



Importance of criminalizing the practice of stalking in protecting the right to freedom and privacy in the digital sphere¹

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SUMMARY

This article addresses the importance of classifying the practice of persecution known as *stalking* in Brazil, through the Law n. 14,132/2021 to protect the right to freedom and privacy. In this way, the objective was to analyze the constitutional protection of the rights of freedom and privacy and how the criminalization of the practice of *stalking* in Brazil impacts this protection. To achieve this objective, the methodology used for the research was the deductive method and literary review. As this is a new topic, such as its wording in the penal code, the use of periodicals and relevant doctrine was essential. It was concluded that stalking is a crime that violates fundamental constitutional rights, having a major impact on the victim's freedom and privacy.

Key words: *Stalking*. Freedom. Privacy. Persecution. *Cyberstalking*.

ABSTRACT

This article deals with the importance of typifying the practice of persecution known as stalking in Brazil, through Law n. 14.132/2021 for the protection of the right to liberty and privacy. In this way, the objective was to analyze the constitutional protection of the rights of freedom and privacy and how the criminalization of stalking in Brazil impacts on this protection. To achieve this objective, the methodology used for the research was the deductive method and literary review. Because it is a new topic, its wording in the penal code, the use of periodicals and relevant doctrine became essential. It was concluded that stalking is a crime that violates fundamental constitutional rights, having a great impact on the victim's freedom and privacy.

Keywords: Stalking. Freedom. Privacy. Persecution. Cyberstalking

1. INTRODUCTION

Characterized by occurring repeatedly and frequently, the conduct of insidious persecution, commonly called *stalking* should be understood as unhealthy and criminal behavior. A person can pursue another for a variety of reasons, ranging from exaggerated admiration, envy, love, hate, rejection and obviously obsession. Regardless of the motivation that the criminal has, it does not justify the practice of acts that hinder the victim's freedom and privacy, and that harm their human dignity, causing physical and psychological harm. Even if the act of stalking reveals itself as a practice of persecution, mainly on social networks, due to admiration, curiosity, and even romantic interest or jealousy.

This is not a recent behavior, on the contrary, it is an ancient practice that has been with us since the beginning of time, however, in current times it has caused great concern throughout the world, especially when practiced in the form of *cyberstalking* that in the virtual environment finds fertile ground to act, since it is possible to have access to various personal information and hide behind anonymity to invest in criminal practice.

It is important to highlight that the practice of *stalking* goes far beyond a mere unpleasantness and occasional nuisance, criminalization is the practice of repeated persecution that can culminate in much more severe acts and, therefore, the conduct is already considered a crime in many countries. Following this global trend, in Brazil the *stalking* began to be seen as a crime of persecution after Law no. 14.132/2021, upon understanding that it is an act that can be accomplished by the most different means of approach and that it is possible to use the most diverse persecution tactics, constraining the physical, psychological and moral integrity of the target person.

This article aims to investigate the importance of criminalizing the practice of *stalking* in protecting the right to freedom and privacy in the digital sphere in Brazil, through Law No. 14,132/21, indicating its impact on the legal system and the protection of the rights to freedom and privacy.

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2. MATERIALS AND METHODS

Research based on the deductive method, developed through literary review, searches were carried out in books, law magazines, as well as on the main digital platforms available considering the fact that this is a relevant topic in the criminal legal scenario. In this way, the methodological path outlined continued with the search for information in the doctrine; in articles and periodicals recently published in specialized databases and, in the current legislation that deals with the topic from a doctrinal understanding, a study of Law No. 14,132/21, which criminalizes the *stalking* in Brazil, with the aim of identifying its suitability to combat repeated persecution, thus offering greater protection to the rights of freedom and privacy.

3. RESULTS AND DISCUSSIONS

With the evolution of the means of communication, together with the globalization of information and data on a gigantic scale, combined with the easy access of third-party personal information, old practices have become increasingly worrying when it comes to protecting privacy, tranquility and even people's honor.

