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The Classification of Actions Running Counter to the Statutory Definition of Harassment and the Questions Related to Providing Evidence

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Abstract. The statutory definition of harassment can be deemed a novel crime in modern legislation. The primary reason for this is that the level of the threat of this crime to society is lower than general, while the weight of the subject of law protected by the statutory definition seems to be lighter as compared to the other values protected by criminal law (e.g. the right to life or property). Basically, it is the social interest of the right to privacy that can be defined as the legal subject of harassment. Of course, this right can also be regarded as a 'piece' of the fundamental rights, as the Fundamental Law of Hungary itself also contains provisions on such values which can be related to this subject of law (e.g. it is stipulated by Section (1), Article VI of the Fundamental Law of Hungary that everyone is entitled to have respect for their privacy and family life, home, as well as relationships, from others). In their joint study, Warren and Brandeis urged that the right to privacy be acknowledged as an independent fundamental right in the countries following the system of common law, as early as in the late 19th century.[1] This fundamental right gained importance in Hungary with a slight delay, to which the effective contributions of the Constitutional Court were also required. In its decision of 1994, the latter body declared that:

> [T]he right to privacy is not defined by the Constitution as a specific, subjective fundamental right, but the right to the freedom of privacy is without doubt such a fundamental right aimed at protecting the autonomy of the individual, which arises from the inherent dignity of a human being, of which the general personality right, the right to human dignity, is the subsidiary fundamental right {…}. The right to privacy is the right to personal fulfilment, and the free fulfilment of one's personality and the protection of autonomy require that {…} the state respect the fundamental rights of a human being, which are inviolable and inalienable.[2]

1 Warren–Brandeis 1890 (qtd by Simon 2005. 33, Tóth 2014. 99).
2 Point II, Constitutional Court Decision No 56/1994 (XI. 10.).

It was in the above spirit that the statutory definition of harassment was incorporated into the previous Hungarian Penal Code (hereinafter referred to as: Penal Code, Act IV of 1978) with effect of January 1, 2008.[3] The statutory definition was supplemented by Act LXXIX of 2008 by including harassment appearing as the occurrence of a life-threatening event, while the aggravated cases of the same action were established by Act XCII of 2008 on the Criminal Code and Other Acts Amendment and Act CLXI of 2010 on the Criminal Code and Other Acts Amendment. The criteria for the criminal act remained unchanged in the new Hungarian Penal Code (Act C of 2012).

Keywords: harassment, cumulative issues, criticism of restraining, providing evidence

I. Theoretical Pre-Questions

1. It is primarily the phenomena found in the European trends that can be indicated as the contributing factors to 'elevating' harassment to a crime. In the opinion of Berkes, it became clear that in the majority of the EU member states the behaviours included in the concept of harassment are intended to be sanctioned by the tools of criminal law.[4] The questions inevitably asked by legislators were, however, complex and unclear: how can actions that qualify as harassment be formulated on the level of the law, in general terms?; whether threats should be a conceptual element of the basic definition of the crime (in the case of violence, obviously, another crime should be established)?; whether the crime can even be established by a one-time action, according to the type of the offending behaviour or whether a permanent infringement should be definitely assumed?; whether it is only a direct intention or also an eventual intention that can be defined as the form of conviction of the delinquency?

What is certain is that harassment belongs to those crimes which have a lower gravity, which are 'attached to a person', i.e. those which can be punished as a consequence of private motions. This is why it comes up as a justified question how such crimes can be handled if the report is made by a person other than the one entitled to file a private motion. The answer to this question can be found in the rules set out in the Criminal Procedures Act, which clearly points out that such reports should be rejected by the authority.[5] If, however, it is disputed whether the report has been made by the person entitled to do so, then the report should be supplemented.

3 I would like to note that the term 'harassment' already came up in Act CXXV of 2003 as an act that can be deemed the violation of the requirement of equal treatment. Based on the Act, harassment is a conduct violating human dignity of a sexual or other nature, with the purpose or effect of creating an intimidating, hostile, degrading, humiliating, or offensive environment around a particular person.

4 Berkes 2008. 16, Tóth 2014. 103.

5 Turn of phrase I, Section 174(1) (e).

If the report is turned down, the decision on such rejection should also be delivered to the offended party pursuant to the provisions set out in the Criminal Procedure Code.[6] In such a decision, the attention of the offended party should be called to the fact that the filing of a private motion is the condition to launching a criminal procedure or to the calling of the perpetrator to account. This information should also include that 1) the private motion will qualify as legally effective if the entitled party is not aware of the identity of the perpetrator, but the former expresses their will to punish the perpetrator for the facts explained in the report within the statutory deadline, and 2) if the entitled party files the private motion with delay, they will be entitled to certify such delay.

2. Pursuant to Section 222(1) of the Penal Code, any person who engages in a conduct intended to intimidate another person, to disturb the privacy of or to upset or cause emotional distress to another person arbitrarily or who is engaged in the pestering of another person on a regular basis commits the crime of harassment. The basic definition is subsidiary, i.e. it can only be established if no graver crime is committed. The legislator has indicated disturbance as the offending behaviour of Section (1). This basically encompasses all such activities which are suitable for making the everyday life and routine of the passive subject difficult, i.e. influencing it in a negative direction. This may be accomplished both verbally and by action; the point is to challenge the already existing poise and to destroy the personal equilibrium (judicial decision No 2014. 169).

