

Crimes against personal freedom: protection of migrant women, victims of trafficking and domestic violence

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1. Preventing and combating trafficking in human beings

In many different parts of the world and in Italian society too, women and girls are victims of crimes against personal freedom (slavery, servitude, trafficking, forced marriage) and therefore see their freedom and equality in terms of dignity and rights denied. Women are subjugated to the power and authority of customary arrangements typical of 'dominical law', subject to the dominion of others, in a state of total dependence and submission.

As in the past, modern slavery is frequently linked to economic gain, with defenceless human beings exploited for profit or pleasure: but it has taken on other, equally intolerable forms (prostitution, work or conjugal servitude, begging) and particularly affects vulnerable subjects: women and girls from developing countries. Various international instruments aim at countering these abhorrent practices as well as the smuggling of migrants, often linked to the trafficking of human beings, even though there is a clear distinction between the two¹. Trafficking violates human

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¹ Since the beginning of the twentieth century, the international community has equipped itself with tools aimed at combating trafficking in human beings, although initially limited to the hypothesis of trafficking for the purpose of exploiting prostitution, especially of women and children; in particular: the *International Convention for the Suppression of the Traffic in Women and Children* of 30 September 1921; the *Convention to Suppress the Slave Trade and Slavery*, concluded in Geneva on 25 September 1926; the *International Convention for the Suppression of the Traffic in Women of Full Age* of 11 October 1933; the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* of 2 December 1949. The prohibition of slavery and trafficking in human beings is also proclaimed in Art. 4 of the *Universal Declaration of Human Rights* of 1948, in the *Declaration of the Rights of the Child* of 1959, as well as in the *International Covenant on Civil and Political Rights* of 1966. With the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* of 7 September 1956, importance was attributed to the notion of 'slavery', provided in Art. 1, constituted by practices similar to slavery, i.e., debt bondage, serfdom, forced marriage and the transfer of a child for the purpose of exploitation. Article 35 of the *International Convention on the Rights of the Child* of 20 November 1989 obliges States Parties to prevent the trafficking of children "for any purpose and in any form". The international instrument that has given a modern and broader definition of the phenomenon of trafficking in human beings is the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, which had been signed during the Palermo Conference of 12-15 December 2000. In this context, an appropriate distinction was made between the crime of trafficking of human beings and that of smuggling of migrants, object of another supplementary Protocol to the UN Convention. In particular, trafficking in persons means "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation" while exploitation refers to "the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs." (Art. 3. point (a)). The expression 'smuggling of migrants' indicates, on the other hand, "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal

freedom and dignity, while migrant smuggling violates the public interest in terms of the integrity of borders and the control of migratory flows.

In trafficking, victims are coerced (through violence, deception or an abuse of the circumstances of vulnerability, physical or mental inferiority or necessity, or by the promise or gift of money or other advantages to the person who has authority over them)². These are women and girls whose transfer takes place for the sole purpose of subsequent exploitation. In illegal immigration, on the other hand, there is an agreement between those who manage illegal trafficking and the migrants themselves.

Like trafficking, migrant smuggling often takes place in conditions of risk and degradation, with serious abuses of human rights. Illegal migrants who resort to traffickers – voluntarily hired – may also become victims of trafficking. Indeed, the line between trafficking and smuggling has become increasingly blurred. The journey itself, with the debt incurred to leave and the reasons that determined it, the ways in which papers for leaving the country of origin are obtained (often through debts and corruption) and the vulnerability of migrants, especially women and girls, are all factors that create favourable contexts for trafficking, exploitation and violation of human rights.

In this regard, specific reference should be made to all cases of migrant women and girls, mostly from Sub-Saharan Africa, who are victims of sexual violence both during the journey and in countries of forced transit (such as Libya), along the way to Europe. The lengthy illegal stay in transit countries – exacerbated by European policies of refusal of entry and control of its outer borders – leaves migrant women and girls in conditions of extreme vulnerability open to abuse and violence, as well as to the risk of falling victim to trafficking and sexual exploitation.

It should also be noted that in addition to the persecutions and violations already experienced, should they return to their country of origin, migrant woman may be trafficked again (re-trafficking) or become victims of retaliation – along with their families – if they dare to report the traffickers.

With law no. 228/2003 laying down *Measures against trafficking of persons* (signed with Legislative Decree 4 March 2014, no. 24, *Implementation of Directive 2011/36 / EU, on preventing and combating trafficking in human beings and protecting its victims*), which redefined crimes against personal freedom pursuant to Articles 600, 601 and 602 of the Criminal Code, international and European Union instruments aimed at combating modern slavery were adopted, causing a significant shift in the centre of gravity of protection, based as they were on the centrality of the dignity of every human being³.

