



The neo-criminalization of stalking in the Portuguese legal system

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ABSTRACT

Despite the theme stalking was only being given attention in the final decades of the 20th century, the truth is that this phenomenon has always existed. It consists in a series of persistent harassment behaviour of which one person is the victim of another, there may exist or have existed a relationship between them or they may be unknown to each other. This behaviour may be of the most varied nature and, frequently, if seen in an isolated form, may appear to be simple acts of courtship and demonstrations of affection, which are not taken very seriously by society.

One of the first countries that criminalized stalking was the United States of America, more specifically the State of California, in 1990. Several European countries also included stalking in their legal systems, making it independent of other crimes, especially the crime of domestic violence. In Portugal, this behaviour was criminalized in 2015, described in article 154-A of the Criminal Code, under the heading persecution.

The aim of this work is to make a juridical analysis of the article 154-A of the Portuguese Criminal Code, to understand if there was truly the need to create a new type of crime for the behaviour of stalking, or if other previously typified legal measures would have been sufficient to protect the victims' interests. This study is also intended to indicate alternative forms of punishment for this phenomenon under the Portuguese jurisdiction.

1. Introduction

Although it was not until the end of the 80s of the 20th century that attention began to be paid to stalking, the truth is that this phenomenon has existed since ancient Greek and Roman times and is even present in various literary works such as those of Shakespeare or Dante.¹ In fact, some conducts that in these societies were accepted and seen as an expression of love, today will fit into what is considered stalking, which is a crime in some legal systems, including the Portuguese one.

Stalking can be defined as a pattern of persistent harassment in which a person is victim of unwanted contact, control, or surveillance by another person, there may exist or have existed a relationship between them or they may be unknown to each other. It can take the form of a wide range of behaviour, from offering flowers and gifts to the victim, calling her insistently or even threatening and pursuing her.² Thus, due to the wide variety of behaviour that stalking can adopt, there is no unanimous definition for this phenomenon, which creates greater difficulty in recognizing and punishing these conducts.

It is a complex phenomenon that involves at least two subjects – on the active side we have the agent/stalker and on the passive side the victim/target (primary victim, if the conduits are directed against him/her) and can affect third parties who are close to the victims (secondary victims, these being the people who surround them and who are

often targeted by the stalker, to get the attention of their main target).

Several studies on this subject^{3–5} have shown that the most frequent reported conducts were receiving unwanted phone calls, voice messages and text messages from the perpetrator, the stalker showing up or approaching them in places they usually attend (such as home, school or work) and being watched, followed or spied on by the perpetrator.

Related to the prevalence of stalking, from the various studies conducted in different countries, it was observed that about 15%–25% of the women and 5%–13% of the men had been victims of this phenomenon at some point in their lives.^{3–6} In Portugal the latest results released by the Portuguese Association for Victim Support showed that in 2017 about 89% of stalking victims were women and in 26% of cases the stalker was someone with whom the victim maintained/maintains a loving relationship.⁷

Despite the diversity of profiles of identified offenders, through analysis of several studies,^{1,3–5,8} it can be shown that most of them are male, known to the victim (namely people with whom she has maintained or maintains an intimate relationship), which increases the risk of escalation of this behaviour, which may even culminate in offenses to their physical integrity (or to others close to them) or even to their homicide. Churcher and Nesca,⁸ in their meta-analysis comprising 5.114 cases, identify eight risk factors to be significantly related to stalking violence: the stalker being a prior intimate partner, threats,

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presence of psychosis, presence of personality disorder, substance abuse, criminal history, violence history and stalker gender. Although most stalkers have several common characteristics, there are many discrepancies between them, so it is not possible to identify an offender promptly.

As the perpetrators, victims are not all the same and anyone, regardless of their characteristics, can be stalked during their lifetime. Although it is not possible to speak of a uniform profile of the victim, the fact is that, according to the studies carried out,^{3,9,10} it has been possible to identify some groups that are more vulnerable to this behaviour, namely women and young people.

Because of the harassment campaign they target, many victims develop several physical problems, namely the existence of digestive disorders, changes in appetite, nausea, sleep disturbances, headaches, fatigue and physical injury as a result of the aggressions committed; psychological problems, such as the presence of fear, hypervigilance, distrust, feelings of abandonment, discouragement, depression, anxiety, rage, suicidal ideation, paranoia, post-traumatic stress disorder, etc.; economic problems, like a decrease in the number of working hours, work abandonment, expenses with security measures, such as the change of locks at home or the installation of surveillance cameras, replacement of property stolen by the stalker; and changes in their lifestyle, like the modification of daily routines, reduction of social contacts, change of residence or place of work, etc.^{1,10}

