LOOK WHO’S STALKING: NON MOLESTATION ORDER AND CIVIL REMEDIES AGAINST DOMESTIC VIOLENCE IN ITALY IN A COMPARATIVE OVERVIEW
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This paper is intended to examine how Italian law deals with domestic violence, with particular reference to civil remedies, and to compare the Italian system with the English one, in terms of their respective solutions.

Firstly it is necessary to define ‘stalking’ and then to evaluate this concept in the context of family relationships and domestic violence.

The analysis framework: ‘stalking’ and ‘domestic violence’

Stalking is a course of conduct which harasses, threatens, intimidates, molests, alarms or causes distress to an individual and which is carried out either for that purpose or for the purpose of compelling that person to do or refrain from doing anything which that person has a right to refrain from doing or to do 1.

Often the purpose of the stalker is to compel the victim to engage in, or re-engage in, a relationship with the stalker but there are other motivations, such as persecutory delusional disorders or schizophrenia2 (see Harmon et al 1995; Mullen and Pathe 1994). The conduct involved generally comprises persistently following an individual, surveillance of his/her home or place of work, entry of her/his property, telephone calls (including faxes), and the sending of letters (or e-mail messages) or other articles. Occasionally it can also involve damage to property and in extreme cases may lead to physical assault.

And how shall we define domestic violence?

There is no universally accepted definition of domestic violence. The 1993 Home Affairs Select Committee (HASC) Report on Domestic Violence3 used the following definition: “any form of physical, sexual or emotional abuse which takes place within the context of a close relationship. In most cases, the relationship will be between partners (married, cohabiting, or otherwise) or ex-partners”.

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1 See Goode, M. (1995) 'Stalking: Crime of the Nineties' 19 Criminal Law Journal 21. The author states that the essence of stalking is "intentionally harassing, threatening, and/or intimidating a person by following them about, sending them letters or articles, telephoning them, waiting outside their place of abode and the like". The Home Office definition is more limited: "Stalking...can be broadly described as a series of acts which are intended to, or in fact, cause harassment to another person" (Home Office and Lord Chancellor's Department Consultation Paper, Stalking: the Solutions, 1996).


The United Kingdom inter-governmental initiative, raising the standards, gives a fuller explanation:

“Domestic Violence and abuse is best described as the use of physical and/or emotional abuse or violence, including undermining of self-confidence, sexual violence or the threat of violence, by a person who is or has been in a close relationship.

“Domestic Violence can go beyond actual physical violence. It can also involve emotional abuse, the destruction of a spouse’s or partner’s property, their isolation from friends, family or other potential sources of support, threats to others including children, control over access to money, personal items, food, transportation and the telephone, and stalking.

“It can also include violence perpetrated by a son, daughter or any other person who has a close or blood relationship with the victim. It can also include violence inflicted on, or witnessed by, children.”

The Italian civil remedies

In Italy, Statute n. 154/2001 regarding the measures against domestic violence provides for new civil remedies against it in domestic relationships. The Act has provided for civil remedies and criminal sanctions to protect the victims of family abuse. The Statute does not introduce a ‘new’ specific offence of ‘domestic violence’ under criminal law; instead, it introduces specific and complementary measures (e.g. to be kept away from the family home) against particular types of conduct. This means that there are many offenses that may apply to violence in a domestic context.

Regarding civil remedies, the Act has inserted in the Italian civil code a new chapter entitled “Protection orders against family violence”, comprised of articles 342 bis and 342 ter of Italian Civil Code.

When the spouse’s or the cohabitant’s behaviour causes serious harm to the other partner’s freedom, physical or moral integrity, the judge, on the party’s request, and only if the action is not prosecutable on its own, may adopt with decree one or more orders under art. 342 ter.

It seems that in the notion of “behaviour causing serious harm to the other spouse’s or cohabitant’s … moral integrity or freedom” it is possible to include ‘stalking’.

The order applies when the victim and the abuser are married to each other, or are co-habiting. Otherwise, Art. 5 of Act n. 151/2001 extends the subjective scope of the protection order also to “other persons who are part of the same family unit”.