In the original version of the Italian Criminal Code, crimes against the individual were characterized by vagueness, as well as by the indeterminacy of the notions of slavery and trafficking, defined through legal notions that may be deduced from international conventions. While Articles 600, 601 and 602 of the Criminal Code referred to slavery as a juridical status, the crime of subjugation (Article 603 of the Criminal Code) had the purpose of repressing the de facto subjection of an individual to the power of another⁴.

entry of a person into a State Party of which the person is not a national or a permanent resident” (Article 3, point a, *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*). Italy ratified the United Nations Convention and Protocols against transnational organized crime with law no. 146. As for Europe, worth mentioning Art. 4 of the European Convention on Human Rights of 1950 and Art. 5 of the *Charter of Fundamental Rights of the European Union* of 2000.

² A position of vulnerability is defined in Art. 2, para. 2 of *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims* as “a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.”

³ See also: F. Mantovani, *Diritto penale. Parte speciale*, vol. I, *Delitti contro la persona*, Padova, 2013, 275ff. On new elements introduced by the 2014 reform see P. Pisa-A. Peccioli, *Giurisprudenza commentata di diritto penale, vol. I, Delitti contro la persona e contro il patrimonio*, Padova, 2018.

⁴ Subjugation, reducing the victim to a ‘state of complete subjection’ to another, was difficult to prove, so much so that with judgment no. 86/1981, the Constitutional Court of the Italian Republic declared it unconstitutional since it violated Art. 25, para. 2, of the Italian Constitution.

2. Protecting victims

Modern slavery concerns people in a condition of weakness, and therefore of vulnerability, subjugated by their tormentors and thus reluctant to report them. A fundamental part of the fight against modern slavery is therefore constituted by the protection measures available to victims, who suffer serious violations of their rights, including harm to their physical and psychological integrity. These measures aim at removing them from the condition of slavery, subjugation or secondary victimization.

Italy's regulatory instruments for the protection of trafficked women and girls and for combating criminal organizations constitute a point of reference for Europe as a whole. Significantly, Art. 18 of the Consolidated Immigration Act, with provisions concerning immigration and the condition of foreign nationals, referred to in Legislative Decree no. 286/1998, provides for the issue of a residence permit for 'special cases' in order to allow the victim to escape the violence and conditioning of the criminal organization and to take part in an assistance and integration program, regardless of whether the victim has reported the organisation or stands as a witness at trial.

Rather than a reward then, the law states that the issue of a residence permit may be proposed both "by the public prosecutor, in cases where proceedings have begun" (judicial process), and "by the social services of local authorities or associations, bodies or other organisations present listed in the Register in favour of immigrant foreign nationals, Section III, Presidency of the Council of Ministers, Department of Social Affairs" (social route). The Police Commissioner, having assessed the seriousness and actuality of the danger, then proceeds to issue the residence permit bearing the wording 'special cases' (valid for six months, renewable for one year, or for a longer period such as might be required for legal reasons, and convertible). In practice, the 'social route' is marginal, with the granting of the residence permit often depending on the victim's cooperation with the judicial authorities.

In this regard, it should be pointed out that the residence permit may be granted only if the victim is assumed to be in danger on attempting to escape from situations of violence or serious exploitation and if the victim officially reports the perpetrators or makes a formal declaration in the course of criminal proceedings.

Thus, the residence permit has no value. In EU Directive 36/2011 of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims – which reflects the innovative effect of the Italian system – it is stated that "assistance and support for a victim are not made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial" (Art. 11, para. 3).

3. Violations of fundamental immunities within cultural groups

A further dimension to dignity is the relational aspect, which is linked to both pluralism and multiculturalism. The migratory phenomenon that structurally characterizes our societies raises issues relating to the coexistence of different cultures within Western countries, with a set of social practices that are increasingly varied and branch into a network of relationships, bonds and interactions within the family and the wider community.

Guarantees of fundamental rights, protecting the most vulnerable subjects, should protect all differences and therefore, in practice, also the weakest subjects of an ethnic group from the cultural legacies of the strongest (the woman towards the father or husband, the child towards the parents). In this regard, practices such as female genital mutilation, conjugal servitude, acts of violence for

educational purposes and forced child begging may be considered. Respect for the cultures of which they are a manifestation cannot legitimize such harm⁵.