Having said this, it is known that the fundamental right to private life is of utmost importance with regard to human development itself. However, the right to private life has long been subject to threats, which have now gained in intensity and become more common and devastating, given technological advances. In this violation scenario, there is the practice of *stalking*, action in which the agent persecutes his victim, repeatedly or continuously, with the aim of causing fear and attacking his psychological or physical integrity, in addition to invading his privacy. However, this persecution until mid-2021 was not a crime in Brazil, it was only punished as a criminal misdemeanor.

Damásio (2008), being one of the national precursors on the topic, already conceptualized the practice of *stalking* as:

"Stalking is a form of violence in which the active subject invades the victim's sphere of privacy, incessantly repeating the same action in different ways and acts, using different tactics and means: calls on cell phones, home or business, love messages, telegrams, bouquets of flowers, unsolicited gifts, subscriptions to unwanted magazines, messages on banners posted near the victim's residence, staying outside school or work, waiting for them to pass by a certain place, frequenting the same leisure place, in supermarkets, etc. O stalker, sometimes, spreads rumors about the victim's professional or moral conduct, says that she has a serious illness, that she was fired from her job, that she ran away, that she is selling her home, that she lost money gambling, that she is wanted by the police etc. This gains psychological power over the passive subject, as if he were the general controller of his movements."

Regarding the different means and behaviors that are used to practice the *stalking*, great attention is paid to that practiced through electronic means, known as *cyberstalking*. The ease of access to the internet and social networks, which is provided through the development of the media, favors persecutors.

According to Gomes (2016), these are examples of *cyberstalking* the conduct of invasion into the victim's computer time, intrusion into their email accounts, social networks, attempts at virtual contact, sending obscene messages and online sharing of intimate or manipulated content of the victim. Unfortunately, the anonymity provided in the digital world makes individuals even more daring and dangerous outside the virtual world.

Pereira (2014, p.33), reiterates that, "the strategies used by *cyberstalker* are based on the use of Internet, to find your target, identify it and geographically locate it".

Although the use of technologies provides benefits, with them come threats to the freedom and privacy of individuals, as private life becomes immensely exposed.

Within this scenario, we must insert the recent criminalization of *stalking* in Brazil, through Law no. 14,132/2021, which added art. 147-A to the Penal Code and revoked art. 65 of Law No. 3,688 of 1941 (BRASIL, 2021). Therefore, if previously repeated persecution was considered a mere misdemeanor, now becomes considered a crime, with a penalty of imprisonment, from 6 (six) months to 2 (two) years, and fine, and if the crime is committed against a woman, for reasons of female sex, against a child, teenager or elderly person or, even, through a group of people, the penalty may be increased by half.

The criminalization of the practice of *stalking* in Brazil, it occurred in line with global concern about the issue, since several countries have already criminalized the practice, including the United States, Germany, Italy, Austria, Canada, Australia and the United Kingdom, which already punish insidious conduct.

4 FREEDOM AND PRIVACY RIGHTS AND CONSTITUTIONAL PROTECTION

Our Constitution of the Federative Republic of Brazil of 1988 represented a significant advance

in relation to the protection and defense of the fundamental rights of the individual, by adopting as foundations the dignity of the human person, as expressed in its article 1, item III. (BRAZIL, 1988).

In this line of thought, the Brazilian Federal Constitution of 1988, when providing protection over the protection of fundamental rights, recognizes the essential importance of human dignity, which is the starting point of other guarantees.

Within the rights supported by Brazilian legislation, freedom and privacy must be analyzed from a more detailed perspective, as these rights have acquired great vulnerability within the current society that is en masse in the digital world.

The Brazilian legal system, as well as other foreign legislation, provides for the right to privacy. The Constitution of the Federative Republic of Brazil of 1988 provides the protection of fundamental rights, namely: privacy and intimacy, both provided for in article 5,, *in words*:

X - The intimacy, private life, honor and image of people are inviolable, ensuring the right to compensation for material or moral damage arising from their violation; (BRAZIL, 1988).