I would like to note that disturbance may even be accomplished in the capacity of an indirect perpetrator. In one of the cases presented by the summary report on the review of prosecutor's practices related to harassment (hereinafter referred to as: the Report):

> … among others, the accused party also disturbed the offended party by having displayed an advertisement on an Internet page, according to which the offended party would like to sell their car at a price substantially lower than its market value. The accused party displayed the actual data of the offended party in this advertisement, including their phone number, emphasizing that this number could be called at any time. As consequence of the behaviour of the accused party, the persons who thought that the advert was real kept calling the offended party continuously from the time of displaying the advert to the cancellation thereof.[7]

The possibility of the infringements affecting other persons as well cannot be excluded either despite the intention of the perpetrator to only harass one or perhaps more persons. Such cases, for example, when the harassing phone

6 Section 169(4).

7 http://ugyeszseg.hu/repository/mkudok7747.pdf.

calls are taken by the relatives of the target person rather than the victim or the disturbing messages come in to an e-mail address jointly used by the family members, and this is consciously done by the perpetrator, can be listed in this group. As a general rule of principle, in the judicial practice, it is only the relationship between the perpetrator and the target person that is considered since in the case of a criminal act it is exclusively the *dolus directus* that is accepted as a possible form of conviction. In my opinion, however, with regard to the legal subject of the criminal action, it would be justified to consider the extension of the contents of Section (1) to the level of *dolus eventualis*. In the case of infringements, the situation is that such a regular or long-term contact between the perpetrator and the persons other than the target persons may also be established whose subject is the regular offending or simple threatening of the passive subject, etc.; however, the minute that the relative or partner becomes aware of such acts through direct communication, they will inevitably become the passive subjects of this harassment. In my view, this latter circumstance should also be considered, which is why Section 222(1) should be regarded as one that is in line with the statutory definition in such cases too.[8]

Harassment will only fulfil the statutory definition if it is regular or permanent. Thus, the Penal Code does not include occasional infringements under the objective effect of the crime, which I regard as an absolutely logical solution. Berkes thinks that by regularity we should understand a behaviour that is demonstrated over shorter periods of time, one that is repeated, while permanence should mean a longer period of time.[9] Based on this, for example, the following repeated behaviours can be listed in the scope of the crime: phone calls (irrespective of the time of the day), offending and abusive messages (e.g. on an answering machine, via e-mail, in text messages, in letters, etc.), the observation or stalking of the passive subject, etc.

In order for the criminal action to be considered completed, it is not required that the victim receive the repeated phone calls or read the messages (judicial decision No 2011. 302), but only those behaviours will qualify as ones fulfilling the statutory definition which the victim is aware of. It is irrelevant whether the tone of the perpetrator's behaviour is positive or negative or whether the passive subject himself/herself gets in contact with the perpetrator (e.g. out of necessity).[10]

Being found guilty is not excluded by such circumstances either that the accused and the victim mutually establish contact with each other or if the victim used to be the earlier perpetrator (judicial decision No 2014. 169). Based

8 'However, it will involve a different judgement if the victim puts the speaker on during their telephone conversation with the accused who is making threats and the accused also threatens the life of the other person who is present, being aware of the fact that they are on the speaker. In such cases, the action will qualify as a harassment of two counts.' Monori 2016. 224.

9 Berkes 2008. 17, Tóth 2014. 106.

10 Based on its ruling No Bfv. III. 818/2010/5, the Curia does not exclude the establishment of harassment if the passive subject receives the calls and maintains the conversation.

on the Report, the following questions should be examined in such cases: who initiates contact more often; at what time the contact tends to be established (e.g. night-time or daytime hours); whether it can be concluded that the reason for the victim's getting in contact with the accused is exclusively to communicate the intention to break contact with the accused; whether it can be concluded that the victim only gets in contact with the perpetrator on account of the fulfilment of some obligation to the perpetrator (e.g. child maintenance payments) – however, the perpetrator's attempts to take up contact point beyond this, etc.[11]

The Debrecen High Court of Appeal established the criminal liability of an accused party who regularly appeared in front of the victim's apartment or workplace.[12] However, the motions filed by the defence emphasized that staying in a public area cannot be the subject of a crime in itself. At the same time, the view of the third-instance court was that these actions fulfilled the content criteria of harassment.

According to Section (1), the compliance of an offending behaviour with the criteria of the statutory definition requires a separate investigation in those cases when the perpetrator wishes to enforce a right that is realistic or assumed or wishes to fulfil an obligation. According to the Report, it is primarily after the dissolution of a marriage or the termination of a domestic partnership that it is experienced that:

> [O]ne of the parties tries to establish regular contact with the other party with a justification that is also acknowledged by law. Such reason may be e.g. the visitation of a common child, the availability of joint property, or the enforcement of a financial claim against the other party. In these cases, the victim may not refrain from the keeping of contact without justification, and the accused cannot be expected to break all relations with the other party either. Thus, if the establishment of the contact–however objectionable it is considered by the other party–happens in order to exercise the statutory rights of the perpetrator, or to fulfil his obligations, to a justified extent, no crime is committed.[13]

In the Report, those cases in which the crime can be established despite the fact that the perpetrator wishes to exercise their (assumed) statutory rights are brought up as counter-examples. The Curia classified as harassment the action committed by a biological father who interfered with the life of the child and the mother voluntarily, purely by making a reference to their being relatives. The highest judicial forum explained that:

11 http://ugyeszseg.hu/repository/mkudok7747.pdf.
12 Debrecen High Court of Appeal, judicial decision No II. 201/2013/5, in: A. Tóth: i. m. p. 107.
13 http://ugyeszseg.hu/repository/mkudok7747.pdf.

