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CRIMINAL OFFENCE OF STALKING IN SERBIAN CRIMINAL LAW AND MACEDONIAN CRIMINAL LAW

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Abstract

Stalking is a harmful and socially dangerous phenomenon. The victim of stalking faces great mental and physical and stress and fear. In this paper, the authors analyze the characteristics of the criminal offense of stalking in Serbian and Macedonian criminal legislation. In order to examine the similarities and differences in legal solutions, the authors primarily use the comparative law method. After presenting the legal solutions in these two countries and the judicial practice in Serbia and in North Macedonia, the authors address the issue of an effective legal response to stalking and action aimed at combating this crime.

Keywords: *criminal law, stalking, legislation, jurisprudence.*

1. Introduction

In etymology, the word "stalking" is derived from the English word "to stalk", which means to sneak up, pursue, secretly follow someone closely over a period of time (CUP, 2024).¹ Stalking can be explained as a continuous, unwanted intrusion of one person into another person's life, through direct or indirect contact and communication; thus, it is also known as obsessive pursuit (Randelović, 2016, p.233). The basic characteristic of stalking as a socially unacceptable behavior is one person's desire to make contact with another person and be present in his/her daily life against the other person's will (Kovačević, 2016, pp. 58-59).

Although the criminal offence of stalking is a relatively new form of socially unacceptable behavior, some criminologists (such as Kamir) point out that the first case of obsessive pursuit (persecution, stalking) was recorded in the Mesopotamian myth of Lilith (1,000 BC), but we may also refer to the case of Helen of Troy who was pursued by Agamemnon. The first incrimination of socially unacceptable conduct which could be designated as the crime of stalking in modern vocabulary was recorded in Justinian's Institutions of 529 AD. Paragraph 4 of book IV refers to the infliction of injuries caused by the constant monitoring of matrons (supervisors) or obsessive pursuit of a young boy or young girl who is still underage (Van der Aa, 2010, p.30).

¹ CUP (2024). Cambridge Dictionary: Stalk; <https://dictionary.cambridge.org/dictionary/english/stalk?topic=pursuing>

In the United Kingdom, the first cases of criminal prosecution and trial for the committed crime of stalking were the landmark cases *Dennis v Lane* (1704) and *R v Dunn* (1840) but the first anti-stalking law was adopted 157 years after the case *R v Dunn* (Dimovski, 2024:105; Van der Aa, 2010, pp. 30-31). After these first cases in Great Britain, countries around the world were silent on this socially unacceptable behavior for quite a long time. In the United States, the murder of a famous television actress Rebecca Schaeffer on her doorstep in 1989 by a mentally ill fan was the case with huge media coverage which contributed to spreading awareness about the need for a response of state authorities to the crime of stalking. This case and four other cases of women stalking in Orange County, all of which also had fatal outcomes, contributed to the incrimination of stalking as a criminal offense in the state of California. In the UK, the first anti-stalking law called Protection from Harassment Act was passed in 1997, which explicitly incriminated the offence of stalking. Yet, for a long time, the UK was the only country in Europe that sanctioned the crime of stalking. One of the possible reasons was the lack of political will in most states of the time to criminalize stalking because it was considered to be a private matter of individuals involved (Dimovski, 2024, p.105; Van der Aa, 2010, pp.30-31).

Taking into account the historical context of emergence of stalking and the social danger arising from this phenomenon, the authors of this paper analyze the criminal law aspects of stalking by relying on to the contemporary findings in victimology and criminology, particularly in view of the fact that the victims of stalking face huge psychological and physical stress and fear. The authors analyze in more detail the most important characteristics of the criminal offense of stalking in Serbian and Macedonian criminal legislation, searching for similarities and differences in certain legal solutions. To that effect, the authors primarily use the comparative law method. By comparing legal solutions and practices of the relevant courts of different countries, the authors address the issue of an effective legal response to stalking and action aimed at combating this crime.