The indoctrinator Maria Helena Diniz considers that:

Privacy cannot be confused with intimacy, but the latter can be included in the former. That is why we treat it differently, despite the fact that privacy concerns external aspects of human existence – such as confinement in one's own home without being molested, choice of way of living, habits, communication via letter or telephone, etc. And intimacy concerns internal aspects of a person's life, such as personal secrets, romantic relationships, modesty, etc. (DINIZ, 2013, p. 136)

In line with Maria Helena Diniz's speech, indoctrinator Gilberto Haddad Jabur brings the following teaching:

The right to privacy derives from the right to freedom, insofar as the first encompasses the right to stillness, inner peace, solitude and isolation from public curiosity, in relation to everything that may interest the person, preventing them from bare your private life; while the second protects the right to a free choice of what the individual intends or does not wish to expose to third parties, protecting his restricted circle in any way he sees fit. (JABUR, 2000, p. 260)

That said, it can be said that the right to privacy refers to the individual's relationship with society in their social isolation, inner peace, etc.

According to Bittar (2014), as they are increasingly necessary and indispensable in people's daily lives and lives, technological means leave them exposed to risks, since personal information is easily available for access and can be disclosed and used improperly. It is not uncommon for an individual to have a large exposure of their intimate life, however, this does not mean that there is automatic authorization for the use of this information, especially for illicit purposes. Amiky (2014) points out that, “the fact that certain information and images are disclosed by the person themselves and/or by the family nucleus does not take away their privacy protection, nor does it obviously authorize such information to be used for illicit or criminal purposes”.

The fact that this type of persecution is characterized by the permanence of time, that is, in a repeated and lasting manner, means that during this period the victim's right to freedom and privacy is violated. These rights, as already explained, are constitutionally guaranteed.

The caput of article 5 of the 1988 Constitution of the Federative Republic of Brazil proclaims:

Art. 5 - Everyone is equal before the law, without distinction of any kind, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, freedom, equality, security and property, as per the following terms :

The aforementioned article points to freedom as an essential prerogative of the democratic rule of law. Therefore, any action by third parties that takes away the freedom of others is not permitted. It is important to highlight that although freedom, like all other fundamental rights, is relative, such relativity is limited only by the State, based on the principles of legality, proportionality and reasonableness. Therefore, the power to protect all legal assets essential to social life, and among them is freedom, is the exclusive responsibility of the State, which always aims to prioritize what is most relevant, depending on the specific case and respecting democratic aspects. of society.

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The Penal Code, in article 146, in the special part of Decree-Law 2,848/1940, typifies any and all actions by third parties that violate individual freedom, as provided:

Art. 146 - Constraining someone, through violence or serious threat, or after having reduced, by any other means, their capacity to resist, not to do what the law allows, or to do what it does not require:

Even though initially the *stalking* and or *cyberstalking*, do not opt for the use of violence or serious threats, without a doubt the incessant attempt at communication, surveillance and insidious and repeated lurking, take away individual self-determination, that is, their freedom and autonomy for social life. Lots of

Sometimes irreparable damage is caused to the health and mental integrity of the victim, who, due to fear of the persecutor, changes his address, place of work, and may even be confined to his own place, in fact being deprived of his ability to act for himself, having their limited locomotion and social interaction and expression of thought are restricted, which can lead to the emergence of diseases that restrict their ability to move around, socialize and express their thoughts, which can generate anxiety and depression.

Therefore, the crime of *stalking*, in addition to bringing psychological and physical consequences that harm the dignity of the individual, it incisively offends the freedom and privacy of the victims. According to Amiky (2014):

If the person is protected as a whole, in their psychological and physical integrity, and if, in order to develop a dignified life, as the Brazilian legal system aims, the person needs both physical and mental health, the *stalking* affects the human person at its core, as the damage caused is so serious that it impedes the development of the personality itself, since no human being can develop freely, fully and with dignity under the yoke of another.

It is clear that the criminalization of the practice of *stalking*, appears not only to protect the rights to freedom and privacy, but also as an essential tool for protecting human dignity, which is in fact the fundamental right and basic principle of our Federal Constitution of 1988.