This statement allows the judge to proceed with an order of protection against any abuser regardless of kinship relations between the parts for any case bodily, psychological or moral injury.

The phrase “other member of the family” has sociological origins. It allows the judge to apply the order of protection to every situation characterized by physical or psychological violence that can take place in a situation of family cohabitation without regard to the kinship ties or affinities between the members of the family unit.

Art. 5 of Statute n.151/2001 gives the judge more freedom in the individualization of non economic relationships for which it is possible to use the civil remedies introduced by this Act.

In order to adopt these measures, the civil judge must verify the existence of serious psychological or physical harm or offence to the freedom of a member of the family. He must also find out if the behaviour of the abuser caused offence to a personal right, in particular to the health (physical integrity), the honour or the reputation (moral integrity) of the victim, as well as to their freedom, considered as the capacity of their self-determination. Furthermore, the judge has to evaluate the relevance of the abuser’s behaviour not only in terms of the danger caused by the isolated act but also its reiteration and its duration.5

The contents of protection orders are specifically fixed by the Act. The judge can force the abuser to cease the behaviour and prohibit the abuser to occupy the house. If necessary, the court can exclude the abuser from the house’s surrounding area. The judge may also prohibit the abuser to go close to the places usually attended by the victim (e.g., workplace, parents’ house).

The judge can order the intervention of local social services, family mediation and women’s or children’s refuge associations. He can also order a periodic payment of a cheque in favour of the people who live with the abuser and who, because of the judge’s order, have no other means of subsistence. The judge can decide the terms of the payment; for example, if necessary, he can order the money to be transferred directly from the abuser’s employer to the assignee through a salary deduction.

With the same decree, the judge decides the duration of the protection order, which cannot be longer than six months. For serious reasons, at the party’s request, the order of protection may be extended for a certain period of time.

Additionally, the judge decides the methods of execution. The judge has the power to respond to problems or controversies that may arise from previous decisions, even to the extent of requiring the intervention of the police authorities.

In emergency cases, the judge, after gathering summary information, can adopt immediately an order of protection. The judge fixes the appearance hearing within fifteen days, and assigns a deadline of eight days at the most to the petitioner to notify the petition or the decree. During the hearing, the judge confirms, changes or annuls the order of protection.

The Act explains that the victim may not request an order of protection from the judge if separation or divorce proceedings are already pending and the first hearing has already been held and temporary and necessary measures have already been adopted.

The injunctions under Family Law Act 1996 in Britain

Part IV of the English Family Law Act 1996 (FLA 1996) provides a civil remedy for molestation, violence and occupation. Its purpose is to protect people who experience domestic violence in a family relationship. There are strict criteria about who can apply for protection in reference to an injunction or occupation order.

Under this act, the victim of domestic violence can apply for either one of the two types of injunctions regulated: occupation order and non-molestation order.6

A list of those who are eligible to apply for a non-molestation and/or occupation order under the FLA 1996 is at Annex A. The principle is that eligibility is based on association through family relationships and/or cohabitation.

5 Tribunale di Bari, 18 luglio 2002.

To apply for an order, the applicant must be related to the abuser in one of a number of ways. In other words, the victim and abuser must:

- be/have been married to each other;
- be/have been cohabiting;
- be/have been living in the same household (though not as tenant, lodger or boarder); 
- be relatives;
- have formally agreed to marry each other;
- be the parents of/have parental responsibility for the same child;
- be involved in the same family proceedings (e.g. divorce).

Under section 42 of FLA 1996, a non-molestation order is used to restrain someone from causing or threatening violence to the applicant or to any children, or from molesting them. The Act does not define “molestation” but will cover violence or the threat thereof as well as "any form of serious pestering or harassment". Any of the activities which might fall within stalking, such as following a person, watching their home or place of work, telephoning them, interfering with their property, sending them offensive letters or other material, would fall within the ambit of molestation.

The actual wording of non-molestation orders forbids the respondent from using or threatening violence against the applicant and instructing, encouraging or in any way suggesting that any other person should do so. It can also forbid the respondent from intimidating, harassing or pestering the applicant and instructing, encouraging or in any way suggesting that any other person should do so.

