over 60% of respondents did not meet the legal criteria for the victims, because they did not feel fear.²⁴ In some jurisdictions introduced the concept of "reasonable person" as a criterion. Thus, the victim does not have to prove that he has experienced fear, anxiety or any other consequence of stalking. It is sufficient for the court to assess, on the basis of all the circumstances of the offense, to anxiety and fear exist in the view of "reasonable, rational person."²⁵

Most countries in addition to the basic form of this criminal act, prescribes more severe form. Aggravating circumstances related to the victim and some of its features (child, pregnant women, helpless person) or relating to the relationship that exists or existed between the victim and the stalker (marriage, partnership, guardianship). For example, Hungarian law goes further and envisages stricter punishment if the offender threatens the privacy of other more important people, or causes him distress, abuse of a relationship of trust, authority or influence it has in relation to the victim. When it comes to the prosecution of the perpetrator of this crime, in most countries is taken at the proposal of the victim, although there are solutions where the prosecution ex officio in the case of a qualified form²⁶. On the other hand, German criminal law provides that the public prosecutor can initiate criminal proceedings ex officio in the case of a basic form, if required by the public interest²⁷. In Croatia, the prosecution ex officio is taken only in cases where the victim is a child²⁸.

4. Stalking in Criminal Code of the Republic of Serbia

The Criminal Code of the Republic of Serbia to the amendments in 2016 did not contain specific criminalization of stalking, and is in search of similar crime jurisprudence persecution cases prosecuted under the crime of endangering security.²⁹ Today, in our criminal legislation in the group of criminal offenses against the freedom and rights of man and citizen provided the stalking.³⁰ Object protection of stalking is the personal freedom of man. But in a broader sense, it is also the private life of the individual, namely the right to respect it. Privacy encompasses countless aspects of human life and without it you can't imagine the free development of man. Everything concerning personal health, philosophical, moral, religious beliefs, family life, friendships and other social relationships, belongs to private life.³¹

The stalking has the basic shape and two qualified forms. The act of committing basic offense of stalking consists in taking one of several alternative anticipated activity in art. 138a. Criminal Code of Serbia, during a period of time, as follows: 1) monitoring an unauthenticated another person or taking other action for the purpose of physical approach to that person, contrary to his will; 2) contrary to the will of another person attempt to establish contact with it directly, or through a third party through the means of communication; 3) abuse

²⁴ Tjaden, P., Thoennes, N., *Stalking in America: Finding from the nationale violence against women survey*, National Institute of Justice, Washington, DC, 1998, p. 143.

²⁵ Ibid.

²⁶ Tjaden et al, op. cit., p. 146.

²⁷ Art 138 Criminal Code of the Federal Republic of Germany, 1971, amended 2013.

²⁸ Art 140 Croatian Criminal Code, Official Gazzete No 125/11, 144/12, 56/15, 61/15, 101/17, 118/18.

²⁹ Art 138 Criminal Code of Republic of Serbia, Official Gazzete No 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014.

³⁰ Art 138a Law on Amendments to the Criminal Code of the Republic of Serbia, Official Gazette 94/2016

³¹ Cohen – Jonathan, G., *Respect for Private and Family Life, The European System for the Protection of the Rights*, Kluwer, 1993, p 356.

of personal data of another person or a person close to him like offering goods or services; 4) the threat of an attack on life and limb or liberty of another person or a person close to him; taking similar actions in a way that can significantly threaten the personal life of the person against whom action is taken. We can conclude that there is broad incrimination set and can relate to many situations, however, among other things, the monitoring of certain people through social networks, and against her / his will. Of course, it is necessary to do so for the purpose of physical to a certain person. Thus, the existence of the crime will not be enough just to follow certain people on social networks (for example, by sending a request for friendship on different profiles, etc.), it is necessary to prove that the target was a natural convergence of the person (for example, search for its address of mutual friends on network, information about her workplace, lifestyle, etc ...).