> [T]he voluntary nature of the behaviour of the accused can be established irrespective of whether the reasons quoted as the basis for his behaviour are realistic or not. It holds no relevance whether or not the accused is in fact the biological father of the victim's child. Their relationship is settled by the rules of family law, the authorizations of the affected parties with regard to the definition of the child's family law status and the possibility to challenge the latter are defined by law.[14]

Further questions of legal interpretation are brought up by whether the effect of the private motion extends only to infringements of the past or also to those of the future. According to the everyday legal approach, the actions included in the scope of the term of harassment in Section (1) can be considered a natural unit in the case of the same offended party, and, accordingly, at the time of filing the private motion, the offended party presumably thinks that no further private motions should be filed with regard to the further partial actions of harassment. However, in the Report, the reader's attention is called to the objectionable practice in which in such cases the investigative authority usually does not warn the offended party any more that new private motions should be filed in the case of new infringements. This practice seems to be rather improper mainly because in the judicial practice those principles which are related to the handling of crimes punishable on the basis of private motions of such a nature are already known. Among others, it is also pointed out in judicial decision No 2014. 169 that when a private motion is filed the criminal claim only becomes enforced with regard to the actionable conduct indicated therein, which means that the criminal claim should be repeatedly enforced for any further repeated behaviours of the same kind. The situation is that for any new partial actions that have been committed after the filing of the private motion a new private motion should be obtained (decision No ÍH2014.87).

3. Pursuant to Section 222(2) of the Pencal Code, any person who, for the purpose of intimidation, conveys the threat of force or public endangerment intended to inflict harm upon another person, or upon a relative of this person/ Point (a)/ or gives the impression that any threat to the life, physical integrity, or health of another person is imminent /Point (b)/, is guilty of harassment.

Contrary to what is defined by Section (1), the offending behaviors regulated here can be committed by (a) one (phase) action as well. However, as long as the perpetrator demonstrates the same conduct as set out in Points a) or b) several times against the same victim, with a single intention of will, in short intervals, then continual offending behavior can be established. In the latter case, it is only the factual cases touched upon in the private motion that can be included in the statutory unit of continuality (judicial decision No 2002. 252), and the victim is

14 http://ugyeszseg.hu/repository/mkudok7747.pdf.

entitled to file a private motion for each action committed against them (judicial decision No 1988. 348).

The threat defined in Point a), by taking the interpretative provisions of the Penal Code into account, is defined as envisaging such a grave disadvantage which is suitable for generating strong fear in the person who is threatened. The compliance of this turn of phrase with the statutory definition, however, also depends on the content of the threat: a crime can only be established if the threat specifically forecasts the prospect of committing a violent action against a person[15] or of committing an action causing public endangerment. This is why the existence of the situation described in Point a) cannot be established in the case of generally formulated statements (e.g. 'You will get in trouble!')[16]; if the threat in question is aimed at channelling the anger accumulated during the assault rather than at intimidation (in such cases, another crime should be established – judicial decision No 2011.303); if the perpetrator makes their statements in lack of a serious intention, in order to channel their momentary anger or perhaps as part of their usual vulgarity[17]; if the perpetrator seriously threatens another person with disclosing a fact that is suitable for staining the honour of the threatened person or their relatives to the wide public, with the purpose of intimidation (this is the act under the statutory definition of dangerous threat listed in Section 173 of the Minor Offences Act).[18]

The use of expressions like 'I will kill you', 'I will cut your throat', 'I will beat you to a pulp', etc. meet the requirements of the statutory definition based on the grammatical interpretation of the Penal Code, but I have doubts as to whether the law enforcement practice which establishes the accomplishment of the action defined in Section (2) purely based on such a statement is right. What is more, in some opinions, 'a threat realized purely by implied conduct, non-verbal signs, physical hints, gestures, and body language can also meet the criteria of the statutory definition. Such cases include, for example, situations where the perpetrator indicates to the victim what awaits them by pulling their hand in

15 Homicide, kidnapping, sexual violence, robbery, act of terrorism, etc.

16 However, the Curia thinks that verbal threats that envisage the killing or cutting the throat of the victim can be suitable for establishing harassment – judicial decision No BH+ 2013.5.186 (Curia decision No Bfv. III. 726/2012).

17 http://ugyeszseg.hu/repository/mkudok7747.pdf.

18 'The form of an infringement is basically the preparation for defamation committed in front of a wide public. The offended party may experience well-founded fear if someone who is in possession of discrediting information about them threatens to disclose this to the wide public. However, it is important that on the subjective side the intention may not extend beyond intimidation as, for example, if it is coupled with the purpose of gaining benefits, then the act may qualify as attempted blackmail, which also holds true for the statutory definition of harassment. The level of reality of the fact is indifferent here; however, the seriousness of the threat is relevant, which may be suggested by an earlier threat or, potentially, by a conflict reaching the level of an assault besides the obligation to examine the general meaning of the statements as well as the form and content of the threat.' Bisztriczki–Kantás 2014. 469.

front of their throat or by shaping their hand as a pistol'.[19] Neither Monori nor myself agree with this viewpoint; in my view, it is only compliance with Section (1) that can be established in such cases at most.