2. The Criminal Offence of Stalking in the Criminal Law of the Republic of Serbia

The criminal offense of stalking was introduced into the Serbian criminal legislation in 2016. Nomotechnically speaking, the crime of stalking is part of Chapter XIV of the Criminal Code of the Republic of Serbia, titled "Criminal offenses against the rights and freedoms of man and citizen". The object of protection in these offenses are the rights and freedoms of man and the citizen but personal rights and freedoms are also protected in other chapters of the Criminal Code. The question arises whether a distinction can be made between rights and freedoms, i. e. whether there are separate criminal offenses against rights and separate criminal offenses against freedoms, as well as why both criminal offenses are systematized within the same chapter of the Criminal Code (Stojanović, 2024, pp. 512-513). The legislator probably had in mind that the provisions of the Constitution of the Republic of Serbia² do not explicitly distinguish between rights and freedoms. Criminal repression is legitimate only if it serves to protect the fundamental rights of man and those social goods which are in the function of exercising those rights. In this sense, freedom is one of the fundamental rights of man and, thus, one can speak of the "right to freedom" (Stojanović, 2024, p. 513). In criminal law theory, there is a view that it is enough to refer to the protection of rights and that it is not necessary to set freedoms as an object of protection at the same level as rights (Stojanović, 2024, p.513). Essentially, referring to the constitutional provisions, the legislator makes no distinction between freedoms and rights.

The criminal offence of stalking is prescribed in Article 138a (1) of the Criminal Code of the Republic of Serbia (hereinafter: CC RS).³ It is committed by a person who, over a certain period of time, persistently: 1) follows another person without permission or undertakes other actions with the aims of

² The Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*", 98/2006, 115/2021.

³ The Criminal Code of the Republic of Serbia, *Official Gazette of the RS*, 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019; hereinafter: CC RS).

getting physically closer to that person contrary to his/her will; 2) attempts to establish contact with another person against the person's will, either directly or through a third party, or through means of communication; 3) abuses the personal data of another person or person close to him/her for the purpose of ordering goods or services; 4) threatens to attack the life, limb or freedom of another person or a person close to him/her; and 5) undertakes other similar actions in a manner that may perceptibly jeopardize the personal life of the person against whom the actions are taken. The basic form of this criminal offense is punishable by a fine or imprisonment of up to three years, but this offence also has two more severe (qualified) forms. The first qualified form exists if, due to the commission of the basic form of criminal offense, the perpetrator endangers the life, limb and health of the person against whom the act was committed or a person close to him/her; in such a case, the offender will be punished by imprisonment for a term ranging from three months to five years (Art. 138a (2) of the CC RS). Another qualified form of this criminal offense exists if, due to the commission of the basic form of the criminal offense, the perpetrator causes death of another person or a person close to him/her; in such a case, the prescribe punishment is a term of imprisonment ranging from one to ten years (Art. 138a (3) of the CC RS).

The introduction of the criminal offense of stalking in the criminal justice system of the Republic of Serbia can be assessed as positive for a number of reasons. First, this fulfilled the obligation arising from the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention 2011), ratified by the Republic of Serbia in 2013.⁴ Second, it ensured a more complete criminal law protection to victims of stalking. However, it should be noted that several controversial issues are observed in the incrimination of the criminal offense of stalking (Article 138a of the CC RS). The first one refers to the phrase "over a certain period of time"; it is unclear what period of time is required for taking an action that constitutes the essential element (*actus reus*) of the criminal offense of stalking in order to be considered a "certain period of time". For example, the criminal offense of stalking has not been committed if the perpetrator sends the victim a hundred disturbing messages in a single day; yet, depending on the content of these messages, it may constitute a criminal offense of endangering security under Article 138 of the CC RS. On the other hand, if these actions have been taken over a longer period of time (several weeks or months), then it could be a criminal offense of stalking (Paunović, 2019, pp. 31-32).

The second question is whether it is an active criminal offense (where the act occurs) or a consequential offence (where the conduct causes a particular outcome). The concept of an active criminal offense rests on the following fact: for a criminal offense to exist, it is sufficient that the action of the criminal offense has been undertaken. The advantage of this understanding is that it is easier to achieve criminal law protection because it is not necessary to prove that some negative effect or consequence has occurred (Miladinović-Stefanović, 2016, p.148). In criminal law theory, there are also opinions that stalking is a consequential criminal offense, and that it exists only in cases where undertaking the act of commission leads to "a noticeable or significant threat to the personal life of another or a person close to him/her". Considering that stalking threatens the personal rights of a particular person, the above circumstance should be assessed according to the subjective characteristics of the victim and not according to the objective criteria of the average citizen (Paunović, 2019, pp. 33-34). We believe that both views have their advantages. As already noted, the understanding of stalking as an active criminal offense makes it easier to prove it; in case of perceiving, it as a consequential criminal offence, the existence of a criminal offense is conditioned by the occurrence of harmful consequences for the victim.

