

MIGRATIONS AND “CAPORALATO”: WHEN MOVEMENT GENERATES EXPLOITATION – REFLECTIONS ON EUROPEAN AND ITALIAN CRIMINAL LAW CLASSIFICATIONS

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INTRODUCTION: WHAT IS “CAPORALATO”?

“Caporalato” is the Italian term to refer to illicit intermediation of workers, in English “gangmaster system”, in Portuguese “*sistema de capataz*”.

From a sociological point of view, the “caporalato” is a criminal phenomenon realized by the recruitment of workers, selected mostly daily by a gangmaster (*capataz*), to carry out different types of work. The *capataz* is a private intermediary, often related with mafia organisations, who is engaged by employer to select the manpower and bring it on the place of work. This recruitment happens mostly with illegal hirings, or without the necessary permission to work as intermediation agency, but it can also occur with legal forms.

The most hateful aspects of this crime are the several abuses which carried out by *capataz* on workers during and after the job performance, consisting of physical and mental violence, threat of dismissal if they don't accept the hard and bad work's conditions (excessive timework, unsafe and dirty workplaces, low salaries). All these conditions are violations of fundamental human rights, and, first, dignity. The purpose of the authors of these violations is to keep the workers on the state of economic, social and legal weakness, defined in doctrine “existential subordination” (SCHIUMA, 2015, p. 88), in order to exploit the state of need in which they are.

The vulnerability characterizes the victims of this practise of work exploitation, so much that the line between these workers and slave workers is not so clear, in fact some authors talk about new forms of slavery or “modern slavery” (SANTORO, 2009, p. 159).

MIGRATIONS AND EXPLOITATION

Since the past the illegal intermediation and work exploitation is strictly linked to massive movements of labours. In Italy there are traces of similar practice since 16th Century, related to huge migrations of agricultural labours to Maremma in Tuscany, to Agroprontino in Lazio and to Apulian Tavoliere (PERROTTA, 2015, p. 194). The same Italian term “caporalato” was born in Northern Italy, related to labours' migration to Vercelli's rice paddies (PASSANITI, 2017, p. 38). So, these people were MIGRANTS, inside the national borders, who were forced to move themselves to one place to another to find work.

Over time, the prospective has changed at least in part, because since the second half of the 1970s, immigration both from North and Sub-Saharan Africa to Europe has become a significant phenomenon and has gradually acquired a structural dimension (MCBRITTON M, 2015, p. 110). Since the 1980s, therefore, the gangmastering started to have a new face because of his new victims: migrants from another Countries.

Today the work exploitation through intermediation has become increasingly interwoven with immigration, and, if in the past were used mainly in the agricultural business, now is used in all economic sectors, like a structural method of production in a globalized market. The

transformation is from an archaic method of recruiting native workers to an entrepreneurial phenomenon, whose exchange's commodity is labour power, constituted by the new desperates created by global poverty (PASSANITI, 2017, p. 43).

So, people most at risk for the violation of human rights in this context are migrants.

The "x" in this proportion is given by the state of need in which immigrants deal, that creates a deep existential vulnerability, and they became easy targets for several "criminals", as UNODC calls them.

Just the UNODC, the *United Nations Office on Drugs & Crime*, in his *Global Report on Trafficking in Persons* in 2016, underlines how is extremely easy that during the migration path, undertaken to different push and pull factors, traffickers have managed to insinuate themselves among the folds of the desire to change and improve the quality of lives, to exploit weaknesses.

The UNODC distinguishes 2 type of factors: ones which push someone to emigrate from their home country, so-called *push factors*, can be the simply decide to change his life, as well as political-institutional instabilities, the lack of economic prospects, armed conflicts, famine, and persecutions. While the so-called *pull factors* are, for example, the demand for low-cost and low skilled labour appears, in those sectors of the economy considered unattractive by the local workforce, the so-called 3Ds jobs, Dirty, Dangerous and Demeaning jobs, strongly characterized by occupational segregation, wage discrimination and ghettoization (CHIAROMONTE W., 2018, p. 323).

Through the UNODC analysis, the clear distinction between *smuggling* of migrants and *trafficking* in human beings, laid down in the two Additional Protocols to the United Nations Convention of Palermo (2000) falls, because it is focused on the voluntary consent given by victim/migrant to be moved. According to the two Protocols, people who voluntary pay the smuggler to across borders are not considered victims, but criminals (illegal migrants) as the smugglers, and so they not deserving any program of humanitarian protection. While people who are part of a plan of exploitation, forced to move to another Country where they're are destined to be exploited, are considered victims and so deserving humanitarian protection.