Monori thinks that 'the prosecutor's office, presumably in order to find evidence more easily {…}, frequently quotes that the statements or communications arising from emotions generally do not reach the limits of the crime of harassment, their level of being realistic can be objectively questioned, they are not suitable for intimidating people'.[20] However, in the author's opinion:

> [T]he intent of the action cannot be excluded by building our opinion on the lack of suitability for intimidation {…}, such an argumentation by the prosecutor's office and the reason for examining suitability presumably arise from the general definition of threats as it is an element of the general statutory definition of threats that the disadvantage envisaged by the threat should be suitable for intimidation. However, such suitability is irrelevant from the aspect of the intent of intimidation, and in the scope of analysing threats as an offending behaviour it should be mentioned on what basis the general term of threat cannot be applied in the consideration of harassments committed with dangerous threats.[21]

In the case of Point b), committing such an action will meet the statutory definition not only in the case of action against the offended party, or the relative of the latter, but also in the case of any other person the danger envisaged should be imminent, which means that the passive subject should count on the occurrence of the disadvantage in question within a short period of time. Belovics thinks that an act in the context of which the perpetrator delivers an envelope with the label 'anthrax', which actually contains talcum powder, to the victim, is typically such an act.[22] As per Section 222(3) of the Penal Code, the above actions will qualify as graver offences if they are committed by the perpetrator against a spouse or former spouse or against a domestic partner or former domestic partner /Point (a)/; against a person under the perpetrator's care, custody, supervision or treatment /Point (b)/ or if abuse is made of a recognized position of trust, authority, or influence over the victim /Point (c)/.

With regard to points a) and b), we are basically talking about the criminological aspects of 'domestic violence'.[23] An attempt at including this term in the scope of statutory definitions was made as early as in 2004 in the form of a bill prepared

19 Monori 2016. 227.
20 Monori 2016. 221.
21 Monori 2016. 221.
22 Belovics–Molnár–Sinku 2015. 280.
23 I would like to note that in Point a) I am missing the references to registered partner relationships, which is an independent legal status today.

by the Ministry of Justice (IM).[24] It was in this draft that the very phenomenon was defined for the first time, but its manifestation on the statutory level has not even happened to date. What I think the main reason for this is, in agreement with Andrea Tóth,[25] is that the term 'domestic violence' may also include such actions in the case of which using the tools of criminal law may seem to be a disproportionate solution. I would hereby like to note that among the cases examined by the Report the aggravated cases of harassment almost always included actions committed against the (former) spouse or the (former) domestic partner.[26]

In a classical case, Point c) includes improprieties that are manifested in the framework of an employment relationship or another legal agreement to work. I would like to note that the quality of being an employer is not, in itself, a sufficient criterion for establishing compliance with Point c). There is an interesting dogmatic reasoning on this question in one of the comments on the Penal Code:

> If an employee gives their mobile phone number to their boss based on their own decision, on which number the latter regularly calls them after work hours, then the basic definition of harassment will be fulfilled. If, however, the offended party did not give their phone number to their boss, and the accused party became familiar with this phone number through their access to employees' data, and this is how they kept calling the victim, this will meet the definition of the aggravated case under Section (3).[27]

Pursuant to Section 173(3) of the Code of Criminal Procedure, the private motion should be filed within thirty days from the day on which the party entitled to file a private motion becomes aware of the identity of the perpetrator. There are two possible options regarding aggravated cases: 1. the victim knows from the very start who commits the harassment; 2. the victim is not aware of the identity of the perpetrator. If the victim files the private motion before the identity of the perpetrator becomes known, but the identity of the perpetrator later becomes familiar, then, according to the position taken by the Report, the offended party does not have to give yet another statement on whether or not they would like to uphold the motion. I cannot identify with this viewpoint as it is not certain that after learning about the familial relatedness the victim would still like the procedure to be conducted. On the other hand, the nature of the crimes punishable as a result of a private motion justifies that the acting authority should only make the launching or the termination of the procedure dependent on the victim's decision or any other eligible party defined by the Penal Code.

24 Bill No T/9837 on restraining applicable for domestic violence, April 2004.
25 Tóth 2015. 87.
26 http://ugyeszseg.hu/repository/mkudok7747.pdf.
27 Tóth 2014.108.

II. Cumulative Issues

1. The number of instances of harassment is adjusted to the number of passive subjects. In the opinion of Andrea Tóth, in the case of common contact details (e.g. common correspondence addresses/phone numbers), it should always be checked which person the harassing intention of the accused was directed against.[28] I can only identify with this standpoint to the extent that the examination is aimed at making a distinction between *dolus directus* and *dolus eventualis*. In other respects, in my opinion, both actions may fall under the effect of Section (1) as long as the perpetrator is aware of that another person; besides, the target person (e.g. a relative) may also become aware of their establishing contact as well as of the content of such contact.

2. Harassment under Section (1) creates a natural unit since the individual partial actions result in the regular or permanent harassment of the victim not by themselves but in their totality. However, the Report suggests that the substantive cumulation of Sections (1) and (2) is not excluded either as long as the multiple statements of the perpetrator concerning the same victim qualify as ones under Section (1) at one time, while under Section (2) at another time.[29] It is on this basis that the Szeged District Prosecutor's Office qualified the conduct of the accused 'as the cumulation of disturbing harassment and continual dangerous threatening (against his former domestic partner) when he tried to establish contact with the victim on a total of 238 occasions in a period of 20 days (he started 177 calls and sent 61 short text messages), and he provenly visited the offended party in her home on two occasions when in a drunken state he threatened to kill her'.[30]

I do not necessarily agree with the above practice as Section (2) incorporates the actions defined in Section (1) anyway, and from the aspect of the passive subject it is mostly the threat running counter to the latter turn of phrase that is suitable for generating well-founded fear or a condition similar to the latter. In such cases, I think that it is unnecessary to conduct the entire evidence procedure with regard to the actions running counter to Section (1).