In practice, another issues is who is considered to be a close person. In terms of victimology, family members may be indirect victims of this crime (within the meaning of the Criminal Code). If observed in a broader context (within the meaning of the Family Act), victims may be persons who were or are still in an

⁴ The Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention, 11 May 2011) was ratified by the Republic of Serbia, *Official Gazette of the Republic of Serbia-International Treaties*, 12/2013.

emotional or sexual relationship. In the broadest sense, close persons (vicarious victims) may also be friends and colleagues of the injured party (Paunović, 2019, p. 34).

Another controversial issue may be the problem of establishing the subjective element of importance for the existence of the criminal offense of stalking. It is clear that the commission of this criminal offense implies the presence of intent. In this sense, it is necessary to prove direct intent, i. e. that the act was committed knowingly, deliberately and voluntarily. However, taking into account the condition from Article 138a of the CC RS that the commission of this criminal offense entails an action taken "persistently over a certain period of time", it is quite clear *de lege lata* that direct intent must also include awareness of repeated performance of actions that constitute an essential element of the criminal offense of stalking. If the perpetrator has awareness only of one-time action, then it could constitute some other criminal offense (Paunović, 2019: 34-35). According to the letter of the law, the consequence in the form of "a noticeable endangerment of the personal life of the person against whom the actions are taken" is envisaged only for the criminal offense referred to in Article 138a (para. 5) of the CC RS; although other paragraphs do not explicitly prescribe this consequence, it is difficult to imagine the situation that the perpetrator can also undertake the actions prescribed in other paragraphs without direct intent.

When it comes to "other similar actions", they have to be committed knowingly, deliberately and voluntarily. Due to the persistent and continuous nature of the offender's conduct, aimed at causing certain change in the victim's behavior and mental life, the presence of direct intent is considered to be necessary (Stojanović, 2024:544).

Resolving all disputed issues is of great importance for the principle of legality in criminal law, which ensures the citizens' legal certainty (Lazarević, 2006, p. 3). Considering all the above, it can be concluded that the criminal offense of stalking protects the personal life of an individual as the most important social value, and that its introduction into the Serbian criminal legislation is a completely legitimate move. In the next part of the paper, we will focus on the criminal offense of stalking in the criminal legislation of the Republic of North Macedonia.

3. The Criminal Offence of Stalking in the Criminal Law of the North Macedonia

The criminal offense of stalking (Mak. *demnenje*) is incriminated by the provision of Article 144a of the Criminal Code of the Republic of North Macedonia⁵ (hereinafter: CC RNM). This criminal offense is committed by a person who repeatedly monitors, persecutes or otherwise unauthorizedly interferes with the personal life of another, or establishes or seeks to establish unwanted contact with another, by moving in the space where that person is located, by abusing one's personal data, by using public information or other means of communication or otherwise psychologically harassing, intimidating or abusing the person, and thereby causing the feeling of insecurity or anxiety of that person or a person close to him/her; such a person shall be punished by a fine or imprisonment for a term not exceeding three years. A qualified form of this criminal offense exists if it is committed against a person who is involved or was involved in an intimate relationship with the perpetrator, or against a child; such an offence is punishable by a term of imprisonment ranging from six months to five years. (Article 144a CC RNM). Criminal prosecution for this offence is initiated by the injured party.

Like in other countries of the former SFRY, stalking is widespread in the Republic of North Macedonia. The results of the research conducted in 2023 within the framework of the National Network against Violence against Women and Domestic Violence - Voice against Violence from Skopje, which included 349 female respondents, show that 88.3% of them stated that they were victims of intrusive

⁵ The Criminal Code on the Republic of North Macedonia, *Official Gazette of the Republic of Macedonia*, 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015, 226/2015, 97/2017, 248/2018, and *Official Gazette of the Republic of North Macedonia*, 36/2023; hereinafter: CC RNM).

behavior embodied in interference with the victim's privacy, establishing unwanted contact or endangering one's personal space which generated a sense of fear, anxiety and concern for their own safety (Spasovska, 2023, p. 14). The perpetrators of the criminal act of stalking are mostly men known to the victim (in 80% of cases); only in 20% of cases they were persons unknown to the victim. Of particular concern is the research finding that as many as 15% of minors have experienced stalking (Spasovska, 2023, p. 38). Although the aforementioned research was conducted on a non-representative sample, its results indicate the prevalence of stalking as a socially harmful phenomenon.

