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Penal systems compared
Violence in the domestic and family circle

(Italy)

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1. Problems of legal definition

A legal institute ascribable to the notion of "violence in the domestic and family circle" was only introduced into the Italian legal system in 2001. We refer to Law N° 154 dated 4th April, 2001 which, precisely in its title, provides for *Measures against violence in family relations*.

However – take note – this law has not created any specific new kinds of criminal cases. It has made a different choice, as regards proceedings. That is, it has improved on the ordinary tools which are available for penal and civil judges to use during proceedings, adding to the code of penal procedure the personal coercive precautionary measure of *removal from the family home* (Art. 282-bis), and to the civil code *the order of protection against family abuse* (Art. 342-bis).

It is a fact that in the entire Italian legal system the concept of domestic or family violence does not appear. No norm expressly refers to it, or defines it either for that matter. Besides, the very notion of domestic violence is not unequivocal. Firmly stated in the appeals of the feminists, whose intention was to expose the hidden aspects, to break the silence which had gone unpunished, surrounding the various forms of domestic violence or violence "within the couple" or "through trust" – physical, sexual, psychological, economical violence – practised by a husband or partner or ex sentimental partner[1], it has expanded to include violence practised by adults on boys and girls as well, changing the focus to the authors of the violence (of the male kind) and towards a point of view which focalises the crucial importance of the difference in kind when violence is practised.[2]. So the final preference is for the notion of "violence in kind" even if the use of the term domestic violence still aims to stress that the private place for affection and personal relations is precisely the most risky for the safety and – therefore – for the freedom of women[3].

On the other hand both the concepts of violence and family appear many times in the criminal law system, but with varying content and scope in the various contexts, so much so that, in synthesis, we can only observe that there is no unitary notion for either violence or family. As far as the concept of violence is concerned, in its double register which derives from the Latin root *vis/violentia*, this indicates force in power which becomes violence in action and can only be defined by the person who suffers it and perceives it as such, and for this reason provides doubtless difficulties when translated into the legal language of criminal repression[4]. Violence appears in the penal code, both in the general and the special part, as an element in many crimes or as an aggravating circumstance, but it is not definable in unitary terms[5]. Equally the notion of family varies in criminal law[6], which must be interpreted according to the various contexts where criminal

law gives importance to family relations, which also occurs outside the title specifically dedicated to crimes against the family, that is outside that body of norms which we can find in the penal code of 1930, book II, in title XI entitled "on crimes against the family"[7]. In fact the notion of family and family relations are considered in some cases not punishable or in aggravating or extenuating circumstances Arts. 576, 577, 307, 384, 649).

The title of crimes against the family (Arts. 556 to 574) distinguishes "crimes against matrimony " (e.g. bigamy), "crimes against family morals " (e.g. incest), "crimes against family status " (e.g. altering status) and "crimes against family assistance", which include the crimes which most interest us here, that is the violation of the obligations of family assistance (Art. 570), the abuse of means of correction and discipline (Art. 571), maltreatment in the family or towards children (Art. 572), consensual removal of minors (Art. 573), removal of incompetent persons (Art. 574).

This group of norms, by now archaic, is still riddled with problems. In the first place the interpreter has had to harmonise it with subsequent important texts dealing with norms, that is both the Bill of Rights dated 1948 and the modifications to ordinary law on the question of family rights resulting from the introduction of divorce (Law N° 898 dated 01.12.1970, subsequently modified by Law N° 84 dated 06.03.1987) and the family rights reform (Law N° 151 dated 19.05.1975), and then again with all the subsequent civil laws (e.g. the first law dealing with adoption, N° 184 dated 1983) by means of which regulations have recorded the changes which have taken place in society in family matters and, in a wider sense, in matters of inter-subjective relations[8].

2. The notion of legally relevant violence in the Penal code of 1930

We do not find specific contrasting norms within the penal code for the various types of domestic violence. The interpreter is forced to use the current norms, which are nevertheless ill fitting to understand all the various forms in which this violence manifests itself. It is a much easier task to translate physical violence into penal cases, that is violence in its more traditional form: reference is made to crimes of beating (Art. 581), personal injury (Art. 582), personal violence (Art. 610), house breaking (Art. 614), maltreatment (Art. 572). As far as sexual violence is concerned, this is sanctioned by the hypotheses today reformed under Law N° 66 dated 15th February 1996, *Norms against sexual violence* (which also provides for certain specific aggravating dispositions or for ex officio prosecution in the case of some family relations or age) and also under Law N° 269 dated 3rd August 1998, *Norms against the exploitation of prostitution, pornography, sexual tourism to the detriment of minors, as new forms of subjecting to slavery* (in the part where Art. 600-bis, 2nd paragraph and Art. 600 sexies are introduced).

It is however more difficult to tackle the question of economic and psychological (or spiritual or moral) violence, in which cases the principal remedy still remains the application of civil proceedings for separation, divorce and the interruption of de facto co-habitation, that is those forms which solve the conflict by regulating the termination of the relationship perceived to be violent.