In the new prospective, the UNODC suggests that it becomes very hard to distinguish the quality of consent, whether flawed or free, considering that even those who decide to voluntary embark on the migration path, often become victims of exploitation when they arrive in the new Country, even if they aren't part of an exploitation plan since they leave their own Country. That's because the state of need generates vulnerability, which spoils the consent.

TRAFFICKING IN HUMAN BEINGS, WORKERS EXPLOITATION AND ILLEGAL INTERMEDIATION: SIDES OF THE SAME COIN?

If we considered the crime of human trafficking, as defined in the Additional Protocol of the Palermo Convention (2000), it was described as a transnational traffic of people, forced to move to one place to another by the trafficker's violence to be exploited (art. 3a). This definition is based on two important elements: the transnational displacement and the flawed consent at the expatriation (ANNONI, 2013, P. 1).

The definition of human trafficking was implemented by Warsaw Convention in 2005, at the article n. 4 – "Definitions":

a. "Trafficking in human beings" shall mean 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. Exploitation shall include, at a minimum, 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;

b. The consent of a victim of “trafficking in human beings” to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

c. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in human beings” even if this does not involve any of the means set forth in subparagraph (a) of this article;

d. “Child” shall mean any person under eighteen years of age;

e. “Victim” shall mean any natural person who is subject to trafficking in human beings as defined in this article.

Of particular interest is the letter a), because describes the crime of human trafficking in 3 essential elements:

1. the act of general displacement of people, not only transnationally, but also nationally (the last one so-called *domestic trafficking*);
2. the way the conduct of displacement takes place;
3. the purpose of exploitation.

As we can see, among the general purpose of “exploitation” is also included labour exploitation, from both the Additional Protocol on Human Trafficking and from the Conventions of Warsaw. That’s the way which is considered work exploitation in the international criminal law, only related to trafficking in human beings, not as an independent concept. To confirm this, also the ILO – International Labour Organization – in 2005 shall draw up Guidelines, *Human trafficking and forced labour exploitation. Guidelines for legislation and law enforcement*, which aim to identify when labour exploitation develops into trafficking: the offenders are the physical or sexual violence to which the worker is subjected; confinement in the workplace or restriction of the victim’s freedom of movement; work performed partially or exclusively to repay the debt contracted during the recruitment or transport of the victim(so called “*debt bondage*”); a worker who receives no remuneration or a salary below the minimum trade union limit; an employer who retains the worker’s documents or passport; the worker who is threatened with a complaint to the authority because of his irregularity.

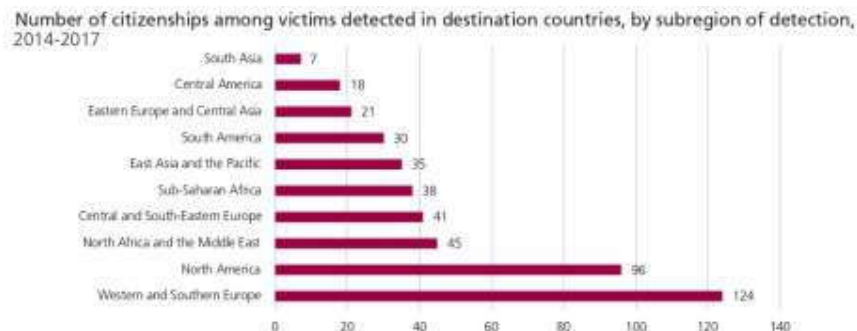
The guidelines drawn up in 2005 are then supplemented in 2009 by a further document containing “operational indicators” which are concerned with harmonising and synthesising significant trafficking indices in four categories: trafficking for the purpose of adult labour exploitation, trafficking for the purpose of sexual exploitation of adults, trafficking for the purposes of child labour exploitation, trafficking for the purposes of sexual exploitation of children. Compared to the first category, of our interest, are distinguished three types of indicators (*strong, medium and weak indicators*), and under the *indicators of exploitation* section there are as a *strong indicator* the excessive working time in which the worker is employed (*excessive working days or hours*); as *medium indicator* the bad or dangerous working conditions, low or no pay for work done, non-compliance with the contract of employment and labour law; and, in the end, as *weak indicator* the lack of access to education.

All these data confirm that also the ILO strictly connect the labour exploitation, defined by operational indicators, to trafficking in human beings.