It should be stressed that it is the equality of differences that shapes the dignity of the person and constitutes, through equality in the rights of freedom, the fundamental guarantee of a non-conflictual coexistence and mutual respect for different cultures, religious beliefs, moral conceptions and customs, where their practice does not harm the freedoms and integrity of other people. This implies a clear relationship between respect for different cultures and fundamental freedoms. The first, fundamental, cultural right was religious freedom: all cultural rights are based on its ambivalence, which are freedom of cultures, therefore protection of different cultures, but also freedom from cultures, meaning respect for their limits to protect those people who, within their cultural groups, refuse to be conditioned by it⁶. Thus, 'freedoms from' – or fundamental immunities – place a limitation on their relationship with 'freedoms to' or basic freedoms. By virtue of this limitation, the exercise of rights of 'freedom to' cannot supersede the rights to freedom of others⁷. This basic limitation is concretized in the guarantee of religious freedom, and therefore also of freedom from religion, meaning immunity from physical injury or psychological coercion that may derive from the exercise of freedom of religion in an active sense, to which it is superordinate.

The only unlimited freedoms – in principle – are fundamental immunities, which take the form of 'freedom from' (the right to life, freedom of conscience, protection from torture and the various forms of habeas corpus), which, precisely because they consist only of negative expectations, cannot clash with the rights and freedoms of other subjects. The principle right of immunity is the right to life, not separated from the other fundamental immunity, which includes the rights to personal freedom; in particular, the foremost personal freedom is the exclusion of slavery.

It is important to note that there is a freedom-immunity that is still seriously threatened, that is the freedom of women and their immunity from coercion and violations of their body, which is substantiated in the immunity of the woman's body from rape, violence, harassment, genital mutilation or conjugal servitude, as well as immunity from overt prostitution or trafficking in persons. The protection of fundamental immunities as inviolable immunities should never be omitted, even where it is in contrast with the exercise of a right qualified as a fundamental right. This has important consequences as regards the issues that concern us here. It is unquestionable that the right to culture constitutes a human right of a universal nature. Moreover, the way in which it is exercised should not violate fundamental immunities.

Where culturally-motivated behaviour threatens fundamental immunity, it cannot take on a positive value and the acting subject may not be treated favourably. Thus, in relation to the violations of fundamental immunities within cultural groups, the question of the protection of victims arises, with particular regard to the most vulnerable, such as the protection of women with respect to the father or husband, of children with respect to their parents. It should be noted that in this context, because of customary practices personal assets are vulnerable, in some cases with the consent of the victims themselves (or, in the case of children, of those responsible for their protection) who adhere by conviction to the cultural model by virtue of which they suffer violence or harassment, but often without such consent, or because they cannot make an independent and conscious choice, or are strongly opposed to this model.

The application of criminal law could therefore, in some cases, be perceived by the victims of violence themselves as the imposition of some 'other' cultural model, a particular form of re-victimization, which does not derive from the traumatizing consequences associated with participation in trial proceedings, but precisely from the very activation of the process, which the victim rejects as it is in contrast with the affirmation of his / her own ethnic-cultural identity. It should also be pointed out here that culturally-motivated crimes frequently take the form of

⁵ See P. Scevi, *Riflessioni su reati culturalmente motivati e sistema penale italiano*, in *Archivio penale*, 3/2016, p. 800ff.

⁶ See L. Ferrajoli, *Principia iuris. Teoria del diritto e della democrazia. 2. Teoria della democrazia*, Roma-Bari, 2012, p. 316.

⁷ On this theoretical elaboration, *Ibid.*, p. 314ff.

behaviours in which the cultural legacy of the strongest subjects of the cultural group is revealed to the detriment of the weakest: violations of fundamental immunities such as the right to life, the right to personal freedom, the freedom of women to be immune from coercion and violations of their body (rape, violence, harassment, genital mutilations, conjugal servitude).

4. Protecting fundamental immunities

Protection measures for victims who suffer serious violations of their rights are of fundamental importance, including the right to physical and psychological integrity, through interventions aimed at recognizing victims reinforced protection, since they are in particularly vulnerable situations, both due to the relationship of trust or responsibility between the victim and the perpetrator, and to the position of dominance of the latter.

In this regard, the law of 15 October 2013, no. 119 (enacting the decree-law of 14 August 2013, no.93), which introduced a series of preventive and repressive measures to combat gender-based violence in the area of substantive and procedural criminal law, provided for specific protection for foreign nationals who were victims of 'domestic violence'. This might include one or more serious, but not isolated acts of physical, sexual, psychological or economic violence occurring within the family or family unit or between people currently or formerly bound by marriage or an emotional tie, regardless of whether the perpetrator shares or has shared the same residence with the victim. This provision was achieved with the insertion of Article 18-bis in the Consolidated Immigration Act, which considers the granting of a residence permit for 'special cases' in favour of foreign nationals who are victims of domestic violence.