4.1 THE CRIMINALIZATION OF STALKING IN BRAZIL

Insidious persecution has become a major problem around the world due to its high incidence and severity, for this reason several countries have taken the lead and created legislation to combat it. The United States was the first to be concerned with the issue, since the 1990s the practice of *stalking* was already criminalized, and was followed by several countries such as Germany, Italy, the United Kingdom, among others. Following a global trend, repeated persecution was recently criminalized in Brazil through Law No. 14,132/2021.

The law of *stalking* is recent, with just over 1 (one) year in force, on the other hand, the cases of persecution in the country are old and were already present and some became quite famous due to the repercussion achieved and, especially when it comes to those known in the media .

Law No. 14,132/21 was on March 31, 2021, includes article 147-A in the Brazilian Penal Code, which makes the practice of stalking someone a crime, "*stalking*". Entering into force on April 1, 2021 and, after its publication in the Official Gazette of the Union, it revoked the criminal offense of disturbing the peace that was provided for in article 65 of Decree-Law No. 3,688/41, which was used until then to punish similar practices in Brazil.

According to the wording of art. 147-A, it states:

Art. 147-A. Persecuting someone, repeatedly and by any means, threatening their physical or psychological integrity, restricting their ability to move around or, in any way, invading or disturbing their sphere of freedom or privacy. Penalty – imprisonment, from 6 (six) months to 2 (two) years, and fine. § 1 The penalty is increased by half if the crime is committed: I – against a child, teenager or elderly person; II – against women for reasons of their female sex status, under the terms of § 2º-A of art. 121 of this Code; CRIMINALIZATION OF STALKING IN BRAZIL 79 III – through the involvement of 2 (two) or more people or with the use of a weapon. § 2 The penalties in this article are applicable without prejudice to those corresponding to violence. § 3º Only proceed through representation.

Based on the understanding that the repeated conduct is a succession of criminal practices of disturbing third parties; paying attention to the expression "any means" used by the legislator in the body of the text given to article 147-A, leaving an interpretation that understands that the crime of persecution can be configured through the use of different instruments, be it physical contact, social networks or even two (BRAZIL, 2021).

However, it is worth highlighting that the criminal conduct of persecution requires that the criminal practice occurs obsessively by the subject.

Given the export throughout this article, it appears that the crime can be committed by various means, given these facts, the legislator also starts to worry about some conduct, which often begins in the virtual world (*cyberstalking*), without technology, the means used to persecute someone or through physical persecution (CRESPO, 2015).

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Regarding conduct, it can be considered as a commissive crime, with positive movements by the aggressor, carrying out acts directly or indirectly to gain space in the victim's life, whether he or she can identify himself or not. In terms of criminal law, there are two possibilities for the crime to be consummated, the first is when the actions threaten the physical or psychological integrity of the victim, even impeding their freedom to come and go, the second is invasion or disturbance. of privacy or freedom. In this way, the illicit is consummated.

In fact, it is necessary to highlight, as Adriano Sousa Costa, Eduardo Fontes and Henrique Hoffmann (2021) points out, that criminal conduct is "bicommon", since the legislator does not require any special quality from the criminal or the victim. Finally, there is the possibility that the sentence will be increased by

half if the victim is a child, teenager, elderly person or woman.

In cases where the persecution is aimed at serious practices, such as rape, feminicide or homicide, if there is proof that the active subject used persecution as a means of carrying out serious crimes, based on the principle of subsidiarity it will be necessary to absorb the crime of persecution .

It is important to highlight that in the case of domestic and family violence against women, the procedural steps occur in accordance with Law 11,340/06 and, furthermore, according to Summary 536 of the STJ, they do not apply to crimes subject to the rite of the Maria Law da Penha the benefits of the conditional suspension of the process and the criminal transaction (BRITTO; FONTAINHA, 2021).

