



LAW campaign



Stalking and its impunity must end

PROFESSOR M. RAFIQUIL ISLAM

THE High Court on 2 November 2010 has expressed grave concern for recent alarming increase in stalking, tragic suicides of victims, and associated revenge killings. The Court has also issued directives upon the government to formulate policies and guidelines for combating the plague of stalking. Stalking is a recognised indictable crime in many national criminal justice systems. Australia, the US, the UK, Canada, New Zealand, Japan, Italy, Germany and Iceland in particular have their own specific legislation criminalising stalking. Specific legislation is necessary because criminal law in general does not adequately cover various existing and emerging manifestations of stalking. Despite the current surge in reporting, much stalking goes unreported in Bangladesh due to the socio-economic circumstances of many victims. Stalking offences seemingly goes unabated in spite of sporadic resort to the criminal law as a means of arresting the mounting offences. This is partly because the criminal law of Bangladesh generally provides very limited protection against stalking, remedies for victims, punishment for perpetrators, and deterrent to those inclined to stalk. It is therefore high time for the criminal justice system to take the crime of stalking seriously and embark on a specific legislative response and reform to combat this crime. Stalking, being complex and deceptive in nature, is inherently difficult to legislate. This short note is intended to offer some suggestions in articulating the legal elements and sources of criminality

of stalking and the culpability of its perpetrator.

Stalking offence and its effects

Stalking in law refers to wilfully committed (a) unwanted conducts such as following, watching, teasing, and sexual innuendo; (b) obsessive attention such as physical presence, sending gifts, and loitering nearby; (c) unwelcomed advances such as stopping, confronting, approaching relationships, and sexual harassment; (d) intrusive behaviours such as surveillance, spying, phoning, emailing, text messaging, and giving offensive materials; and (e) cyber/internet bullying by individuals or groups of individuals (gang stalking) to another person/s. In order for any said act to be an illegal stalking, it usually needs to occur persistently or repeatedly, though discrete and un-protracted acts may well constitute a talking offence depending upon its circumstances and harmful effect. The recent spate of stalking of girls and women in Bangladesh appears to be a gendered crime, which is associated with sexual obsession.

Stalking often results in detriment to the stalked person who suffers from irritation, annoyance, harassment, humiliation, and intimidation reasonably arising from the circumstances of stalking. Stalkers may resort to threats, violence, vandalism, and property damages as a means to frighten their targeted victims. Stalking is more often than not a terrifying and distressing experience, which induces a constant fear of risk, physical harm, and emotional trauma in the mind of victims, who suffer from psychological depression,



anxiety, shame, hopelessness, self-blaming, erosion of self-esteem, and a sense of vulnerability. Stalking usually takes place in the vicinity of victims' residence, business, workplace, education institutions, or any place where victims frequent for the purpose of any activity. A sense of loss of control over their lives and to escape their stalkers force many victims to disrupt their daily life and convenient routine by changing their routes, contact numbers and addresses, employment, residence, and restricting movements. These self-isolating measures have marginalising effect on victims' well-being and freedom of movement. Given these consequences, stalking is a form of predatory mental assault in which the stalker, being an unwanted person/s,

disruptively intrudes into the life of the victim.

Legal requirements for prosecution

The anti-stalking laws and their judicial interpretations in the jurisdictions referred to display certain unique yet common requirements of prosecutable stalking. These are briefly explained below.

1. Causing harm: Harming the victim is the central element of illegal stalking. The requirement of "serious harm" appears to be an unnecessary bar, which became impediment to successful prosecution. This situation has necessitated amendments to stalking legislation in many jurisdictions. Causing actual harm or potential harm is considered enough for

prosecution. The scope of harm caused by stalking is broad enough to embrace all physical, mental, and property harm temporary or permanent.

2. Mens rea of the stalker: The intention to cause harm is largely presumed in that the stalker should or ought to have known or understood that engaging in stalking would likely to cause physical or mental harm or arouse fear in the victim. The intention of the stalker to cause harm or to cause the victim to be fearful is immaterial. The commonsense knowledge of the stalker that his/her act is likely to cause fear in the victim is enough. Nor is it necessary to prove that the victim actually feared that the stalking threat would be carried out to inflict harm. The pleading that the stalker did not intend to harm or hurt serves no defence to prosecution.

3. Awareness of the victim: It is not a legal requirement that the victim must be aware of the stalking directed to her/him or the stalker intended the victim to be aware of the stalking. It is enough that the stalker has directed the alleged stalking at a person, who develops fear or apprehension arising from all circumstances of stalking in a manner that could reasonably be expected of an ordinary person. In other words, the stalked person has reasonable grounds to fear.