In such cases, the establishment of continual offending behaviour under Section (2) seems to be more realistic. In one case:

> [T]he former husband kept going back to the former common real estate property several times a week for several months, and he kept shouting

28 Tóth 2014. 109.

29 'One of the district-level prosecutor's offices also deemed that the cumulation of harassment as defined in Sections (1) and (2) can be established in the case when the accused party tried to get in contact with the victim on a regular basis against the latter's will in order to voluntarily intrude on their privacy, then the accused also threatened the victim with battery on the last occasion.' http://ugyeszseg.hu/repository/mkudok7747.pdf.

30 Monori 2016. 225.

> to his ex-wife still living in the house from the street in a drunken state, he was swearing, shouting curse words, and on one occasion he also threatened his ex-wife with violence and killing, to which the neighbours were ear-witnesses. There was no one to witness what was said on the occasion of the earlier personal harassments, but the court accepted what was presented in the report, and they concluded from the continual nature of the action and the embittered relationship of the spouses that such and similar threatening statements must have been communicated earlier too; so, this conduct was qualified as continual.[31]

However, in Monori's opinion, this tendency of law enforcement is highly disputable as in such cases the cumulation of sections (1) and (2) should be established, and, also, one (proven) threat cannot serve as the basis for establishing continual offending behaviour.[32]

3. Related to the cumulative assessment of harassment, I would like to refer back to that an offending behaviour qualifying under Section (1) can only be established if no graver crime is committed. Therefore, if e.g. the accused intruded the privacy of the victim on several occasions, and these incorporated such partial actions which qualify as disturbance of peace, harassment in a formal type under Section (1) cannot be established due to its subsidiary nature.[33]

Coercion, as it is an alternative crime, cannot be cumulative with harassment either. Furthermore, I would also like to note that in the case of coercion we are not talking about 'aggravated threats', what is more, in the case of harassment, the perpetrator does not intend to make the passive subject do, not do, or endure something.

'It was qualified by the prosecutor's office as the cumulation of harassment committed by threats and the deprivation of liberty when after a family gathering the accused party rampaged in the apartment in a drunken state; then, he did not let his mother-in-law out of the living room for almost half an hour; he threatened to kill her, and in the victim's presence the accused called his own father on the phone saying that 'I am keeping my mother-in-law as a hostage, please, bring some people who will kill her.'[34] In agreement with Monori and Gellér,[35] however, I think that this act runs counter to the statutory definition of the deprivation of liberty committed by mortifying the victim. This means that it is not possible to establish the statutory definition set out in Section (2) because this would therefore run counter to the prohibition of double consideration.

31 Monori 2016. 225.
32 Monori 2016. 225.
33 http://ugyeszseg.hu/repository/mkudok7747.pdf.
34 Monori 2016. 227.
35 Gellér 2016. 601.

Related to the distinction from threatening with public endangerment, we should examine whether the statements made by the perpetrator contained real threats and whether all this proved to be suitable for disturbing public peace. Thus, e.g. a statement 'I am going to light the house on you!' uttered in a family row in the staircase of a prefabricated building in principle makes the appearance of danger; however, in my view, it is not suitable for establishing the statutory definition of threatening with public endangerment even if there is a higher number of persons present when the threat is made. Thus, in such cases, the turn of phrase under Section 222(2) of the Penal Code should be established.

> In another case, on the other hand, the Szeged District Court established the cumulation of harassment committed by continual dangerous threatening and threats of public endangerment when the accused intimidated his own mother, with whom he shared a household, for several years by having verbally abused her and threatened her with physical abuse on a daily basis {…}, and he threatened several times in front of the neighbours too that he would open the gas tap and would explode the whole condominium. The agreeing position of the Szeged District Court and the prosecutor's office was that these threatening statements of the accused party were made in order to intimidate the offended party, but these were heard by several tenants in the staircase of the condominium, and several others also became aware of these threats; so, this action of the accused party was suitable for disturbing public peace. The reason for this cumulative standpoint was presumably the difference in the legal subjects and the assessment of the intention to generate fear.[36]

If the enforcement of a financial claim also appears as one of the intentions of the act, it may come up as a practical problem how harassment and vigilantism as well as blackmailing can be distinguished from each other. In the case when the accused party threatened the offended party, who was in a hostile relationship with him because of a settlement dispute arising from an earlier car sale, by saying that 'by the time you come home, you should have the money or you will die', a procedure was launched on account of an action under Section 222(2) of the Penal Code, but later the case was redefined by the prosecutor's office as an attempt at vigilantism. Also, the report for harassment was rejected because of attempted vigilantism in a case when the accused party told the victim on the phone, related to the latter's debt, that 'someone will go to your place and collect my money from you.' In the latter case, the criminal procedure was terminated by the prosecutor's office because in their opinion a threat should be concrete in the case of vigilantism, and abstract, distant, and ambiguous statements do not meet

36 Monori 2016. 230.

this requirement. However, in my view, the statutory definition of harassment should have been established in this case.