According to the results of the OSCE research on violence against women in North Macedonia (2019), in more than a quarter of the most serious incidents (28%), stalking lasted for several days; in 13% of cases, it lasted longer than 10 years but, in half of the cases (48%), it lasted for several months. The most common forms of stalking are threats over the phone, while 4% of respondents stated that they experienced stalking at the age of 15. The next most common form of stalking is deliberate tracking, waiting in front of a house, school or workplace and sending SMS messages. Each of these forms was reported by 2% of respondents, and 6% of female respondents stated that they were still victims of stalking (OSCE, 2019, p. 31). This indicates that the legislator has to focus on the criminalization of stalking in North Macedonia.

While there are some similarities between the incrimination of stalking in Serbian and Macedonian criminal legislation, we may also identify some differences. In both legislations, the act of committing the criminal offense of stalking is similarly defined and includes actions aimed at establishing or maintaining unwanted contact with the injured party or a person close to him/her. Both legislations prescribe the same criminal sanction for the basic form of this criminal offense of stalking: a fine or a term of imprisonment of up to three years. The main differences between the two legislations are reflected in the prescribed qualified forms and the grounds for the prosecution for the criminal offense of stalking. In the Serbian criminal legislation, qualified forms exist if, due to the commission of the basic form of criminal offense, there is an imminent danger to the life, health or limb of the person against whom the act was committed or a person close to him/her; in such a case, the offender shall be punished by imprisonment for a term of three months to five years. Another qualified form of this criminal offence exists if, due to the commission of the basic form of the criminal offense, the act resulted in death of another person or a person close to him/her; in that case, the prescribe punishment is a term of imprisonment ranging from one to ten years. In the Macedonian criminal legislation, a qualified form exists in case the offence is committed against a person with whom the perpetrator is or was in an intimate relationship, or against a child; in such a case, the prescribed punishment is a term of imprisonment ranging from six months to five years.

The Macedonian legislation does not prescribe the most serious form of stalking, in case the commission of the offense results in the death of another person or a person close to him/her, which is criminalized in the Serbian criminal legislation and punishable by a term of imprisonment ranging from one to ten years. Yet, the Macedonian criminal legislation should not be rebuked for not enacting this provision because the criminal offense of stalking is still under development, and both criminal law solutions are most likely to change in the future.

We may also raise the question whether it is necessary to prescribe this most serious form of stalking in the legislation of Serbia, bearing in mind that the legislator prescribed a special maximum punishment of up to ten years, taking into account the specific circumstances or the intent to commit this act, whereas the prescribed general maximum punishment for the commission of this crime is a term of imprisonment of up to twenty years. Thus, consideration should be given as to whether it is necessary to incriminate this qualifying circumstance of the act, or to determine it as an aggravating circumstance of the offence in the sentencing process in case this form of stalking has occurred.

In the Serbian criminal legislation, the basic form of the act is committed with intent. When it comes to a more serious and the most serious form of stalking, it should be noted that such an act is qualified by a more serious (grave) consequence which may be attributed to the offender's negligence. The qualifying circumstances refer the perpetrator's liability for causing a more serious consequence prescribed in the general provisions of the Serbian Criminal Code. Thus, under Article 27 of the CC RS, when a criminal

offence results in a more serious consequence (where a more severe punishment is prescribed), such punishment may be imposed if the consequence is attributable to the offender's negligence and if the offender acted with intent (unless the offender's conduct comprises the elements of some other criminal offence).

The Macedonian criminal legislation offers a better qualifying circumstance of the offense, which may be said to be more acceptable. The legislator did not deal with the degree of danger of committing the act against life, limb and health of the victim/injured party, or the occurrence of death of the victim/injured party resulting from the commission of the act, given the fact that the perpetrator does not undertake the act for this purpose but for the purpose incriminated in the basic form of the criminal offence. Thus, in case the qualifying circumstances involve the perpetrator's intent, the Macedonian solution (which prescribes the qualified form of stalking in case the act is committed against a person who is involved or was involved in an intimate relationship with the perpetrator, or against a child) is more acceptable.

In addition to different qualifying circumstances of the criminal offence of stalking (where we prefer the Macedonian solution), there is a significant difference in criminal prosecution. In the Republic of Serbia, prosecution for the criminal offence of stalking is initiated *ex officio*; in North Macedonia, it is initiated at the proposal of the victim. Although it is a criminal offence that interferes with the sphere of personal life, we believe that the legal solution in the Serbian criminal legislation is more appropriate due to the degree of social danger stemming thereof. Namely, for a number of objective and subjective reasons, the victim may be prevented from submitting a proposal for criminal prosecution of an act of stalking, which may ultimately lead to inadequate criminal protection. *De lege ferenda*, when amending the criminal legislation of the Republic of North Macedonia, the legislator should consider the possibility of introducing the *ex officio* prosecution for the criminal offence of stalking (without the proposal of an injured party). In our opinion, it would improve the criminal law protection of victims from this form of crime.