4. Procedural matters: Obtaining evidence of stalking may be a simple procedure using the existing crime investigation powers of the magistracy and law enforcing authorities. The onus of defence to stalking works in a reverse way in that it is the stalker, not the victim, who is required to prove beyond reasonable doubt that the alleged stalking was for a genuine public

interest purpose not legally prohibited and that it falls within the permissible defences. Defences mainly include: mental and psychiatric disorder; actions taken in course of official duties and with lawful authority; acts done for industrial, political or other public interest purposes; and conducts reasonable for trade, business, occupation, and obtaining crucial information entailing legitimate interest.

5. Remedies and penalties: The usual remedy is imprisonment or fine or both. The frequency and intensity of stalking and its consequential detriment to the victim are relevant factors for the determination of penalty. The maximum penalty ranges from 5 to 10 years of imprisonments or fines or both in most jurisdictions for aggravated stalking involving threat of use of violence. There is room for civil responses as well. Instances of ongoing or potential stalking may be a basis of an application for a protection order under civil proceedings and the issuance of a civil restraining order where there is a reasonable apprehension that the stalker is, unless restrained, likely to continue provocative conducts. The strategy of prevention under civil proceedings may be better than curative intervention under criminal proceedings in instances of stalking short of threat of violence.

The anti-stalking legislation in Bangladesh must aim to nip in the bud unruly and offensive behaviour of some men towards women. It needs to provide a precise definition or a list of illegal stalking, legal contents for prosecution, defences, and mechanisms for the judiciary to restrain the stalker from unlawful stalking. Expanded range of admissible evidence can be an effective weapon for successful

prosecutions and convictions. Legislative response may not be a panacea to combat the epidemic of stalking. For a lasting solution may warrant a multidisciplinary and coordinated approach involving law enforcement, the judiciary, the magistracy, correctional and social services, advocacy groups, community organisations, and educational institutions. Collaborative and integrative strategies and measures are indispensable in providing effective protection and trauma counselling for victims and apprehending and prosecuting stalkers. Anti-stalking education, community vigilance, and sensitisation of the authority are likely to go a long way in mitigating the problem of stalking.

Stalking is quintessentially a crime of context, which derives its criminality from the circumstances in which it occurs. It is a crime because of its unacceptability in the community and susceptibility to cause devastating harm to victims. The overriding goal of criminal law is to protect the community from unjustifiable harassment and harm. As such, unlawful stalking comes well within the purview of the criminal justice system to protect the community from harm. Stalking must be criminalised and propelled by appropriate penalty to send a message across loud and clear that stalking is unacceptable in order to deter potential stalkers. Viewed from this perspective, the High Court directives are a timely and welcoming intervention and wake-up call for the government to be proactive in ending the impunity and infestation of stalking offences in the community.

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GOOD NEWS



UN launches trust fund for victims of trafficking in persons

Demi Moore and Ashton Kutcher join UN Secretary-General in launch of UN Trust Fund for Victims of Human Trafficking

IN a bid to help the victims of human trafficking, Secretary-General Ban Ki-moon on November 4, 2010 launched the United Nations Voluntary Trust Fund for Victims of Trafficking in Persons with Hollywood stars and humanitarian activists Demi Moore and Ashton Kutcher. Joining them were Joseph Deiss, President of the General Assembly, Yuri Fedotov, Executive Director of the United Nations Office on Drugs and Crime (UNODC), former trafficking victims, and New York Times journalist-author and Pulitzer Prize-winner Nicholas Kristof.

The Trust Fund is one of the most important elements of the new United Nations Global Plan of Action to Combat Trafficking in Persons adopted by the General Assembly in July 2010. It will provide humani-

combat such trafficking and to adopt a human rights-based approach. UNODC has been designated to administer the Fund, with the advice of a Board of Trustees appointed by the Secretary-General.

Ms. Moore and Mr. Kutcher have been strongly committed to the fight against human trafficking. They created "DNA", the Demi and Ashton Foundation, which aims to raise awareness about child sex slavery worldwide, change cultural stereotypes about the issue and rehabilitate victims. "Freedom is a basic human right and slavery is one of the greatest threats to that freedom," Mr. Kutcher said. "No one has the right to enslave another person," said Ms. Moore.

In a cruel irony, victims of human trafficking are

with the support of a Board of Trustees said, "We are honoured to have Demi and Ashton join us in launching the UN Trust Fund for Victims of Trafficking in Persons. We hope Demi and Ashton's extraordinary commitment to the plight of trafficking victims will move others to take similar action".

The United Nations has estimated that more than 2.4 million people are currently being exploited as victims of human trafficking. No country is immune. Human trafficking affects every country of the world, as country of origin, transit or destination. UNODC reports that victims from 127 countries undergo exploitation in at least 137 nations. Human trafficking takes many guises: forced or bonded labour; domestic servitude and forced marriage; organ removal; and the exploitation of children in begging, the sex trade and warfare.

