STALKING IN THE NETHERLANDS

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Introduction

This article explores the role that law can play in combating stalking behavior. It starts with a sketch of the laws of a number of countries are described as well as the discussions that have taken place about these laws. The article elaborates on the role that criminal law and other remedies – both of legal and non-legal nature - might play in cases of stalking. The case of the Netherlands is presented to illustrate the process of legislation. The article ends with a number of conclusions as to the desirability of various types of remedies for combating stalking behavior.

Over the last decades, stalking has drawn increasing attention. Incidents have been reported in the news-media, and drafts for new laws that address this behavior have been designed in many countries. There exists, however, a considerable variety in the types of behavior that are generally described in the news-media and the literature as 'stalking' which complicates the way the legislatures of different countries deal with it. When looking at the various wordings that have been employed in the legislation of a number of countries, it may be concluded that the 'essence' of stalking is neither clear nor undisputed.

This article describes how the presumed essence of stalking is reflected in the laws of a number of countries, as well as the discussions that have taken place in these countries. Because of the limitations of this article, this description is restricted to only a small number of countries. The following section elaborates on the role that criminal law and other remedies might play in cases of stalking. These other remedies are both of legal and non-legal nature. The case of the Netherlands serves to illustrate the ongoing process of legislation. The article ends with a number of conclusions.

Legal definitions

USA

The legal description of stalking in the first stalking law (that of California) includes the *willfully, malicious, and repeatedly following or harassing another person, as well as the making of a credible threat with the intent to place that person in reasonable fear for his or her safety, or of his or her family* (Saunders, 1998). A number of California Court of Appeal cases have clarified the various elements of this stalking statute. 'Repeatedly', for example, was explained as 'on more than one occasion'; and intent to carry out a threat was not considered as a requirement for a conviction. That the suspect intended to place the victim in fear is sufficient. Other states in the US have based their legislation on the California law.

United Kingdom

In 1997, the 'Protection from Harassment Act' was introduced in the UK. To obtain a conviction for criminal harassment, the prosecution must prove beyond reasonable doubt that the accused *pursued a course of conduct which amounts to harassment of another person and the accused must know or ought to know that the conduct amounted to harassment*. The course of conduct is defined as 'conduct on at least two occasions' (Gibbons 1998).

A further section to this Act (Section 4) pertains to causing fear of violence. It says: "*A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him, is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions*." This new Act has been severely criticized for its lack of precise definition. The question has been posed whether it adds to the already existing criminal law. In the UK, three Acts cover conduct that might also be described as stalking. These acts are: the 'Malicious Communications Act', which deals with offensive mail; the 'Post Office Act', which makes it an offence to send a letter or parcel likely to cause the recipient injury; and the 'Telecommunications Act',

which can be used to tackle obscene, offensive or annoying phone calls (Gibbons 1998, p. 134). Other sections of this UK 'Protection from Harassment Act' create a civil tort or describe restraining orders which can be imposed on anyone convicted of one of the other sections (2 and 4).

Western Europe

A number of other Western-European countries have also introduced stalking laws or laws that, without expressly using the term 'stalking', are clearly applicable to such behavior. The legal definitions of stalking vary among those countries. Norway makes the *frightening or annoying behavior or other considerate conduct that violates another person's right to be left in peace* punishable by law (Gibbons 1998, p. 137). The Irish law makes harassment punishable; this includes *persistently following, watching, pestering, besetting or communication with (someone)* (Gibbons 1998, p. 138). The law of Denmark pertains to the *violation of the peace of some other person by intruding on him, pursuing him with letters or inconveniencing him in any other similar way* (Gibbons 1998, p. 138). Belgium has made the *stalking of a person while the suspect knew or ought to know that by his behavior the peace of mind of this person would be violated* punishable (Stevens 1999). In France, conducting malicious phone calls is an offence, as well as sexual harassment. However, stalking as an umbrella concept is not made punishable by a separate provision in this country (Gibbons 1998, p. 139). In the Netherlands, a draft of a new law has been designed which makes the *willful intrusion upon a person's right to privacy* punishable. The Draft of the Dutch new law will be discussed below.