In order to improve the protection of victims of stalking in the Republic of Serbia and the Republic of North Macedonia, it is necessary to consistently apply the existing legal solutions, and to raise awareness among citizens about ways to recognize stalking. In addition, continuous education of representatives of competent state bodies and services (police, prosecutor's office, courts and social welfare centers) can contribute to more effective protection of victims (Spasovska, 2023, pp. 41-42). It is also necessary to provide protection for all victims of gender-based violence from EU countries who happen to be on the territory of North Macedonia, which is very important considering that the Republic of Macedonia is a candidate for membership in the European Union (Risteska & Cekov, 2019, p. 38).

The analysis of relevant case law is of particular importance in combating persecution. In the next part of the paper, we present some cases from the judicial practice in the Republic of Serbia and the Republic of North Macedonia involving the criminal offence of stalking.

4. The Criminal Offence of Stalking in Judicial Practice in the Republic of Serbia

In this part of the paper, we will present and briefly analyze appropriate parts of judicial decisions on the criminal offence of stalking rendered by Serbian courts of different jurisdiction. The court decisions are retrieved from the *Paragraph Lex* information database of legal regulations and court decisions.

4.1 Judgment of the Court of Appeal in Kragujevac, Kž3 14/2023 dated 6.12. 2023

The distinctive characteristics of the criminal offence of stalking have been achieved when the perpetrator, over a certain period of time, in order to physically approach and establish contact with the injured party against her will, continuously sends messages to the victim via mobile phone, appears in the immediate vicinity of the victim's workplace and records her with a mobile phone, sends her kisses and heart-shaped gestures, overtakes her while driving and blocks her way by his vehicle looking in her direction. By taking these acts, the offender has seriously endangered her personal life.

In the explanation, the court stated:

"The second-instance court properly established that the defendant (B.B.) had undertaken actions, in the manner and for a period of time stated in the disposition of the judgment, which were contrary to the will of another person (the victim L.L.), by persistently following and monitoring her without permission, attempting to establish contact with the victim through means of communication and undertaking other actions described in the disposition of the judgment, which endangered her personal life. In addition to the aforesaid messages that he undoubtedly sent her, he waited for her in front of the school where she was employed, sending her kisses and making heart-shaped gestures. On several occasions, he blocked the way with his car, opened the window while overtaking her, played loud music looking in her direction and tried to establish contact with her. On several occasions, he recorded her with his mobile phone while she was walking in the street on her way to school and he posted a notification on the Internet portal "CC" that he was involved in an emotional relationship with the victim. After the victim filed a criminal complaint against him for the previously described actions which, as correctly established by the second-instance court, clearly reflect the defendant's persistent endeavour to establish contact with the victim, which are recurrent and undertaken against the will of the injured party, which are of such intensity that they may cause psychological insecurity and fear of the injured party, and which may noticeably endanger the personal life of the injured party, as explicitly stated in the injured person's testimony before the court, which was properly accepted by the second-instance court as honest, clear, unambiguous, convincing testimony, the third-instance court accepts these reasons as such and refers to them. In his defence, the defendant claimed that he sent messages to the victim by mobile phone in the form of a holiday stickers and a song with a message as expressions of friendship because they used to be schoolmates and because it was a common form of communication among friends. The second-instance court properly assessed the defendant's defence as unfounded and given in attempt to avoid criminal liability because he did not provide evidence in his defence to prove that the victim had sent him such messages and wanted that kind of communication with him. In this regard, the court also assessed as unfounded the allegations of the defendant's lawyer who claimed that, if the defendant's alleged actions of unauthorized following almost on a daily basis and persistent efforts to establish contact with the victim L.L. in the specified period were observed in isolation, they were not sufficiently harmful to merit incrimination, that most of the actions could be claimed to be even socially acceptable, bearing in mind that the defendant and the injured party had known each other since their student days, that they come from the same local community where most people know each other. The defendant's representative further claimed that the second-instance court did not establish in a clear and decisive manner that the defendant had taken the actions "persistently", which is the essential characteristics of the criminal offence of stalking; thus, pointing to the violation of the Criminal Code, the defence attorney asserted that all the above actions of the defendant, observed in isolation and in mutual correlation, did not constitute an act of commission of the crime of stalking prescribed in Article 138a (para.1, items 1, 2 and 5) CC. In the conducted proceedings, the second-instance court correctly and fully established all decisive facts, including those which are of importance for the act of commission of the crime of stalking as well as those concerning the defendant's subjective attitude towards the committed offense; the criminal legislation was properly applied to the correctly and fully established factual situation when the second-instance court legally assessed the illegal actions of the defendant (B.B.) as a criminal offense of stalking prescribed in Article 138a, para. 1, items 1, 2 and 5 CC" (Judgment of the Court of Appeal in Kragujevac, Kž3 14/2023 dated 6.12. 2023).