A Court, in deciding whether to make a non-molestation order (and in determining its terms) shall have regard to all the circumstances including the need to secure the health, safety and well-being of the applicant and any relevant child.

Orders can be sought by the victim, by the children (if they are seen to have sufficient understanding) or be brought about by the court itself during the course of other family proceedings. Differently from what happens in Italy, FLA 1996 allows the adoption of these special measures even during separation and divorce proceedings. They can be granted for six months or for an indefinite period.

If the victim is a childless woman who has never lived with her abuser then she cannot receive protection under this Act, although some protection is available through the Protection from Harassment Act.

An occupation order regulates the occupation of the home shared by the couple and their children to protect any party or children from domestic violence. The order can exclude an abuser from the property altogether, or divide the property to exclude him from part of the accommodation. If a respondent has already left the property, an occupation order may, therefore, be used to prevent him from re-entering and/or coming within a certain area of the property. The occupation order can be used to:

- enforce the victim’s right to live in the house;
- require the abuser to allow the victim to enter and occupy the home;
- prohibit, suspend, or restrict the abuser’s right to occupy the house;
- exclude the abuser from the house itself and/or from the surrounding area.

Before issuing such an order the Court will apply the “balance of harm” test, which includes the concept of significant harm. This is a test to find out which person and/or child or children living will be at most risk if an order is made, or is not made.

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These orders are restricted in their application. The order can be used by victims who are sole or joint owners/tenant of a property. It can also be used by a married victim who is married to a sole owner/tenant of the property. But cohabitants who have no existing legal right to the home can only gain an occupation order for a maximum of a year. It is important to bear in mind that applicants can only seek an occupation order in relation to a property which either is, has been, or is intended to be the home of the parties involved. For example, an order cannot be made concerning a property that has been bought for investment purposes.

Section 45 of the FLA 1996 contains the statutory provisions regulating without-notice orders. These used to be called ‘Ex-parte’ applications. They are heard without notifying the respondent (therefore in his absence). In deciding whether to hear an application without notice, the court must consider whether, on the balance of probability, there is a risk of harm to the applicant (or any children) if an order is not made immediately. If a non-molestation and/or occupation order is made without notice, the court has to give a date for a full hearing so that the respondent has an opportunity to attend court personally. Without notice applications are usually granted, but if one is refused by the court (and this does happen occasionally), the court ensures that a hearing takes place quickly, usually within a week. Non-molestation orders are more likely to be given without notice than occupation orders.

**Conclusions**

What stands out after analyzing the application of the precautionary measures provided by the English legislator is that the category protected by them is quite wide: spouses; partners (including homosexuals); people that live in the same house. People that have never lived together, or that don’t have any children, or that have not formally agreed to marry each other, although they have a relationship, do not have protection under the Act. In this case protection from violence is obtained through another Act, the “Protection from Harassment Act” of 1997, or through secondary measures and other common law actions, as “actions in tort”.

According to our interpretation, in Italy, orders of protection must be applied to all cases which have physical and/or psychological violence involved in families, disregarding the kind of relationship the involved people have to one another.

In relation to the use of different protection instruments, we must point out that prior to the introduction of the new precautionary measure, the measure provided by art. 700 of Italian Civil Procedure Code, due to its atypical nature, could reveal itself in an order to stop the harmful behaviour and to keep away from the family home when there are needs of protection for a spouse or a partner. However, after the introduction of the specific measure ex articles 342 bis and 342 ter, it is reasonable to consider that in order to obtain protection from stalking in family matters, the specific measure provided by the Act n. 154/2001 prevails on the measure provided by article 700 c.p.c., which is considered a residuary rule.

In relation to the contents, the **occupation order** is quite similar to the protection orders provided by the Italian legislator if we consider the keeping away from the family home aspect. Of course, the common law’s legislator choice to provide an additional and independent measure, like the **non molestation order**, is favourable. This measure, which can be applied separately from the order of keeping away from the family home, becomes useful when moral or psychological violence must be hindered
(which is the case of stalking), instead of physical violence that can be hindered by a keeping away order.