This legislation on crimes that particularly concern women and children extended the protection afforded to victims of slavery and servitude by Article 18 of the Consolidated Immigration Act and Art. 27 of Presidential Decree no. 394/1999, providing for interventions aimed at removing them from the condition of slavery and servitude, or from forced marriages, conjugal servitude, or forced child begging. Thus, if in the course of police operations, investigations or crime proceedings acts of violence or abuse against a foreign national are ascertained, the Police Commissioner, with a favourable opinion on the part of the prosecuting judicial authority or on the latter's proposal, will issue a residence permit to allow the victim to escape violence, as long as there is evidence of real and actual risk to the safety of the victim, as a consequence of the choice to escape from the violence itself or as a result of the declarations made during preliminary investigations or in court. Violence or abuse in the domestic sphere might include mistreatment of family members and cohabiting partners (Art. 572 of the Criminal Code), serious or very serious personal injury (Art. 582 and Art. 583), practices of mutilation of female genital organs (Art. 583-bis), abduction (Art. 605), sexual violence (Art. 609-bis), stalking (Art. 612-bis), as well as for one of the crimes provided for by Art. 380 of the Criminal Proceedings Code. An important role at the start of the procedure for issuing a residence permit is played by the violence referral centres of the local social services or the social services specialized in assisting victims of violence.

It is important to note that the guidelines to the bill enacting decree-law no. 93/2013 state that with Art. 18-bis "Article 59 of the Istanbul Convention is implemented, allowing the issue of a residence permit to victims of acts of violence set out in the Convention⁸." However, it should be

⁸ The *Council of Europe Convention on preventing and combating violence against women and domestic violence*. The Convention was signed in Istanbul on May 11, 2011 and entered into force on August 1, 2014. Italy signed the Convention on September 27, 2012 and Parliament authorized its ratification with law no. 77/2013, which, however, does not allow for amendments. The Convention, the first legally binding international instrument aimed at creating a complete regulatory framework for the protection of women against any form of violence, identifies a series of crimes (including physical and psychological violence, sexual violence, rape, genital mutilation, stalking, forced marriage) regarding which the Parties should take the necessary measures to "ensure that culture, custom, religion, tradition or so-called "honour" shall not be considered as justification". The Convention also introduces a gender perspective towards the violence of which migrants are victims, providing the possibility

emphasized that Art. 59.1 of the Istanbul Convention does not require the existence of a “real and actual risk” to the safety of the victim – required instead by Art. 18-bis, for the purposes of issuing the residence permit. It refers only to “particularly difficult situations”, giving prominence to the personal situation, with the aim of ensuring protection to victims who – it should be remembered – are in a doubly vulnerable condition due to the acts of violence perpetrated against them.

For the purposes of a complete implementation of the Istanbul Convention, it is also necessary to establish that the victims may obtain a suspension of expulsion procedures initiated as a result of the regularity of their stay depending on that of a family member, in order to guarantee the possibility of receiving protection from coercion, ill-treatment, retaliation and from any other compulsory behaviour. This would allow them to apply for an autonomous residence permit, as required by Art. 59.2 of the Istanbul Convention.

Abstract

La schiavitù moderna, come quella del passato, ha frequentemente motivazioni economiche: sfruttare, a scopo di lucro o di piacere esseri umani indifesi; ma ha assunto altre forme, altrettanto intollerabili (prostituzione, servitù da lavoro o coniugale, accattonaggio) e colpisce in modo particolare soggetti vulnerabili. Donne e fanciulle provenienti da Paesi in via di sviluppo sono vittime di delitti di liberticidio (schiavitù, servitù, tratta, matrimonio forzato) e vedono dunque negate la libertà e l'uguaglianza in dignità e diritti. Diversi strumenti internazionali sono mirati a contrastare queste pratiche aberranti così come a contrastare il traffico di migranti, sovente legato alla tratta di esseri umani, ancorché tra questi fenomeni vi sia una netta distinzione. La tratta viola la libertà e la dignità umane, il traffico di migranti viola l'interesse pubblico all'integrità dei confini e al controllo dei flussi migratori.

Parole chiave: delitti di liberticidio, tratta di esseri umani, donne migranti

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Key words: crimes against personal freedom, trafficking in human beings, migrant women

to obtain resident status independent from that of the spouse or partner and establishing the obligation to recognize gender-based violence as a form of persecution (under the 1951 Geneva Convention relating to the status of refugees).