There is only one exception in the European law: Directive 2009/52/CE. At the article n. 2, let. i, the European legislator gives for the first time a definition of labour exploitation: “*particular disproportion of working conditions with respect to the conditions of employment of workers employed legally, contrary to human dignity*”. But, even if this definition is not linked to trafficking, is connected to the fight against illegal immigration. In the Directive’s prospective, the labour exploitation is a consequence of smuggling of migrants and the illegal immigration (GENOVESE D., SANTORO E., 2018, P. 549). Through sanctions for employers who hire and exploit illegal migrants, the European legislator wants to reduce the demand for cheap labor in the European economy (BARBIERI M., 2010, P. 92).

In conclusion, if in the international scenery, the labour exploitation is considered only as one of the purposes of trafficking, and gangmastering or illicit intermediation of workers is a *species* of the *genus* labour exploitation, so also gangmastering is trafficking, in his “new” face of domestic trafficking. And that’s true if we considered the last UNODC Report, *Global Report on Trafficking in Persons, 2018*, in which the Agency deduces, firstly, that trafficking in human beings is no longer characterised by the international character of the displacement of victims, but that there are increasing cases of internal trafficking or domestic trafficking, which has increased sharply in recent years (97% in South America and 56% in Europe). Moreover, it pointed out that the essence of the crime is not the movement of the victims, but their exploitation.

Immagine 1 – UNODC’s Data



Source: UNODC elaboration of national data.

Shares of detected victims by area of origin and of detection, by subregion, 2016 (or most recent)



Source: UNODC elaboration of national data.

Note: The boundaries and names shown and the designations used on the map do not imply official endorsement or acceptance by the United Nations.

So, we can make a comparison between the gangmastering/illegal intermediation and trafficking in human beings (especially the domestic one), a crossing the pairs (T is for Trafficking and G is for Gangmastering):

1. the behaviour, consisting in the general displacement (T) and labours' recruitment (G);
2. the means, which are the same for both (T and G)
3. the purpose, of general exploitation (T), of labour exploitation (G).

So, the two crimes are substantially overlap.

From a jurisprudential point of view, the workers exploitation through intermediation has been framed in different ways. In particular, are significant two recent sentences of the Court.

The first one, *Chowdury & others vs. Greece* (application n. 21884/2015), 30 March 2017, in which the Court applied the article number 4 of ECHR (prohibition of slavery and forced labour) to a case of labour exploitation of migrant's workers in the Greek countryside. The Court classifies as trafficking in persons and trafficking into forced labour through an evolutionary interpretation of the concept of forced labour, recognising the condition of irregular immigrants (in the paragraphs n. 96-97) like a vulnerable situation for the workers.

The second one is *J. and others vs. Austria*, (application n. 58216/12), in 2017, the Court classified a case of domestic labour exploitation against a Filipina girl, reduced to servitude in a Dubai family, through a legal intermediate agency, as inhuman and degrading treatment (art. 3 ECHR). In this sentence for the first time, the ECHR Court applies the art. 3 to a case of labour exploitation, breaking up the strict link between trafficking in human beings and labour exploitation.

There is also another important pronounce, *S.M. vs. Croazia* (application number 60561/2014) in 2018, because even if it has a different subject (a case of prostitution), the importance of this sentence is that for the first time the Court applies the category of *domestic trafficking* to a case of inner prostitution, where a Croatian woman forced to prostitute herself, under the pressure of a policeman.

In my opinion this international classification is misleading, because the labour exploitation not always is trafficking, and the other way around, while it's true that gangmastering is always a specific form of trafficking for the purpose of labour exploitation, most of the time, domestic trafficking.

Looking at the italian criminal law, it's quite particular, because the legislator has introduced the punishment of caporalato (in the 2011) before introducing the crime of severe labour exploitation, going upstream to international and European tendency.

In the first version of article 603-bis, the employer wasn't punished, while the gangmaster was punished for the illegal intermediation and bad work's conditions. So, for years labour exploitation was punished only if connected to illegal intermediation.

Only into 2016 the legislator has introduced the crimes of sever labour exploitations, by changing the 603-bis through a specific hypothesis for the employer. However, for the Italian legislator and jurisprudence, the "caporalato" is not trafficking, or rather it's still considered something quite different from trafficking. The different classification on the criminal law, leads to a very different punishment, if we consider that the trafficking in human being (art. 601) is punished from 8 years to 20 years of detection, while the illegal intermediation and labour exploitation (art. 603-bis) is punished from 1 year to 6 years of detection, and, in the aggravated case (art. 603-bis, co. 2), from 5 years to 8 years.

In conclusion, it could be important to redefine the legal, both international and national (Italian) categories to caught the real essence of these criminal phenomena, in order to be able to fight them, and also to better understand the causes and how to protect victims, especially migrant victims.

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