"The Trust Fund will foster partnerships between Governments, the private sector, international organizations, NGOs and individuals so that they can work together to help victims of human trafficking, especially women and children", stressed the UNODC chief. "I am very proud that the United Nations Office on Drugs and Crime will serve as manager of the Trust Fund. UNODC has been working against human trafficking for many years, focusing on prevention of trafficking, prosecution of traffickers, protection of victims, and building partnerships to stop this shameful crime and to help its victims."

During the event, the first pledges to the Trust Fund were made by the Governments of Qatar, Luxembourg, Egypt and Thailand, as well as by Mr. Naguib Sawiris, Executive Chairman of Orascom Telecom. Mr. Fedotov expressed his gratitude to these donors for taking the lead in making pledges.

UNODC has drawn attention to the plight of trafficked victims through the Global Initiative to Fight Human Trafficking (UN.GIFT) and the Blue Heart Campaign. The fund-raising slogan for the Trust Fund will be "Have a Heart for Victims of Human Trafficking" making a clear reference to the Blue Heart, which is rapidly becoming an international symbol against human trafficking and of solidarity with its victims.

UNODC invites all Governments, Foundations, the Private Sector and even individuals to generously pledge contributions to the Trust Fund.

Source: UN Global Initiative to Fight Human Trafficking.

RIGHTS monitor



USA: Status quo stance at first Universal Periodic Review

THE United States should take concrete steps to address serious failings in its human rights record, Human Rights Watch said. Many of the issues were raised by UN member countries on November 5, 2010, during the United States' first review of its human rights conditions and policies before the Human Rights Council in Geneva.

"The US wasn't defensive in its responses, but it also refused to budge from the status quo," said Antonio Ginatta, US advocacy director at Human Rights Watch. "US officials were often reduced to restating current practices that grossly violate human rights, like the death penalty, poor prison conditions, and sentencing youth offenders to life without parole."

During what is called the Universal Periodic Review, a vast majority of countries expressed their concern about the death penalty and called for a nationwide moratorium. Similarly, countries pointed out problems with mistreatment of migrants and racial disparities in education, access to health care, and the criminal justice system. Many called on the United States to follow through on its promise to close the prison at Guantanamo Bay.

Almost all participating countries also called on the United States to ratify core human rights treaties, such as the Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of all forms of Discrimination against Women, and the Convention on the Rights of the Child.

One senior US official said at the proceedings that the only way to promote American values was to "live them at home." But that doesn't apply to everyone in the United States, Human Rights Watch said. One in ten African American men is incarcerated; about 2,500 youth offenders are serving sentences of life without parole; 40 people have been executed so far this year; 400,000 immigrants are in prison-like detention centers; and 48 people remain imprisoned at Guantanamo facing unfair military commission trials.

The Universal Periodic Review system was established in 2006. The review provides a



chance to draw attention to, and make recommendations about, human rights violations in all UN member states. States under review submit written reports concerning the human rights situation in their country and respond to the questions and recommendations put forward by other UN member states. All 192 UN member countries undergo such reviews every four years.

At the session, more than 55 countries spoke for two minutes each, offering recommendations and asking questions of the delegation. The US took one hour to discuss its record and respond generally to some of the statements. Following its review, the US held a town hall meeting for civil society organizations gathered in both Geneva and Washington, participating through the web. It was a major opportunity for civil society groups to ask questions and further engage with the US government about its rights record. The US is the first country to hold such a session.

The report of the proceedings will be released early next week, and the United States will have until March 2011 to submit its final responses to the recommendations.

"Thankfully the US seems to acknowledge that today's meeting was not the final chapter in the UPR process," Ginatta said. "While today's meeting leaves little room for hope that the government will announce reforms in its final response to the UPR in March, Human Rights Watch and other civil society groups will continue to press the US to fulfill its human rights obligations."

Source: Human Rights Education Associates (HREA).



arian, legal and financial aid to victims of human trafficking with the aim of increasing the number of victims who are rescued and supported, and broadening the extent of assistance they receive.

The Trust Fund was established following the adoption by the General Assembly in July 2010 of the United Nations Global Plan of Action to Combat Trafficking in Persons, in which Governments are urged to take coordinated, comprehensive and consistent steps to

very often treated as offenders rather than victims of a crime. Recognizing this, Secretary-General Ban Ki-moon stated, "Many victims end up stranded, friendless, trapped in modern day slavery. They may not ask for help because they are isolated or cannot speak the local language. Or they may be seized by fear - fear that they will be treated as criminals even though they have been forced to engage in criminal acts".

Mr. Fedotov, whose Office will administer the Fund