Besides the emotional responses of the victims, there are other strategies that can be adopted by these as a way of reacting to stalking behaviour, which are called coping strategies and can be divided into five groups: moving away (which includes the refusal of any contact with the stalker or changing daily routines), moving toward/with (which includes talking to the offender and asking him to stop or suggesting that they become friends), moving against (which includes attacking the stalker, made by the victim or by others), moving inward (which can be the use of medication or alcohol, with the aim of denying, minimizing or redefining their problem) and moving outward (namely using support services, dialogue with friends or relatives, etc.). Besides leading to changes in the life of the victim, the most advised strategies are those of moving away, since this makes it difficult for the stalker to approach the victim, and move outward, which can reduce the isolation of the victim, thus having an impact on the level of their safety.^{10,11}

The main explanation for the emergence and continuity of stalking behaviour is related to the transformation that the role of women in society has suffered in recent times, making relationships more unstable and leaving more partners to deal with feelings of rejection. Hence, the former partners are the main group who commit stalking, as well as the most violent, and this behaviour is often associated with the end of a relationship, and aims mostly for a reconciliation, revenge for the ending of the relationship, intimidation of the victim, etc.^{1,12}

The United States of America was one of the pioneers in the criminalization of stalking, following the death of the American actress Rebecca Schaeffer, in 1989, in the State of California, murdered at the door by a fan, Robert Bardo, who had been pursuing her about three years, and tried to contact her several times. Also in that same year and in the same state, four other women were murdered by their ex-husbands or ex-boyfriends after reporting to the police that they suffered harassment and threats from them. These cases had great media visibility and influenced the creation of the first anti-stalking law, which was adopted by the State of California in 1990. Subsequently, many other countries criminalized stalking practices in their legal systems, including Portugal.

In Portugal, this phenomenon was only debated in 2010, largely due to a study on the prevalence of stalking in the Portuguese population, which demonstrated a general lack of knowledge of the phenomenon and a high rate of victimization.⁴ In addition, many crime victim support associations have pointed to the need to create measures to protect these victims, in line with what has been discussed in the Council of

Europe, in Resolution (1962) and in the Convention on preventing and combating violence against women and domestic violence. One of the arguments for the criminalization of these type of conducts in Portugal was that there would be a legal obligation to criminalize them because this country has ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence, also known as Istanbul Convention.¹³ According to articles 4 and 34 of the Convention all ratifying States would have to criminalize this reality, as well as guarantee means of protection for the victims of such conducts, including restraining or protection orders and sanctions, which should be monitored by the court. Due to these pressures, the Portuguese political parties created 3 bills for the criminalization of stalking, which culminated, in 2015, in the creation of Law no. 83/2015, of August 5th,¹⁴ which added the article 154-A to the Portuguese Criminal Code, criminalizing this phenomenon in Portugal.

2. Stalking in Portugal

2.1. The article 154-A of the Portuguese Criminal Code

Article 154-A is inserted in Chapter IV, Title I, Book II, of the Special Part of the Portuguese Criminal Code, that is, in the chapter on offenses against personal liberty. Because of the multiplicity of conducts that stalking can cover, this type of crime may protect other legal interests beyond personal liberty, such as the health of the victim, the privacy, the right to the image, the right for the inviolability of the domicile, among others, being therefore, a complex crime. However, it seems that the legal interest it intends to protect more strongly is the freedom of self-determination, which finds constitutional acceptance in the right for the development of the personality, foreseen in article 26 of the Constitution of the Portuguese Republic.^{15,16}

The doctrine divides the offenses into several categories.¹⁷ According to the way in which the legal interest is questioned, article 154-A of the Portuguese Criminal Code seems to have the form of a crime of danger and the victim does not need to be afraid, restless or inhibited in his/her freedom of determination, being enough that the act which was practiced had that potentiality. In relation to conduct, the crime of persecution is a crime of mere activity, since it is not necessary that there is an effective injury of the victim's freedom, being sufficient that the conduct of persecution can endanger that freedom. The crime of persecution is also a common crime, since its author can be any person, and a crime of free execution, since the execution of the crime is not described in the type and the typical conduct can be practiced by any means.^{18–20}

In addition, it will be necessary to reiterate the conducts because, since this article covers an infinity of daily acts, many of which do not even constitute crime and others that, due to their small criminal and social gravity, are considered criminal trifles and, for this reason, they are not worthy of punishment, accepting the punishment of an isolated act (like sending flowers or chocolates to the victim with the aim of conquering him/her) would be unacceptable and disproportional to the agent rights and his freedom.^{15,22} The crime of persecution is punishable by fraud, which means that the agent must have the knowledge and willingness to engage in unlawful action, to be held accountable for the practice of that crime.

Paragraph 2 of article 154-A of the Portuguese Criminal Code punishes the attempt of persecution. The attempt occurs when the agent practices acts of execution of a crime that he decided to commit but it was not consummated for any reason unknown to his will. The rule in this matter of attempt is, according to article 23 of the Portuguese Criminal Code, is punishable only when the abstract criminal frame of the consumed crime is more than three years in prison or when the type of crime expressly provides for this. However, it is difficult to achieve in what way the attempted persecution can be punished. While it is common ground that the crime in question can involve a real campaign of harassment or persecution of the victim, it seems that it only makes

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