This non-exhaustive overview of legal definitions makes clear that not only the categorizations of stalking behavior found in the literature show a wide variety, but that legislatures over the countries have produced a plethora of different phrasings as well. A few laws restrict themselves to an enumeration of specific actions, such as following a person, sending him or her letters or making intrusive phone calls. Other countries make use of qualifying terminology like: 'harassment', 'threats', the 'causing of fear', 'stalking', et cetera. And some countries combine the two methods.

Differences and similarities

Meloy (1998, p. 2) states that legal definitions of stalking vary from state to state (in the US), but generally have three elements in them: 1. a pattern (course of conduct) of unwanted behavioral intrusion upon another person; 2. an implicit or explicit threat that is evidenced in the pattern of behavioral intrusion; and 3. as a result of these behavioral intrusions, the person who is threatened experiences reasonable fear. The legal definitions of some other countries seem to place the emphasis more on the intrusion upon the victim's peace of mind than on the causing of fear. The laws of Ireland, Norway, Belgium and Denmark do even not require that the suspect cause fear in the victim or the intent to do so; in these countries it is sufficient that the suspect intrudes on the peace of mind of an other person. Most countries combine the requirement of harassment with that of an instigation of fear within the victim. The exact wordings in which the legal provisions are phrased show a wide variety however.

The differences between the US on the one hand and the Western-European countries on the other can, partly, be explained by the fact that lethal weapons can be obtained more easily in the United States than in Europe, which provides more opportunities for stalkers to threaten people. American victims of stalking might more readily actually feel menaced when a persons threatens to harm them than a victim in Europe would because they always have to reckon with the possibility that the other person possesses a weapon. Therefore, the US laws place more emphasis on the fear-aspect. In spite of a relatively lower degree of weapon-possession, sufficient reasons for criminalizing stalking behavior have remained in Western-European countries however, as evidenced by the fact that they have also drafted new laws.

Stalking behavior has a variety of manifestations and backgrounds. Both absence of a previous contact or relationship as well as highly intimate relationships preceding the stalking behavior can be found. Both severely mentally disturbed people and seemingly sane people exhibit stalking behavior. The lack of an unambiguous classification of both stalking behavior and those who commit this behavior (and their victims) is of serious consequence for the question which intervention suits best for combating it: should new articles be introduced into the criminal law, should other actions be undertaken, or both? These questions have been explicitly addressed during the drafting process of a new stalking law in the Netherlands currently being dealt with by the Dutch Parliament. The next section goes into discussions that have recently been conducted about whether a new stalking law is desirable in the Netherlands, and whether a correct definition of stalking has been chosen.

Stalking in the Netherlands: new legislation

The former minister of Justice of the Netherlands, Winnie Sorgdrager, considered it unnecessary to draft a new law forbidding stalking. She argued that victims of stalking would probably not be prepared to inform the police of the crimes they had felt prey to, because such a notification would intrude upon their own privacy: they would be requested to provide information of a highly private nature about their relationship with the stalker to the police. A second argument for not explicitly making stalking behavior punishable was that it would probably be difficult for the prosecution to prove these crimes. Stalking generally takes place with no one else present to witness it, which hinders the collection of sufficient evidence for a conviction. The minister's final argument was that cases of very serious stalking would be covered by the insanity law: perpetrators could be admitted to a psychiatric hospital on a mandatory basis if they were to bring the safety of persons and goods in danger.

The refusal of the government to draft a new law has led to an initiative of three members of the Dutch Parliament to make a law on their own. In December 1997, they drafted a new law that said:

> *"He, who unlawfully repeatedly willfully intrudes upon a person's privacy with the intent to force that person to do something, to refrain from doing something or to instigate fear in that person will be punished as guilty of belaging (stalking) to a prison term with a maximum of three years or a fine of the fourth category"*

On July 12, the new law has come into force. This period of existence of the new law is too short to draw any conclusions as to its effectiveness.

