

The private law answers to a criminal attitude: the human trafficking and smuggling in a new Italian perspective.

During this hot and sluggish Italian summer our national press was concerned with a lot of extremely important news: the new Borsalino hat exhibited by our Prime Minister instead of his traditional bandana; the marriage of “billionaire” Mr. Briatore with a starlet; the questioning if good looks and *charme* are not restricted to women members of parliament or some of the men are well worth a second glance; the analysis of Inter, Milan, Rome and Juventus probability of winning the soccer premier league.

Of course all the newspapers reported, in fact in a few lines, the “usual” news of the daily unloading of hundreds of clandestine to Lampedusa. But even if the unloading in itself it is not more a “news” the problem is real and the Italian public opinion is very aware of it.

Two years ago, just here in Cambridge discussing on “human trafficking”, I had the opportunity to expose from one side the latest development of the Italian statutory law and from the other side my personal doubt that approaching the question only by a criminal law point of view it is really effective. Now I remark that true situation is going from bad to worse, statutes are more restrictive then ever but the phenomenon is still present and the demand of protection of human rights of migrants is dramatic and actual. The point, in my opinion, is more political and juridical than strictly legal.

In Italy the law seems to fight the irregular or clandestine migration with two different options. From one side our criminal rules have been modified to increase the punishment against the persons and criminal organisations, which make profit from human trafficking and smuggling. From another side the law, even recently, has been modified to increase the punishment against the irregular or clandestine migrants, i.e., in a great numbers of cases, against the ... victims.

Thus, referring to the first group of rules, according to article 600 of Italian criminal code, “each person who: a) exercises over another person powers and

prerogatives like the ones exercised by an owner or; b) puts or maintains a person in state of continuous awe or submission, forcing that person to work or make sex (in any form) or begging or any other service allowing its exploitation, will be punished with imprisonment from a minimum of 8 year to a maximum of 20 years". The punishment is increased up to the half if the victim is a minor or the facts are related to prostitution or withdrawal of human organs. The most interesting point consists into the definition of the "state of continuous awe or submission" that should be the consequence of any kind of "violence, intimidation, menace, duress, fraud, abuse, undue influence or exploitation of any situation of physical or psychological inferiority or any situation of necessity, or any kind of promise of money or other advantages to the parents or who exercise parental authority" on the victim.

The rule is considering all kinds of awe or submission making no difference between physical and psychological inferiority (both of them shall be not intended in a medical sense but as "cultural and cognitive disparity" i.e. even to a submission to certain religious rules or certain traditional or tribal customs) and between absolute or temporary possession of the victim. It is only necessary that the victim lay in a "state of impotence" for an adequate continuous time.

Article 601 extends the provisions of article 600 to the person who makes human trafficking "persuading and inducing by fraud or compelling by duress, menace, abuse, intimidation, etc." another person to illegally introduce, stay or leave" the Italian territory under the same circumstances explained by the article 600. Accordingly it is possible to pursue in Italy the human merchant even if the persuasion was exercised in a foreign Country and even if the material fact of the "introduction, staying or leaving" has been not realised.

On the same camp, the Italian statute on immigration, provide (following the example of the law against the mafia) the confiscation of profits and incomes following the crime and of all assets of the offender. Furthermore the law affords a certain number of alternative penalties like the closure of the activity or enterprise or society or the repeal of the administrative concession of the exercise or the

commercial enterprise which activity results in some way connected with the human trafficking.

On the other camp, to fight the irregular immigration, just at the beginning of this summer our Parliament modified the rules on “expulsion” establishing the detention up to 4 years for the foreign citizen, which does not comply with the expulsion order. Furthermore the same rules establish the detention up to 6 years for the person (e.g. the foreign citizen) who “makes false statement or declaration of identity” or give false information on its identity, status or other personal or distinctive attribute or characteristic. Of course the expulsion is a near immediate consequence.

I understand the “policy” reasons that induced the actual majority to pass these rules. There is a strong demand from public opinion of safety and protection against crimes. Of course people that will come in our Countries should respect our rules and if the foreign citizen commits a crime should be punished ... but I am afraid that often there is a great risk of confounding with the offender the victim of smuggling. Unfortunately this seems to be a general trend: just on this 1st September the Algerian Government announced a new criminal bill introducing detention up to 10 years for the “passeurs” and up to 6 months for they trying to leave illegally the Country. It is simple to imagine what will be the destiny of the thousands desperate people whom reach Algeria each month from southern African Countries.

This is also the European approach: The EU immigration policy targets are directed to combat illegal immigration and to restrict to a maximum extend the legal one; to control severely the EU external frontiers to make more and more impenetrable the “Europe stronghold” which will open its doors only to non EU immigrant workers, **only if legally admitted, only if required, only if necessary.** The political issues concerning returns/repatriations/expulsions and the “externalisation” of controls at the frontiers, are the EU priority concerns. Furthermore, EU Member States agree in adopting and implementing quick measures to order out irregular immigrants seeking to enter in EU territory.