Another aspect of expanding these charges, refers to the second point of the basic form, in the case when the person over a certain time period contrary to the will of another person attempts to contact with them, directly or through a third party or communication means. So, here it is necessary to insist (with aggressive persistence) to establish contact with a person who does not want, and to do so within a certain period of time. It is assumed that in this relation, often report a person who persistently send messages through social networks to people who do not respond to them and so on.

The third point is provided for the punishment of persons who during a specified period of time abusing the personal data of another person or a person close to him like offering goods or services. So this part of the offender data you have about a specific person uses against his will, and the intention of achieving a potential material benefits. This example can be persistently and aggressively sending emails containing offers of a particular product to a person who is on your social network presented the possible need for such products (sports supplements offer the person using the gym for example.). On social networks, these data can be exploited in various ways, and it will be interesting to see how it will be set according to this jurisprudence. The remaining two points in this paragraph refer to threats, as well as all other similar actions which may significantly jeopardize the personal life of the person against whom undertaken. Significantly compromise or influence the personal life of the victim may involve her fear or anxiety resulting from persecution, which is why they say changes or closes their accounts on social networks, avoid visiting certain places and so on.

The existence of the basic shape will not be sufficient only one thus taken action. It is necessary to do so in a certain time interval, on / in a certain sense an aggressive manner or so that it can affect the life of victim. The prescribed punishment for the crime of stalking is a fine or imprisonment of up to three years. Eligible forms of this criminal offense relating to the consequences of actions that stalking can produce. Both will be sentenced to three to five years to punish the offender, if stalking causes danger to life, health or body of persons to whom it was committed or person close to him. The most severe form of this criminal act, for which a prison sentence of one to ten years, refers to the occurrence of death of the victim. In our criminal law system criminal prosecution for the crime of stalking is undertaken by the public prosecutor and criminal proceedings are initiated *ex officio*.

5. Law on prevention of domestic violence and stalking

Interestingly information that drew the attention of the authors is that in most cases, stalking preceded by a personal, emotional (romantic) relationship between the victim and stalker.³² Here are particularly important cases of domestic violence, especially when it comes to partner violence. According to research by the US National Center for Victims of Crime, which was conducted on 8,000 women and 8,000 men aged eighteen years, each of the twelve women, each of forty-five men at least once in my life have been the victims of stalking. In 2001, the UK was carried out extensive research on interpersonal violence in a sample of 22,463 men and women, calendar age of 16 to 59 years. Under interpersonal violence covers situations of domestic violence, sexual assault and stalking. Over a period of twelve months preceding the interviewing, 13% of women and 9% of the men surveyed were exposed to some form of interpersonal violence. Of the total number of respondents, 8% of women and 6% of men were exposed to stalking.³³

In the Republic of Serbia adopted the Law on the Prevention of Domestic Violence³⁴, which represents a systematic approach to a social problem of partner violence. This law is to be applied to cooperation in preventing domestic violence in criminal proceedings, including the stalking (art. 138a, Criminal Code). This collaboration means that each state authority (police administration, basic and higher public prosecutor's office, basic and higher court) and social institutions (social work center) appoint persons designated for the connection to daily exchange information and data relevant to the prevention of stalking, detection, prosecution and trial of offenses provided for by the law and to provide protection and support to victims of persecution. Too, this law provides for the establishment and for the Group coordination and cooperation of which consists of representatives of the above-mentioned governmental agencies and institutions, as well as representatives of the Help and Support victims and witnesses. The group considers the case of stalking that is not terminated by a final decision in the civil and criminal procedure, as well as cases when you need to provide protection and support to victims of stalking and develops an individual plan of protecting and supporting victims.

Conclusion

Stalking is a multidimensional social problem that is defined through its individual manifestations and their etiology. The Republic of Serbia has made a significant step when it criminalized the stalking, and thus under took a legislative measure to the fulfillment of the obligations assumed by the ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic violence to take legislative and other measures to ensure protection from persecution. The stalking has drawbacks that the practice will provide answers. The first question that analyzing the provisions of the law appears is that it is a "certain period of time" in which it is necessary to take action of stalking, and that all activities undertaken by the offender can be subsumed under the term "other similar acts.". The recommendation is that the authors are now required following the application of legal

³² Konstantinović Vilić S.; Ristanović Nikolić V.; Kostić M, Kriminologija, Pravni fakultet Niš, Niš, 2009, p.155.