It follows from the cited judgment that the action of the criminal offense of stalking can be undertaken in different ways: by sending messages, following another person over a period of time, and taking other actions aimed at establishing contact with the victim against his/her will.

4.2 . Judgment of the Higher Court in Čačak, Kž 142/2020 dated 5.11. 2020

The act of stalking does not have to cause the victim's feeling of fear and/or endangerment.

In the explanation, the court stated:

"The fact that the defendant and the injured party were in an intimate relationship, occasionally seeing each other, and that the injured person in the said period sent her explicitly lascivious photographs to the defendant, has no impact on the existence of the aforesaid criminal offence because it did not give him the right to stalk her against her will when she wanted to end the relationship. The injured party explained that she was forced to see the defendant several times after that because he posted her photos on fake profiles, sent offensive and threatening messages to her family, friends and ex-husband whose financial support she financially depended on. In her detailed testimony, the injured party fully confirmed the claims presented in the indictment, which were largely supported in the testimonies of witnesses (...) who pointed out that the defendant had been stalking the injured party for a long time and monitored her movements. As the defendant's lawyer alleged in his appeal that the injured party did not feel fear or threat for receiving such messages, the court considers that such allegations have no affect on a different decision in this criminal-law matter because the subjective feeling of fear or endangerment is not an important element of this criminal offense, unlike the criminal offense of endangering security prescribed in Article 138 CC; the injured party denied such allegations, explaining that she was afraid of the defendant, which was confirmed by the witnesses." (Judgment of the Higher Court in Čačak, Kž 142/2020 dated 5.11. 2020),

This judgment points to a very important circumstance: for the criminal offense of stalking to exist, the undertaken actions should not necessarily cause the victim's fear.

4.3 Judgment of the Higher Court in Čačak, Kž 204/2021 dated 9.11.2021

The defendant who has been found guilty of stalking shall serve an effective prison sentence, and not a prison sentence in his place of residence, due to the aggravating circumstance arising from the application of the institute of recidivism in the sentencing process.

In the explanation, the court stated:

"The second-instance court accepts the appeal filed by the Basic (Municipal) Public Prosecutor against the judgment of the first-instance court where the defendant was found guilty for the commission of the criminal offense of stalking envisaged in Article 138a para.1, items 1, 2 and 5 of the CC and sentenced to one year in prison, which he was to serve in the premises where he lives. In the part of the decision related to punishment, the second-instance court reverses the judgment of the first-instance court and sentences the defendant to serve an effective prison sentence of one year (in a penitentiary) for the committed criminal offense. In the appeal filed by the Basic Public Prosecutor against the decision solely on the ground of the criminal sanction, the Prosecutor asserted that the purpose of punishment would not be achieved because there were no conditions for serving the prison sentence in the premises where the defendant lives, without the application of electronic surveillance. The High Court finds that the first-instance court had in mind the circumstances of Article 54 CC which are of influence in the sentencing process; thus, the court properly assessed the defendant's proper conduct during the proceedings, his family circumstances and the fact that he was the father of one child as mitigating circumstances; on the other hand, the aggravating circumstances were the defendant's prior conviction for the criminal offense envisaged in Article 194 para. 1 CC. However, the first-instance court had to bear in mind that the defendant was found guilty by the final decision of that court (...) for the criminal offense of domestic violence envisaged in Article 194 (para. 1 and 5) CC and awarded a suspended sentence of six months' imprisonment, within the meaning of Art. 55 CC which provides that, if the perpetrator of a criminal offence committed with intent has been previously convicted of an intentional criminal offence, the court shall take that fact as an aggravating circumstance unless five years have not elapsed since the previous conviction or sentence served, as in the case at issue. Yet, the first-instance court did not appropriately consider the importance of this aggravating circumstance,