Making stalking a crime or not?

A great deal of the comments on the draft concerned whether stalking should be made a new crime, or not. Doubts about the desirability of the new draft exist on the grounds that other provisions in the criminal law would already apply to stalking behavior, such as annoyingly pursuing someone, slander, libel, unlawful entry, threat, and the infliction of bodily harm. A provision pertaining to stalking on top of these would not be necessary. Other critics opined that stalking is not a legal problem in the first place, but more a psychological or social one. Other remedies would be more appropriate for combating stalking, such as: first discussing problems between the perpetrator and the victim before legal action is taken; mediation with the help of a third person; and, a stronger role of the police in enforcing restraining orders. Some critics feared that the criminal law's character as *ultimum remedium* (last resort) would be perverted by making unclear behavior like stalking legally punishable.

Some critics have accused the Dutch legislators of drafting a symbolic law that is primarily based on incidents instead of thorough research into stalking behavior. The draft has been dedicated to the victims of stalking in the Netherlands. Some authors considered this to be a misplaced expression of solidarity (Holtmaat 1998), and, thus, the law as having a mainly symbolic function. It later appeared that one of the legislators had himself once been the victim of a stalker.

The fact that the draft is mainly based on incidents certainly has to do with the lack of reliable in-depth research on prevalence, incidence and characteristics of stalking in the Netherlands. Only recently new results on stalking in the Netherlands have been presented (Blaauw *et al.* 2000; Blaauw *et al.* 2000). Conducting this type of research is hindered by the police not registering stalking cases as a separate category. Instead, they use labels such as 'domestic violence' or 'threat'. For the same reasons, the prosecution do not instigate criminal proceedings and courts do not convict stalkers for stalking, but for, among others, 'threat', 'infliction of grievous bodily harm', or for 'attempted homicide'. Similarly, civil restraining orders are not expressly registered as being imposed for stalking, but civil courts use general categories, such as 'family law'. The research that has been conducted in the Netherlands is mainly anecdotal in character and largely based on the stories told by the victims (Hes 1984; Hes & Van Ringen 1986). There probably is a considerable 'dark number' of stalking cases.

Not all criticisms include an explicit dismissal of the initiative for making a new law. Some authors point to the evolution of the Dutch criminal law over the last years. According to these scholars, criminal law gradually evolves from a primary orientation to the imposition of sanctions to an orientation to providing remedies for certain behaviors and the protection of victims (Groenhuijsen 1998). Such a development would be in agreement with the increasing attention for the societal functions and responsibilities of the criminal justice system. From this standpoint, the making of such a new law would be greatly justified.

In the legal literature, a number of criteria have been developed for determining whether the drafting of new provisions in the criminal law pertaining to specific undesirable behavior is necessary. The most recently designed set includes the following criteria (Haveman 1998):

1. Is there a problematic situation that requires a response?
This criterion indicates that an analysis of a particular situation deemed to be problematic is necessary first for determining whether certain actions – among which possibly the drafting of new legal provisions - are required. Without an adequate problem analysis and an establishment of the goals to be achieved, a rational choice for a certain response it not possible. The criterion makes clear that the actions that are taken should be appropriate to combat the problems that are discerned.

2. Is there a role for the State?
This criterion focuses primarily on whether or not the persons involved are able to reach a satisfactory solution themselves, either with support of the authorities, or not. It should be determined whether or not there is consensus within society with regard to the (moral) acceptability of the behavior. Where parties, or society in general, can resolve problems themselves, or when a moral debate is still ongoing about the reprehensibility of certain behavior, states should refrain from intervention, enforcement of certain behavior, or legislation.