Also, the prosecutor's office classified a case as attempted vigilantism when the accused party picked a fight with the victim because of an earlier debt; then, he threatened him that he would 'do away with him, that he would settle the accounts.' When the criminal procedure was launched, the prosecutor's office defined this act as a case under Point b), Section 222(2), but according to their subsequent position these statements did not fulfil the statutory definition of harassment; so, eventually, the procedure was terminated with reference to the lack of evidence after changing the classification.[37]

As compared to the statutory definition of Section (2), the definitions of grave bodily injury, breach of domicile, forced interrogation, assault on a public official, and robbery also qualify as aggravated cases. According to the Report, however, as it is a substantive cumulation, the fulfilment of the statutory definition under Section (2) should be established if the threat is made directly after the basic action has been committed, with a view to the future.[38] I cannot identify with this standpoint as in my opinion any subsequent statements should be regarded as unpunished post-actions.

In my view, the basis for distinguishing between an assault on a public official or one fulfilling a public duty, as well as the definition in Section 222(2) of the Penal Code, is the time of committing the action as well as the outcome thereof. If the threat of committing a violent action against a person or a punishable action involving public endangerment is made at the time of the procedure conducted by the public official or one fulfilling a public duty and the outcome of such action is the hindering of the procedure or compelling the passive subject to take action, then the action will run counter to the statutory definition of assault on a public official or one fulfilling a public duty. If, however, this conduct of the perpetrator is demonstrated after or because the measures by the above-mentioned passive subjects have been taken, the action will qualify as harassment.

III. The Difficulties of Providing Evidence. The Criticism of Restraining

1. The most common forms of manifestation of the criminal act include those cases where the perpetrator harasses the victim by using an electronic telecommunications device. Phone calls, text messages, Skype messages, Facebook messages, e-mail messages, as well as establishing contact through other mobile phone applications should be specifically highlighted. To be able

37 Monori 2016. 231.

38 http://ugyeszseg.hu/repository/mkudok7747.pdf.

to prove the facts of the matter, all these communications and messages should be documented, which may not cause any problem in the case of Internet-based infringements. In the case of instances of disturbance on the phone, however, it causes some difficulty if the passive subject is not in the position to record the conversations in some form or another. In such cases, the acting authorities are not statutorily authorized either to intercept the conversations since the criteria for obtaining secret data do not exist.

In my opinion, if the conversation is not recorded, the presentation of the call history before the court cannot qualify as sufficient evidence, not even if the quantity and times of the calls, e.g. several night-time calls, suggest that the statutory definition can be fulfilled. The court has to be fully convinced of what the purpose of the conversations between the parties was (would have been), but in order to be able to do so a minimum-level knowledge of the content or direction of the conversations would be necessary.[39]

It is also a realistic phenomenon when the passive subject requests police support because of the harassing behaviour demonstrated by the accused party. In such cases, a police report on this should be obtained, and, if necessary, it is justified to hear the acting policemen as witnesses (judicial decision No 1983. 272). Also, evidence should be taken if it is doubtful whether the cohabitation of the accused and the offended parties qualifies as a domestic partnership.

2. The reason for acquittals due to lack of evidence is frequently the fact that the victim, who is related to the accused party, does not wish the accused to be punished after the indictment has been submitted; so, using their right of exemption, they do not testify. As the key to the solution, Andrea Tóth outlines the possibility of the acting authorities' taking the earlier witness testimonies into account in such cases (see the analogy of the rules for the testimonies to be given by the accused party). However, the author adds that by using this method 'the court would obtain such extra items of evidence which would actually be obtained by evading or disregarding the obstacles of giving a testimony'. I have already explained above that due to the 'private motion nature' of the crime I do not think that any similar amendment of the Criminal Procedure would be acceptable.

In one of the cases of a district-level prosecutor's office discussed in the Report, 'the accused regularly harassed her husband's parents in order to voluntarily

39 In the other case examined in the Report, 'the accused party threatened the victim, who had launched a labour law procedure against them, with killing on the phone. There was no ear witness to this threat. From the call log obtained in the course of the investigation, the phone conversations between the accused party and the victim could be certified and, also, it could be confirmed that the victim called the emergency number 112 on several occasions after the threat had been made; however, no other items of evidence had surfaced. The court did not find the victim's testimony and the data found in the call log sufficient against the denial of the accused, so they acquitted the accused due to lack of evidence.' http://ugyeszseg.hu/repository/mkudok7747.pdf.

intrude on their privacy. The fact that the accused party was guilty was proven by the call log certifying the number and times of establishing contact as well as the testimonies given by the victims. After the indictment, the relationship between the accused party and the offended parties was settled, and by using their right of exemption with regard to the familial relatedness they had already refused to give testimony in the court procedure. The list of phone calls, especially in a relationship between relatives, was not sufficient to establish the statutory definition of harassment; so, the prosecutor was right when he filed a motion for the acquittal of the accused party due to lack of evidence.'[40]

I find it an unfortunate practice that despite the rightful refusal to give a testimony on the offended party's part the documents of the text messages, e-mail messages, the correspondence on the Internet social media attached by the offended party and containing the threats made by the accused party can still be used as evidence, along with the testimonies given by those witnesses with whom the victim shared what had happened. However, the police report containing the statement made by the offended party cannot be used in the case of the rightful refusal to give a testimony, and the police officer who acted in the on-site investigation or who conducted the hearing of the witness cannot be questioned as a witness with regard to the statement given by the offended party (judicial decision No 1999. 241). However, the legal effect of the private motion is not affected by any such circumstance in which the party filing the motion gives no testimony later, using their right of exemption (judicial decision No 2014. 2).