the fact that the imposed fine and the earlier conviction in the premises where the defendant resides did not achieve the purpose of punishment, that fact that the injured party joined the criminal prosecution, and the fact that the criminal offense was committed in a short period after the previous conviction, all of which objectively deserve to be taken into account. The defendant was ordered to serve the sentence in the premises where he resides, without the application of electronic surveillance. All the aforementioned circumstances, especially the previous life of the perpetrator, the degree of guilt and the circumstances under which the criminal offense was committed, do not justify the execution of the sentence in the premises where the defendant lives without the application of electronic surveillance. The purpose of punishment can be achieved only by imposing an effective prison sentence of the stated duration. Therefore, the part the judgment of the first instance court related to the decision on criminal sanction is reversed." (Judgment of the Higher Court in Čačak, Kž 204/2021 dated 9.11.2021).

Serving a prison sentence on the premises where the defendant lives is one of the forms of imprisonment. Since the defendant was convicted of the criminal offense of domestic violence, the second-instance court properly assessed that it would not be justified for him to serve the sentence for the criminal offense of stalking in the premises where he lives

4.4 Judgment of the Higher Court in Čačak, Kž 152/2022 dated 20.9.2022

Unauthorized and constant monitoring of the former intimate partner in order to establish contact, interception, violence, harassment, other acts against one's will and slight impairment of health constitute an act of commission of the criminal offense of stalking.

In the explanation, the court stated:

"By properly assessing the presented evidence, especially the testimony of the injured party, it was established that she was involved in an emotional relationship with the defendant; when they broke up, the defendant started stalking her, sent her offensive messages, kept calling her by phone, insulted her, followed her, intercepted her in the city. She reported him to the police, and urgent measures were imposed on the defendant. When the measures expired, he kept on stalking the victim, wishing to reestablishing contact her. Due to anxiety and fear, the victim sought help from a psychiatrist, as proven by the report...The Social Welfare Centre report...shows that the victim continuously reported the defendant for acts of violence, and that he was repeatedly imposed emergency measures which were prolonged because he was jealous and could not accept the termination of their relationship. The first-instance court correctly applied the criminal law when the defendant was found guilty for the aforesaid criminal offense. Thus, the allegations of the defendant's attorney who claims that the defendant did not commit the criminal offense stated in the disposition of the first-instance judgment are unfounded" (Judgment of the Higher Court in Čačak, Kž 152/2022 dated 20.9.2022).

In this case, the second-instance court stressed that the prior intimate relationship does not exclude the existence of the criminal offense of stalking if the actions aimed at re-establishing contact with the victim were undertaken continuously and against her will.

4.5. Judgment of the Higher Court in Novi Sad, Kž1 193/2019 dated 15.8.2019

The commission of the criminal offense of stalking, in the form of physically approaching, insulting and threatening the injured party, must be undertaken and repeated for a certain period of time, i. e. the offender's conduct towards the passive subject must have the characteristics of continuity and permanence.

In the explanation, the court stated:

"The first-instance court found the defendant guilty for the commission of the criminal offense of stalking, envisaged in Article 138a, para,1, items 1 and 4 of the CC, stating that: "On 10 February 2019, around 10 p.m. in N.S., the defendant took actions to physically approach the injured party (V.U.) against her will. Being under the influence of psychoactive substances and alcohol, his ability to understand the

importance of his conduct and to manage his actions was significantly reduced, but he was still aware that it was an unlawful act which he wanted to commit. When she told him that she no longer wanted to communicate with him, he threatened to attack her life and limb..." The first-instance court also stated that "after that, on 11.02.2019, he sent several messages of offensive and threatening content..." It follows that, on that day, 10 February 2019, around 10 p.m. in N.S., the defendant undertook two alternatively prescribed actions envisaged in Article 138a para.1, items 1 and 4 of the CC: he took actions to physically approach the victim, against her will, and he threatened an attack on her life and limb. However, the basic form of the criminal offense of stalking, prescribed in Article 138a, para.1, item 1 CC, is committed by a person who, over a certain period of time, monitors or undertakes other actions against another person without her permission in order to physically approach that person against his will; as the illegal actions against a passive subject must be undertaken within a certain period of time, therefore, they must be repeated and last for a certain period of time..." (Judgment of the Higher Court in Novi Sad, Kž1 193/2019 dated 15.8.2019).

The court concluded that, for the criminal offense of stalking to exist, there must be continuity or repetition of actions aimed at establishing contact with the victim against her will.