3. Are there any adequate non- criminal responses available?
Criminal law is *ultimum remedium* (last resort), which implies that the application of other interventions should be considered first. Responses with an emancipatory character, as provided by, for example, the (mental) health system, are preferred to repressive ones, as provided by the criminal law system. If these other remedies fail or when they are not appropriate for the particular situation, the criminalizing of certain behavior becomes a suitable option.

4. Is the criminal law an adequate response?
This criterion pays attention to such features as the blamefulness of behavior, the proportionality of criminalization, and the necessity of legal protection for victims. The evaluation of these sub-criteria may lead to the decision that the criminalization of certain behavior is desirable. One sub-criterion is especially relevant for stalking: the requirement that the behavior can be adequately defined and legally described. (Haveman 1998, p. 417)

These criteria can be applied to whether new provisions forbidding stalking behavior should be introduced into the criminal law. The first question (criterion) can be answered in the positive: research has shown that stalking is a real problem, at least in the US (Meloy 1998; Tjaden & Thoennes 1998). Eight percent of women and two percent of men in the US have been stalked at some time in their lives. The average stalking case lasts 1.8 years. Less than half of all stalking victims are directly threatened by their stalkers (Tjaden & Thoennes 1998). Research in the Netherlands has shown that 15 to 20% of all killings between partners were preceded by a period of stalking (De Boer 1990). Research conducted in the U.S. has demonstrated that less than 2% of the victims of stalking are murdered by the person who harassed them. The frequency of violence among (US) stalkers toward their object averages in the 25-35 percent range (Meloy 1998, p. 5). Although exact figures about Dutch stalking are lacking because of inadequate registrations by police and prosecution, there are sufficient indications that in the Netherlands stalking behavior is also encountered on a regular basis. The Parliamentary Documents pertaining to the draft for a law on stalking (*belaging*) list a number of incidents comprising stalking that are substantially serious. Certain actions or interventions therefore seem desirable.

The second question (criterion), referring to the role of the State, leaves a little more room for doubt. Some cases of stalking might be resolved by the parties themselves, but other certainly not. These latter cases have led to highly undesirable consequences. Obviously, stalking behavior escalates every now and then, without the parties being able to prevent it. Since we do not have information about the proportion of all stalking cases in which the parties do not succeed in preventing an escalation themselves, definitive answers to this question cannot be given as yet.

The third criterion requires that the role of alternative remedies is evaluated. The effectiveness of remedies provided by the civil law (restraining orders) and by the Dutch insanity law (BOPZ) in cases of stalking has not yet been thoroughly evaluated. Research on restraining orders in the U.S. suggests that these orders lack effect in cases of highly serious stalking: the most obsessive stalkers do not feel impeded by those orders and continue their harassing behavior (McAnaney 1993; Attinello 1993; Tjaden & Thoennes 1998; Stewart 1998). In the Netherlands, no systematic empirical research has been conducted as yet on compliance to civil restraining orders, and nor does data exist on the application of the insanity law (BOPZ) to stalkers. Thus, there are remedies other than criminal ones available, but their applicability in situations of stalking is not yet clear at present.

As a non-legal remedy against stalking, an alarm system has been made available to victims of stalking in Rotterdam. This system (AWARE – Abused Women's Active Response Emergency), has been developed in Canada and is used both in this country and the United States. The homes of nine women in Rotterdam have been connected to this system over the last two years. Only five times these persons have made use of the system. An evaluation of the project has revealed that the system has increased the women's general feeling of safety (Römkens & Mastenbroek 1999). It also showed, however, that some former partners of the women aggravated their stalking behavior after the woman's home had been connected to the alarm system. The system, therefore, seems to have a number of serious negative side-effects. It has been in function for too short a period of time to draw definitive conclusions.