³³ Walby, S.; Allen J., Domestic violence, sexual assault nad stalking: *Finding from the British Crime Survey Home Office Research Study 276, March 2004*, URL= www.homeoffice.gov.uk/rds/pdfs04/hors276.pdf-, Accessed 5 June 2019.

³⁴ Law on the Prevention of Domestic Violence, Official Gazzete No 94/2016.

solutions or ways of prosecuting criminal offenses of harassment, with the aim of finding adequate instrument response to stalking, all in order to examine the possibility of passing a special law on stalking. Particular attention must be paid to the protection and support needed victim of stalking, for which the authors considers that in this moment with such legislative solutions insufficiently regulated.

REFERENCES

- Convention on Preventing and Combating Violence against Women and Domestic Violence, <https://www.humanrights.ch/en/standards/ce-treaties/violence-against-women/>, Accessed 29 May 2019.
- Criminal Code of Republic of Serbia, Official Gazzete No 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014.
- Criminal Code of the Federal Republic of Germany, 1971, amended 2013.
- Croatian Criminal Code, Official Gazzete No 125/11, 144/12, 56/15, 61/15, 101/17, 118/18.
- Fremouw W.J., Westrup D. Pennypacker J., *Stalking on Campus: the Prevalence and Strategies for Coping with Stalking*, 42J. Clinical SCI, 1997, pp. 660-666.
- Guleke J., and Sorrel T., *Violation of privacy and law: the case of stalking, Ethic and Philosophy*, 2016 (4), Warwick, The University of Warwick, pp. 32-60.
- Konstantinović Vilić S.; Ristanović Nikolić V.; Kostić M, *Kriminoogija*, Pravni fakultet Niš, Niš, 2009.
- Law on the Prevention of Domestic Violence, Official Gazzete No 94/2016.
- Modena Group of Stalking, Protecting women from the new crime of stalking: A comparison of legislative approaches within the European Union, University of Moderna and Reggio Emilia, Moderna, 2007, pp. 100-123.
- Mullen, P.; Pathe, M.; Purcell, R., *Stalkers and their Victims*, Cambridge University Press, London, 2000, pp. 164-173.
- Murder of Rebecca Schaeffer – reiew URL= <https://abcnews.go.com/2020/video/rebecca-schaeffer-murdered-home-stalker-part-62368621>, Accessed 29 May 2019.
- Owens, J. G., Why definition matter: *Stalking victimization in the United States*, Journal of Interpersonal Violence, 31 (12), 2016, pp. 2196-2226.
- Reid, Sue T., *Crime and criminology*, New York. 2005.
- Ristanović Nikolić V., Lepojić Kovčević I., Porganjanje: pojam, karakteristike i društveni odgovori, Temida br. 4, Viktimiološko društvo Srbije, 2007. Beograd, pp. 3-12.
- Tjaden, P.; Thoennes, N., *Stalking in America: Finding from the nationale violencea against women survey*, Washington, DC: National Institute of Justice, 1998, pp. 131-147.
- Van der Aa, S, *New trends in the Criminalization of Stalking in the EU Member States*, Tilburg University, Tiloburg 2017, pp. 96-116.
- Van der Aa, S, *Stalking in the Netherlands. Nature and Prevalence of the Problem and the Effestive of Anti-Stalking Measures*, Makly, Antwerpen, 2010.
- Walby, S.;Allen J., Domestic violence, sexual assault nad stalking: *Finding from the British Crime Survey Home Office Research Study 276, March 2004*, URL= www.homeoffice.gov.uk/rds/pdfs04/hors276.pdf-, Accessed 5 June 2019.
- Wesstrup D., Applying *Functional Analysis to Stalking Behavior, The Psychology of Stalking*, Clinical and Forensic Perspective, 1998, pp. 267-276.
- Zona M.; Sharma K.; Lane J., *A comparative study of erotomaniac and obsessional subjects in a forensic sample*, Journal of Forensic Sciences, 38, 1993, pp. 894-903.