5. The Criminal Offence of Stalking in Judicial Practice in the Republic of North Macedonia

The authors had access to one judgment of the competent court from the territory of the Republic of North Macedonia. In the judgment of the Municipal Court in Tetovo (K. 198/24) of 28 February 2024, the defendant S.R. was found guilty of committing the criminal offense of stalking prescribed in Article 144a paragraph 2 in conjunction with paragraph 1 of the Criminal Code of the Republic of North Macedonia (CC RNM). In the period from June 2023 until 7 July 2023, the defendant S.R. followed and tried to establish contact with the injured party (V.M.) from the village of T., with whom he was in an intimate partner relationship from March to May 2022. After the breakup of the love relationship, he followed her to her workplace at the "Zegin" pharmacy located in "One Hospital", entered the premises in an attempt to establish unwanted contact with her and then, when the victim changed her workplace in the "Zegin" pharmacy, he kept on stalking and harassing her: during working hours, he parked his vehicle in the parking lot across from the pharmacy; he followed the victim in his car when she was walking towards her house and passed insulting comments, which caused the victim's feeling of insecurity, anxiety and fear for her own safety. Upon conviction, the court rendered a conditional sentence with protective supervision; the defendant S.R. was imposed a prison sentence of 9 months, which would not be carried out if the defendant did not commit a new criminal offense within 2 years. The defendant was also obliged to report to the competent probation office for the area of the Basic Court in T. within 15 days from the execution of the said judgment, so that the probation officer could prepare an individual program and plan for the implementation of protective supervision; in case the defendant failed to report to the competent probation office, the court would revoke the conditional sentence and enforce the sentence of imprisonment. The court obliged the defendant to pay 2,000 denars to the court (for court lump costs), within 15 days from the date of finality of the judgment. In this particular case, it is interesting that the court considered the defendant's financial and family circumstances as mitigating circumstances, taking into account that he was a person of poor financial standing, that he fully admitted the criminal offense and his culpability, that he demonstrated proper demeanor in court and during protective supervision; for these reasons, the court considered that the measures of protection and assistance to the defendant would achieve the purpose of punishment.

It is important to point out that the possibility of imposing a suspended (conditional) sentence with protective supervision also exists in the criminal law of the Republic of Serbia (Article 71 of the Criminal Code) but, to our knowledge, it is insufficiently used in judicial practice. The judgment of the Municipal Court in Tetovo shows that conditional sentence with protective supervision has its place in the system of criminal sanctions.

Conclusion

The Republic of Serbia and North Macedonia have made a huge step forward in their criminal legislation by introducing the criminal offense of stalking, not only in order to follow the European criminal law trends but also to criminalize actions which are largely present in the contemporary society. Both criminal legislations provide almost identical legal solution on the basic form of stalking, which is punishable by a fine or a term of imprisonment of up to three years. Differences may be observed in the qualifying circumstance of this offense, whereby we give preference to the Macedonian legal solution. In the Macedonian legislation, intent is the qualifying circumstance in the commission of a more serious and the most severe form of stalking; in the Serbian legislature, the perpetrator's negligence is the qualifying (aggravated) circumstance during the commission of more serious or the most serious forms of stalking.

Some differences may also be observed in the manner prosecuting the offenders. In Serbian criminal legislation, prosecution is initiated *ex officio*; in Macedonian criminal legislation, it is instigated at the victim's proposal. In this regard, we prefer the Serbian legal solution because there may be both subjective and objective reasons preventing the victim to submit a prosecution proposal, which may ultimately lead to inadequate criminal law protection. Although stalking is a criminal offense that interferes with the sphere of personal life, criminal prosecution *ex officio* is more appropriate due to the degree of social danger stemming thereof.

The persistent effort to establish contact with another person against his/her will also constitutes stalking. From a social, moral and psychological point of view, it is a form of disrespect and endangerment of that person. Such conduct has an antisocial character. Regardless of the many problems that may arise in judicial practice, the incrimination of stalking has its criminal policy justification. The observed differences in the criminal legislation of the Republic of Serbia and the Republic of North Macedonia testify about the need for a more comprehensive regulation of the legal reaction to this social phenomenon, without calling into question the need to incriminate this criminal offense. On the contrary, differences in the criminal legislation of individual states are a good basis for the development of criminal law.

While the application of criminal law and criminal sanctions are important in regulating the criminal offence of stalking as a negative social phenomenon, the process of combating and suppressing this crime requires synergistic action of state institutions. However, individuals and the society as a whole cannot be effectively protected from various forms of crime without the consistent application of criminal legislation.

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