3. In the cases that were launched exclusively for harassment, court-ordered supervision is usually not used in the investigation phase. In the cases that can be mentioned as exceptions, it is usually only due to the victim's motion that restraining is ordered against the accused party.

The recent period has seen the emergence of serious doubts about the suitability of such court-ordered supervision:

> [I]n the opinion of the civil societies involved in the protection of victims, the situation has only become worse as the long-awaited institution of restraining orders had been integrated but the operation thereof had proven to be unsatisfactory. One of the key deficiencies manifesting themselves in practice is that this institution did not provide prompt and efficient assistance to the victims of abuse since in order to be able to issue such a restraining order a criminal procedure in progress as well as the communication of the suspicion, are the required criteria, which are mostly distant in time from the underlying abuse.[41]

40 http://ugyeszseg.hu/repository/mkudok7747.pdf.
41 Tóth 2015. 85.

The above evaluation seems to be right according to the current rules set out in the Code of Criminal Procedure. The first problem lies in the set of criteria of the Code of Criminal Procedure, which requires that it is necessary for the issuance of a restraining order that 1) the criminal procedure should be in progress and 2) the well-grounded suspicion should be communicated to the accused party. However, a longer period of time elapses before these criteria are met, during which the victim has no legal assistance available whatsoever. In the cases examined by Andrea Tóth, 'in approx. one-quarter of the cases, the motion for issuing a restraining order was rejected by the investigative judge because the person against whom such a motion was filed was not in the position of the accused party at the time of the hearing; this is why the motion qualified as unsubstantiated due to its premature nature, and it had to be rejected'.[42] The primary reason for the dysfunctionality of court-ordered supervision becomes obvious from the wording of the Criminal Procedure, based on which it is used primarily in order to ensure the success of providing evidence rather than to protect the rights of the offended party.

The European Court of Human Rights also pointed out the deficiencies of the functioning of the institution of criminal restraining orders when they condemned Hungary for a measure taken in relation to a restraining order. The judicial forum emphasized the necessity of decision-making without delay, and they found it concerning that the law does not set a specific deadline for decision-making.[43]

In order to remedy the above deficiencies, Act LXXII of 2009 on Restraining Applicable in Case of Violence among Relatives was adopted by the National Assembly, based on Section 1(1), according to which 'any action or failure committed by the abuser against the abused party, which seriously and directly jeopardizes dignity, life, the right to sexual self-determination, as well as mental and physical health, will qualify as violence among relatives'. Basically, the law introduces the possibility of issuing a so-called preventive or temporary restraining order, the point of which is that the obligor is obliged to keep away from the abused party, from the real estate property where the abused party habitually lives, as well as from another person indicated in the temporary preventive restraining order or in the preventive restraining order during the effect of the restraining order; furthermore, they will be obliged to refrain from establishing contact with the abused party either directly or indirectly.[44]

42 Research project conducted at the Buda Central District Court in 60 cases closed with a binding effect in 2013 and September 2014. Tóth 2015. 90.

43 European Court of Human Rights, Kalucza v Hungary, case No 57693/10, Section 64, date of decision: 24 July 2012.
http://www.coe.int/t/dghl/standardsetting/convention-violence/caselaw/CASE%20OF%20KALUCZA%20v.%20HUNGARY.pdf.
Tamási–Bolyky 2014. 52.

44 Section 5(2).

It is the competent local court based on the abused party's habitual residence that decides on issuing a preventive restraining order in a non-litigious procedure. The procedure is launched ex officio at the initiative of the police or at the request of the abused party or a close relative of the abused party. Preventive restraining orders can be ordered for a maximum of 30 days. During the effect of such a restraining order, the abuser will be obliged to keep away from the abused party, from the real estate property where the abused party habitually lives, as well as from another person indicated in the order; furthermore, they will be obliged to refrain from establishing contact with the abused party either directly or indirectly.

While preventive restraining orders are issued in the framework of an administrative procedure, and it takes the provisions set out in the Hungarian Civil Code as a basis for defining the term 'relative', the issuance of criminal law restraining orders depends on the launching of a criminal procedure, and the relatedness between the victim and the perpetrator is not examined. The criteria of issuing a restraining order are different in the two types of procedure also by the legal title of the use of the real estate property where the abuser lives. No preventive restraining orders can be issued if the victim is a courtesy user of the apartment, and there is no child under legal age, common with the abuser, in the household. However, criminal law restraining orders can be issued by the court irrespective of the legal title of the use of the real estate property.[45]

The possibility to issue a temporary preventive restraining order assigned to the competence of the police is the 'entrance gate' to the issuance of a preventive restraining order, which is also regulated by the rules of official administrative procedures. The point of this lies in that in order to prevent a more serious abuse, the police officer could immediately take measures to remove the abuser from the site and should make a decision on keeping the abuser away from the victim for at most 72 hours. A temporary preventive restraining order can be issued ex officio or based on a report. Simultaneously, the police initiate the issuance of a preventive restraining order at the competent local court. The detailed rules of temporary preventive restraining orders are set out in IRM (Ministry of Justice and Law Enforcement) decree No 52/2009 (IX. 30), which helps the police arriving on the site make the right conclusions from the circumstances that can be experienced on the site and apply the right measure for the treatment and prevention of domestic violence.[46]

4. The possibility of using an intermediation procedure may provide considerable benefits to both parties, and the enforcement of the principle of opportunity is expressly justified in the case of actions which run counter to the statutory definition of harassment, on the basis of exclusivity. The process may

45 Tamási–Bolyki 2014. 54.
46 Tamási–Bolyki 2014. 56.

be especially highly justified in the case of infringements between relatives. Among the cases examined by the Report, it happened very rarely that an intermediation procedure was conducted unlawfully despite a reason for exclusion set out in the Penal Code.