Economic violence can be punished through the crime of violating the obligations of family assistance (Art. 570)[9], which is almost exclusively applied today in the hypothesis provided for in the second paragraph, N° 2: "to cause the lack of means of subsistence to minor descendants, that is those unable to work, to

ascendants or to the spouse who is not legally separated as the guilty party". This is a subsidiary, particular, permanent crime. The sphere of passive subjects – besides children and ascendants – is restricted to the family based on matrimony. The divorce law (Art. 12-sexies) attributes similar criminal protection to the divorced spouse, but not to de facto co-habitants.

The most serious problems stem from psychological violence which includes – besides crimes of slander (Art. 594), threats (Art. 612), kidnapping (Art. 605) – in particular the crime of maltreatment (Art. 572)[10], which is a crime suitable to include, as well as psychological violence, other types of violence as well.

The basic case is described by the norm with the verb "to maltreat", which indicates conduct repeated in the course of time. It is therefore a crime defined as habitual (according to a purely doctrinal construction) or a multiple form of conduct, consisting of actions or omissions which are repeated which may not in themselves constitute a crime. It is considered to include the crimes of slander, beating, threats. On the other hand maltreatment includes both the crime of common injury, if intentional, as well as all the other crimes which could be considered structural elements of the fact, provided they have a different legal objectiveness, such as sexual violence or personal violence. The legal object is identified as protecting the normal state of tolerance of co-habitation against systematic, programmed overpowering. Identifying the legal good is however complex in relation to the heterogeneous nature of the three situations associated in the norm: "*a person in the family* " (which the law has extended to protect natural filiation and de facto co-habitation), "*a minor of fourteen years*" (even in a de facto relation), a series of legal subordination relations, public or private, such as those existing with "*a person subjected to someone's authority, or entrusted to a person for reasons of education, instruction, care, vigilance or custody, or for pursuing a profession or an art".*

The crime of maltreatment can be prosecuted ex officio, whereas the offences which it can consist of can moreover be prosecuted in a lawsuit. Ex officio prosecution means that anyone can make a charge for violence, even if the person subjected to the violence is contrary to this. In fact there are some persons in Italy in qualified positions (public officials or those appointed to perform a public service) who are in certain cases obliged by law to make a charge regarding facts which are prosecutable ex officio which they become aware of in the course of carrying out their duty, and failure to do so would involve them in turn in an offence because of their omission to do so.

This may provoke situations of conflict[11] in relation both to the scarce tendency to bring charges of violence on the part of those who are subjected to it and also to the fact that at times the development of case histories sees the relationship recompose. And this determines the necessity of removing criminal proceedings which have become cumbersome. But when the crime is not prosecutable in a lawsuit it is not possible to appeal for the remission of the action, and this involves the risk of being accused of defamation for the person who has suffered violence and then retracts.

3. Measures for proceedings against violence in family relations

Under the law N° 154 dated 4th April 2001[12] it is the mistreating person (spouse, co-habitant or other member of the family unit) who has to leave the home (even if the sole owner of the property) and has to suffer a series of coercive measures, such as the order not to go near the places of work, domicile, education or places

habitually frequented by the abused party, as well as having to pay a regular cheque in favour of the those who remain without adequate means.

Such measures answer the need to provide an immediate reply to the expectations of the person who has suffered violence: interrupting the violence, ensuring a moment of respite to deal with a phase which often corresponds with changes in the person's life, such as interrupting co-habitation, putting a stop to the impunity of the party who exercised it and, even more, striking out against the unacceptable sense of awareness of impunity flaunted by the offending party.

The most innovative aspect is linked to broadening the usually confined area of the concept of violence, here extended to include the "*serious prejudice to the physical or moral integrity of the other spouse or other co-habitant*" and thus leaves aside the necessary subsistence of the crime. This measure can be asked for both where civil and criminal judges are concerned. The criminal measure of "removal from the family home" (Art. 282-bis) is subject to the inherent ordinary limits of the cautionary coercive measures, with derogation only with regard to the limits of the sentence in the hypothesis of some crimes committed within the family.

The criminal judge is vested with powers which are unusual for him, that is the injunction to pay a regular cheque in favour of the co-habitants who, through the effect of the cautionary measure, remain without sufficient means, even in the absence of children.

There is nevertheless a lack of ready and effective guarantees to ensure that the provision is fulfilled by the spouse, co-habitant or parent notified.

Certainly the aspect which causes most problems is the relationship between civil and criminal judges. At the outset, as the preparatory work shows, a system was envisaged where the interested party could indifferently take a case to either a civil or criminal judge, leaving the woman free to choose to have her punitive intentions respected, by bringing a criminal action or not. In this way the scarce tendency to bring criminal charges against persons who mistreat others was also taken into account, especially when the person charged was the only source of income in the family unit.

Unfortunately, as preparatory work progressed, a negative requirement was added to Art. 342-bis, according to which a civil judge can apply a protection order "*if the fact does not constitute a crime which can be prosecuted ex officio* "[13]. But in this way the quickest recourse to protection under civil law is barred precisely in the most serious cases, since the requirement for "*serious prejudice*" suffered is hardly compatible with the opposite requirement that the civil judge should recognise crimes which can be prosecuted ex officio in the facts presented and should therefore refrain from issuing the provision.

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[13] the proposed law N° 1495 has been presented to the Chamber, proposing to suppress those words