Given the facts, the criminalization of persecution conduct emerges in the national system of standards, with the function of changing the scenario so that the legal uncertainty regarding the use of the old criminal misdemeanor, which punished acts as a mere disturbance of peace, is removed. The new crime appears as a protection mechanism for victims of domestic and family violence, which, as mentioned, can be considered aggravating sentences.

4.2 THE LEGAL AND SOCIAL CONSEQUENCES OF THE CRIMINAL TYPE OF STALKING

As we already know, the crime of *stalking* can be practiced through any means, both digitally and as in the physical environment. Therefore, the digital universe and its use on a large scale has become a means of action widely used by criminals, whose target, in most cases, are vulnerable categories, such as women. According to Bittar (2014), the misuse of digital media, especially after the advent of social networks, is fertile ground for criminal conduct, causing negative effects on the virtual integrity of individuals.

Within this scenario, the challenge of protecting the right to personality arises, with the aim of preserving, consequently, the dignity of the human person. Therefore, the performance of Criminal Law is of paramount importance as it is conducive to the protection of essential legal assets, thus fulfilling its social function of protecting fundamental rights, as Capez (2011) points out, it is the function of Criminal Law to promote the protection of substantial rights, such as life, liberty and health.

With the criminalization of repeated persecution conduct, the penalty that was previously treated as a misdemeanor is now more severe, a factor that is intended to inhibit the practice, given the preventive nature of the punishment, in accordance with the relative theory of punishment. (BRAZIL, 2021). If we consider the preventive nature of the application of criminal law, it is understood that when a conduct is typified, it is only capable of discouraging the practice in the social environment. Following this line of thought, it is possible to conclude that the criminalization of *stalking* in Brazil, it could lead to a reduction in repeated persecution, as occurred in other countries. (SOUSA, 2020).

The possibility of reducing crime is envisaged, as as a result of combating persecution, more serious crimes, such as feminicide, can be avoided. However, there is great evidence that the crime of *stalking* The majority of its victims are women, and in many cases, the persecution is aimed at more serious crimes, as shown by studies carried out in several countries. Corroborating this statement, research *Stalking Resource Center*, points out that 54% of victims of femicide reported having suffered repeated persecution before they died, that is, the *stalking* culminated in a more serious crime. (SERRA, 2021; REIS, 2021). In this sense, the concern to eliminate more serious crimes and preserve the freedom and privacy of the individual is one of the purposes of Law No. 14,132/2021 (BRASIL, 2021).

It is clear that the crime of persecution, without a doubt, is a response to the desires of post-modern society, therefore, by criminalizing the conduct, the legislator will be able, in fact, to meet new social demands, when the behavior of insidious persecution has become recurring nowadays. Care for human dignity is the aim of this criminalization, since repeated persecution is a direct offense to the fundamental rights of freedom and privacy, which in the vast majority of cases also results in an offense to the physical integrity of the victim.

CONCLUSIONS

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The crime of *stalking*, has become a very common practice, with consequences that go beyond mere unpleasantness. As the wording of Law no. 14.132/2021 highlights that repeated conduct is criminalized, as it brings great moral, tax and psychological harm to the victims. Crime can be committed by any means, so greater attention should be paid to the digital sphere, as the mass use of social networks, easy access to information and, finally, the anonymity that the screen provides, encourage criminals in their attacks. .

Because there is a gap in the legal system, the creation of Law no. 14.132/2021 took place in a very timely manner, as the recognition that the conduct is an offense to human dignity, bringing great

consequences for the rights of freedom and privacy, depriving victims of their social life, work and daily practices, causing isolation and psychological illness, when the practice does not culminate in more serious violence.

Ostalking It is undoubtedly a crime that must be curbed due to the damage caused to the social structure of victims due to persecution practices that aim to hinder their freedom and privacy. The development of this work allows us to conclude the importance of criminalizing the conduct of *stalking* for the preservation of the freedom and privacy rights of individuals, since typification tends to make the practice increasingly restricted, even though the digital advent facilitates access and monitoring of the lives of others, the punishment for its practice, through of the legislation that came into force in 2021, is already a victory for the criminal legal system.

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