Therefore notwithstanding the declaration that framing “a common immigration policy, including the definition of the conditions of entry and residence for foreigners and measures to combat illegal immigration, is a constituent element of the European Union’s objective of creating an area of *freedom, security and justice*” on the respect of fundamental rights “without discrimination on the basis of sex, race, colour, ethnic or social origins, genetic characteristics, language, religion or belief, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation”, the Directive 2004/81/EC (not applicable on UK, Ireland and Denmark) from one side provides for a grant of “a reflection period” and for a residence permit up to six months in the Member State territory (at discretion of national laws) but only to “third-country nationals who are or have been victims of offences related to the trafficking in human beings even if they have illegally entered the territory of the Member State” and only if they co-operate actively against trafficking in human beings or action to facilitate illegal immigration.

From another side the Directive established that the residence permit may be withdrawn at any time in particular “if the competent authority believes that the victim’s co-operation is fraudulent or that complaint is fraudulent or wrongful” or “for reasons relating to public order and to protection of national security” or “when the competent authorities decide to discontinue the proceedings”. In these cases ordinary alien’s law shall apply with the consequent application of the expulsion order.

From these EU provisions, it emerges apparently the intent to balance two different purposes, which can turn out even inconsistent in their implementation. The first one (priority) is the purpose to control restrictively the immigrant flows to reduce the entries, in EU territory, from third countries and to combat clandestine immigration. The second one is the purpose to take into account the immigrants’ rights, but only if in connection with the enforcement of measures provided to combat illegal immigration. It is here evident the prevalence of the intent to stop the immigration

(regular or irregular it is not the point) and to implement strictly the repatriation and expulsion policies.

Therefore it is not surprisingly that, notwithstanding some “moral” doubts and criticisms, the new Italian rules on expulsion and detention of irregular migrants, justified “for reasons relating to public order and protection of national (and European) security” are consistent with the E.U. Directive.

But even if so the immigration problems is far from be solved: the undifferentiated arrest and deport of thousands peoples is an unrealistic prospective even from a simple and cynical “costs and benefits” balance. Furthermore one simple dramatic consequence of potential increasing of risks for criminal organisations trafficking in human beings is the concrete and effective increasing of costs and prices (in a very wide sense) for the migrants.

In my opinion the point is to face with the phenomenon from one side increasing obviously the control on irregular immigration (and this is only possible in a wider collaboration among European Member States) but from the other side increasing the possibilities to enter regularly in our Countries and at the same time trying to eliminate or to contribute to eliminate in origins the real causes of the emigration.

Let’s assume for a moment that immigration is a positive phenomenon from economic point of view: in Italy practically all the hard works in farming or in small firms or heavy activities (in my town very few “pizzaiolo” are Italian ... the most part are from Tunisia ...) are carried out by immigrants. Let’s now assume for a moment that usually the immigrants hope to come back as soon as possible to their Countries and they hope to raise their abilities, assets and way of life to a higher standard. Is it then possible to think that a more favourable statutory approach to regular immigration aimed to the emersion of the exploitation and the granting of educational support will result in a diminution of the irregular immigration and a diminution of the criminal activities connected with human trafficking?

The merely “punitive” approach, we should assume, is useless. In my opinion there is room and it is more efficient using “private” law in the fight against human trafficking.

Let me give very briefly some example. Some of the great problems within human trafficking were the “illegal adoption” of minors and the selling of human organs. Of course there was a criminal law answer but it was not sufficient. In Italy we improved our legislation on international and national adoption simplifying the procedure and making easier to make affiliation agreements. In the same time we improved our statute law on donation and transplant. The consequence in both cases was the drastic reduction of illegal market of adoptions and of “black market” of organs.

On the contrary, few years ago, the passing of a restrictive statute on human fertilisation had as bad consequence the increasing of recourse to the “black market” of minors.

If this is correct, it is extremely probable that the new formulation of the immigration act (2008) of art. 12 s.5 bis according to which “who rent or lease a house or a flat to an irregular migrant it is punished with detention up to 3 years” and of art. 22 s. 12 according to which “the employer of irregular migrants workers, will be punished with detention up to 1 year and with a penalty of 5.000 euros for each irregular worker”, will be non so rich of results as expected.

On the contrary I think that rules providing for economic and tax incentives to the employers or to people renting houses and flat to foreign migrants may be more efficient inducing the emersion from clandestinity, giving also the opportunity to a real improvement of the condition of life of migrants and a concrete possibility of their stable return in the Countries of origin.

In the same direction we may re-construe the rules on consumers protection and competition freedom in order to avoid speculations and alterations of free market. Further in the same direction we may re-construe the rules on co-habitation and even the traditional concept of “family” or the rules on private employments: I mean the case of “badanti” or “personal assistant”, maids and domestic servants. In this cases it

will be more useful provide for incentives and rewards for the conclusion of contracts with migrants instead of fighting against marriage simulation: just this summer in Modena the Major denounced the increasing quantity of “surprising” civil marriage between very old Italian men and very young foreign women that were initially (irregularly) employed as “badanti”. As a famous English Judge said, “this is probably immoral or reprehensible but ... this is the true life and it is absolutely normal”. And if we want in a more effective way fight successfully the human trafficking we cannot ignore the reality. But this is, once more, a political question.

Thank you.

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