The last criterion, whether provisions in the criminal law would be an adequate response to stalking, may give reason for more doubt about the desirability of criminalization of stalking than the previous criteria did. Of special relevance is the sub-criterion that behavior can be adequately covered by a legal description. As was shown above, there is no agreement among countries and in the legal literature as to the exact description of stalking, and the characteristics of stalkers show a wide variety as well. Nevertheless, this has not impeded the legislatures in these countries from drafting a new law.

Criticisms on the elements of the provision

There were not only criticisms on the initiative to phrase a new provision in the Dutch criminal law, but the elements of the provision were criticized as well. One of the comments that was voiced concerned the lack of clarity of the term 'privacy'. The designers of the law have responded that judicial decisions were to clarify this term, and referred to the decision by the European Court of Human Rights on Article 8 of the Convention in the case of Niemitz (ECHR 16/12/92, NJ 1993, 400). This decision ruled that the right to privacy includes activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunities of developing relationships with the outside world. Since the drafters did not say any more about the scope and the implications of the term 'privacy', it remains a rather unclear concept. This last-mentioned principle requires that all convictions for crimes be based on an existing provision in the criminal law. Legal scholars generally include the requirement that the wordings of these provisions should be clear and unambiguous (*lex certa*) in this principle. The lack of clarity of the term 'privacy' may cause an invasion of this principle.

Further comments on the draft concerned the scope of the provision: it was considered to be both too wide and too narrow. Too wide because it would probably also apply to behavior that would generally not be considered stalking in the strictest sense, such as the paparazzi's pursuing of Princess of Wales Diana, or the neighbor's harassing of a person because the person's pet regularly destroys new vegetation in his garden. The present wording of the provision is not explicitly restricted to stalking in intimate relationships. On the other hand, the scope of the provision would be too narrow because certain actions that, although being highly annoying, would probably not cause fear or force someone to do something or refrain from something and would, therefore, not count as stalking (Holtmaat 1998). The daily sending of flowers or letters would, according to these authors, not imply an invasion of a person's privacy and, thus, could not be labeled as 'stalking'.

Finally, some comments were made on the phrasing: "with the intent to force that person to do something, to refrain from doing something or to instigate fear in that person". Some considered such an addition to be unnecessary, others feared that certain mentally impaired stalkers would even not be conscious of what they do and, therefore, could not be considered to act intentionally.

Conclusions

This article has demonstrated that both the classifications and the legal definitions of stalking show a wide variety. The reason for this finding is that stalking itself is far from an unambiguous behavior: different types of people exhibit this behavior and various sorts of relationships precede stalking; and the behavior itself has many appearances as well. The ways in which newly-drafted laws cover stalking behavior also differs among countries.

It is questionable whether the fact that there is a wide variety within the group of stalkers and their courses of conduct should be of serious consequence for the wordings of the law. Our opinion is that the law can be restricted to covering the essence of stalking behavior, and does not have to contain specifications concerning the different types of stalkers. It is not relevant for the legal

definition whether stalker and victim had a prior relationship or did not know each other at all. Nor does it make any difference for the qualification of the actions what, if any, mental disorder the perpetrator suffers from. It is the course of conduct that counts, not the background of it. ‘Fear’ is not a necessary element in a legal provision, because a great deal of highly annoying stalking takes place without the victim directly experiencing fear. The essence of stalking would then, in our opinion, consist of repeated behavior that unlawfully intrudes upon another person’s privacy. The law, its accompanying Explanatory Memorandum, and judicial decisions should pay a little more attention to defining the term ‘privacy’ than has been the case.

In the Netherlands, the question whether it is desirable and useful to explicitly make stalking behavior a crime has been explicitly addressed. The arguments in favor of and against such an option have been delineated in this article. There clearly is a situation that requires interventions, but it is questionable whether these should take the shape of a new law. The present draft, moreover, has a number of unclear points that should be removed in a further version. One of the advantages of this new law is instrumental: it has provided the possibility to, in extreme situations, take the suspect into preventive custody. This could be highly useful in cases that bear the risk of escalation.