> Related to the ordering of an intermediation process, one of the district prosecutor's offices summoned the victim as a witness and made them give a statement on whether they would give their consent to conducting an intermediation procedure. In lack of consent from the victim, conducting the intermediation process became aimless; so, an indictment was submitted. The district court held a preparatory hearing on this case, where they heard the accused party and the offended party, who then both gave their consent to conducting the intermediation process, and the prosecutor also proposed the same. This is why the district court suspended the criminal procedure for six months and ordered that an intermediation process be conducted, which, however, was not successful. In fact, however, the carrying out of an intermediation process was excluded by the law. The situation was that according to the indictment submitted by the district prosecutor's office, the accused party harassed their ex-partner continuously, from the termination of their life as a couple on 1 June 2012 up until 31 July 2013. The personal part of the indictment also contains that the accused party was put on probation for one year in a judgment that took binding effect on 19 April 2013. Thus, the accused party committed some of his acts during the effect of probation; this is why the carrying out of an intermediation process is excluded by Point d), Section 29(3) of the Penal Code.[47]

5. The Report suggests that it was only in 9 cases that a second-instance procedure was conducted in the case of convicted persons accused exclusively with harassment, i.e. in 85% of the cases the sentence or measure imposed by the first-instance court was acknowledged by both the prosecutor and the defence lawyer. In the case of accused parties convicted exclusively for harassment, the most commonly applied sanction is putting on probation (36.3%), imposing fines, and community work (23.4–23.4% respectively). 3.6% of the accused were reprimanded, 11% of them were sentenced to suspended detention, while 1.8% of the accused were imposed executable custodial sentences.[48]

47 http://ugyeszseg.hu/repository/mkudok7747.pdf.

48 'The court sentenced a Szeged man, who harassed his acquaintance living in Békéscsaba in the social media, in letters, on the phone, and in person too, to executabe detention in jail. The man said that he was in love with the offended party. According to the data of the investigation, the accused had been trying to get the victim's phone number in a social media site ever since June 2015; this is why he kept writing to the woman's friends. As he had not managed to get the woman's phone number, first he kept sending letters to her by post; then he personally dropped his letters

IV. Conclusions

1. Related to the analysis of the criminal act that was discussed above, I touched not only upon substantive but also on procedural law issues. The analysis of the procedural law was primarily related to the circumstances of filing a private motion. It was not by coincidence as, in my opinion, the current practice is unlawful in several aspects. First of all, it should be pointed out that harassment is, in most cases, a 'process crime', i.e. the offended party should be asked to inform the authorities on a regular basis in the case of all the infringements and that they should use the possibility of filing a private motion in each and every case. The situation is that the effect of the private motion filed for the first time only extends to the unlawful actions committed before this point in time.

2. In the case of Section 222(1) of the Penal Code, the regular nature of the action does not in itself substantiate criminal liability. In such cases, the authorities should also investigate into what the intention of the perpetrator was. If the actions are neither of an intimidating nature nor are they aimed at voluntarily intruding privacy, then the offending behaviour cannot be regarded as one that fulfils the criteria of the statutory definition. In this scope, the direction and mutuality of and the reasons for establishing contact should be examined along with the events directly preceding the infringement. 'The mutuality of contact between the victim and the accused does not exclude in itself the establishment of the crime of harassment, but extra attention should be paid to what exactly the communication on the part of the victim and the accused is aimed at.'[49]

Such actions are most frequently committed by electronic telecommunication devices, of which disturbing behaviour through e-mail and Facebook messages stands out. In such cases, it is an indispensable condition to providing evidence that the victim should have the printed copy of the message in question at their disposal or that the latter should be able to show such statements to the staff members of the investigation authority directly through entering their personal pages.

3. Finally, I think that the statutory definition of the behaviour in Section (2) should be supplemented with a subsidiarity or alternativity clause as this turn of phrase is often concurrent with other crimes (e.g. deprivation of liberty by mortifying the victim). Thus, in order to avoid the establishment of actions of

in the woman's postbox. His attempts were not successful in this way either; this is why he started sending messages to the phone number of the woman's father, and he kept waiting in front of the lady's house. When they met in person, the offended party told him that she did not want to get into any kind of contact with him, and she asked him to leave her alone; then she made a report to the police. The Investigation Unit of the Békéscsaba Police Headquarters ordered an investigation, in the course of which Csaba G. was heard as a suspect for the well-founded suspicion of having committed the infringement of harassment.'
http://www.police.hu/hirek-es-informaciok/legfrissebb-hireink/bunugyek/birosag-ele-allitas-zaklatas-miatt-foghazbuntetes.

49 http://ugyeszseg.hu/repository/mkudok7747.pdf.

several counts, it would be desirable to have such a legislator's wording that would only allow the establishment of 'harassment committed with dangerous threats' if no graver or other crime is committed.

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