In-depth research remains necessary on the essence of stalking as well as on the applicability and appropriateness of various legal and non-legal remedies. The results of such research are needed to design a well-considered set of instruments to combat this highly detrimental type of behavior.

References

Attinello, K.L. (1993). Anti-Stalking Legislation: A Comparison of Traditional Remedies Available for Victims of Harassment Versus California Penal Code Section 646.9. *Pacific Law Journal, 24*, 1945-1980.

Blaauw, E., Freeve, A., Winkel, F.W., & Arensman, E. (2000). *Stopping stalking: On the possibilities to stop stalking* (submitted for publication).

Blaauw, E., Freeve, A., Winkel, F.W., & Arensman, E. (2000). *The toll of stalking: The relationship between features of stalking and psychopathology of victims* (submitted for publication).

De Boer, A.P. (1990). *Partnerdoding: Een empirisch forensisch-psychiatrisch onderzoek.* Arnhem: Gouda Quint.

Gibbons, S. (1998). Freedom from fear of stalking. *European Journal on Criminal Policy and Research, 6*, 133-141.

Groenhuijsen, M.S. (1998). Stalking. Strafrecht als interventierecht. *Delikt & Delinkwent, 28*, 521-526.

Haveman, R. (1998). *Voorwaarden voor strafbaarstelling van vrouwenhandel.* Deventer: Gouda Quint.

Hes, J. (1984). Het straatverbod in kort geding als 'ultimum remedium'. *Nemesis, 3*, 130-139.

Hes, J., & Van Ringen, K. (1986). *Blijf uit mijn buurt: Het straatverbod in kort geding: achtergronden en rechtspraktijk.* 's Gravenhage: Vuga.

Holtmaat, R. (1998). Het wetsontwerp Belaging: Een twijfelachtige oplossing voor een ernstig probleem. *Nemesis, 2*, 54-57.

Mcananey, K.G. (1993). From Imprudence to Crime: Anti-Stalking Laws. *Notre Dame Law Review, 68*, 819-909.

Meloy, J.R., (Ed.) (1998). *The Psychology of Stalking: Clinical and Forensic Perspectives.* San Diego: Academic Press.

Mullen, P.E., Pathé, M., & Purcell, R. (2000). *Stalkers and their victims.* Cambridge: Cambridge University Press.

Römkens, R., & Mastenbroek, S. (1999). *Dan hoor je de vissen ademen: Over belaging en bedreiging van vrouwen door hun ex-partner en de beveiliging door het AWARE systeem.* Utrecht: Universiteit Utrecht.

Saunders, R. (1998). The Legal Perspectives on Stalking. In Meloy, J.R. (Ed.), *The Psychology of Stalking: Clinical and Forensic Perspectives* (pp. 267-280). San Diego: Academic Press.

Stevens, L. (1999). Stalking strafbaar. *Rechtskundig Weekblad, 38*, 1377-1380.

Stewart, A. (1998). *Statistical Profiles of Individuals Involved in Single and Multiple Applications for Domestic Violence Protection Orders.* Paper presented at the 24th International Congress of Applied Psychology. San Francisco, August 9-14, 1998.

Tjaden, P. & Thoennes, N. (1998). Stalking in America: Findings from the National Violence Against Women Survey. *National Institute of Justice Centers for Disease Control and Prevention, Research Brief*. Washington: Department of Justice.

Wright, J.A., Burgess, A.G., Burgess, A.W., Laszlo, A.T., McMrary, G.O., & Douglas, J.E. (1996). A Typology of Interpersonal Stalking. *Journal of Interpersonal Violence, 11*, 487-502.

Zona, M.A., Palarea, R.E., & Lane, J.C. (1998). Psychiatric Diagnosis and the Offender-Victim Typology of Stalking. In (Meloy, J.R., Ed.), *The Psychology of Stalking: Clinical and Forensic Perspectives* (pp. 70-84). San Diego: Academic Press.