

THE LEGAL DEFENCE OF VICTIMS OF TRAFFICKING LEGISLATIVE AND JURISDICTIONAL PROBLEMS AND GAPS

Laura GUERCIO*

ABSTRACT: *Although in the last 10 years in Italy there has been a greater sensitivity by the legislature to the trafficking, including in relation to international commitments such as the Palermo Protocol, there are still difficulties and deficiencies in affording effective jurisdictional protection for victims of this shameful social phenomenon.*

Italy has started to pay a sensitive normative attention to the defence of the victims of trafficking through the art. 18 of the DLvo 286/98I that stipulates the concession of a residence permit for social protection to the people that are subject to trafficking, as well as the possibility to be inserted in programs of assistance and social integration. The aforesaid norm has allowed starting an experience that doesn't have comparisons in Europe. There is rather a protection of individual rights, which is unconditional, at least in the first stage. This is the so called "Social path", which allows the trafficked person to seek help from an association, before and independently by a complaint.

The following Law 228/2003 was subsequently incorporated into a path already started four years earlier with the aforesaid Law of 1998 and it should have addressed the problems that had not been handled. The law protects victims of trafficking. In particular it envisaged the establishment of a special assistance program for victims of crimes under Articles 600 ("reduction or maintenance in slavery or servitude"), 601 ("Trafficking in persons") and 602 ("Purchase and sale slave") of the Italian Penal Code. Victims of exploitation are guaranteed assistance and hospitality.

Moreover, the law has radically changed the definition of slavery under Att. 600 Italian Criminal Code, indicating behaviour similar to it or reducing to servitude. It is a rule intended to have a particularly wide scope for punishing behaviour of exploitation in general or in particular the induction and exploitation of prostitution, work performance in conditions of complete subjugation and exploitation of employees against the employer.

The original concept of slavery has been extended to include the existence of a network and thus slavery is made not only through violence, threats and deception, but also abuse of authority or profiting from a situation of need, both in order to obtain sexual services, both for the use of a person for specific job performance, or for begging.

* Lawyer, Legal Aid Worldwide Association-President, Rome, ITALY.

However there are still debates and open problems. It's important and necessary to incriminate and tougher penalties to be applied for the crime of trafficking in humans, which involves the violation of basic human rights. We must underline that the crime of slavery was only applied in few cases, especially when people had minor injuries. In most trials relating to such crimes the sentences included milder penalties.

Also, one should ensure that the criminal action does not result in an additional stress factor and victimization resulting from inadequate methods of conducting the procedure by those authorities - police and judicial - which should guarantee the rights of individuals harmed by the offence (known as secondary victimization).

Special investigation is required for activities on different levels of trafficking, such as trafficking of babies or children to be allocated to begging or forced labour, or domestic servitude.

But within a European approach to the problem, we cannot speak only of the gaps of national legislation. All must be framed in the broader dimension of cooperation. It's important the value of events such as the Protocol between Italy and Romania, signed in Bucharest on July 9 of 2008, which is the source of some transnational cooperation in the areas of intervention of the European Social Fund for the coordination of measures designed to promote the social inclusion of trafficked funded ESF, such as the strategic project "Integrating market labour trafficking victims. We need to promote a strengthening of international cooperation between higher institutions and civil society in the countries mostly involved in this terrible practice.

KEYWORDS: *human trafficking, victims, legal process, guaranteed assistance.*

JEL CLASSIFICATION: *K 14, K 40*

Trafficking in persons is a growing phenomenon, unfortunately, widespread throughout the world. At the same time, the international society is certainly committed to providing an effective response against this crime which must take into account, as primary objective, the importance to ensure the protection of victims of trafficking, such as vulnerable victims. They are certainly vulnerable victims because they live in certain conditions of hardship which may facilitate trafficking, and also because they have suffered serious criminal behavior, and, at last, because they can be submitted, when the crime is reported, for a long case that does not always guarantee protection of the dignity of the victim. We have to admit the bitter awareness of "annoyance" with which the victim is often accepted by most practitioners. Often the victim is a reality "unknown" to judges, prosecutors and also lawyers.

At the international level, States have prepared fundamental documents that testify the common will in the fight against trafficking and exploitation: just to remember, the Palermo Protocol of 2000 which regulates the prevention, suppression and punishment of trafficking in persons, especially women and children, up to the recent European Parliament resolution of February 10, 2010 on the prevention of trafficking in human beings. But, as a jurist, and as a lawyer, the evaluation of the effectiveness of a rule of law for the protection of human rights is estimated at the time of its legal application. The European and international standards against trafficking are now clear in expressing

condemnation of the crime and at the same time provide several measures for legal protection for victims of trafficking.

The question that arises is the level of jurisdiction protection to the victims of trafficking in individual countries in Europe and also whether the dignity of victims of trafficking is protected during the case. It is not uncommon that victims of serious crimes, and also involving the sexual exploitation or violation of human freedom, become *victims a second time* during the case because of dissent and a kind of annoyance against them, as if they were themselves responsible for abuses and violations suffered. Ensuring effective procedural justice and dignity to the victims of trafficking also means ensuring their re-socialization.

There is no doubt that data present us with warnings. According to the data contained in the report "A Global Alliance Against Forced Labour," presented in 2005 by the International Labour Organisation, in the world there are at least 2.45 million people in forced labour as a result of trafficking. Each year 1.225 million people are victims of trafficking for forced labour. In most cases, the reason for trafficking for forced labour and sexual exploitation is economic exploitation. Women and girls represent 56% of victims of forced economic exploitation, men and young boys 44%. As for the commercial sexual exploitation, women and girls are the overwhelming majority (98%). Children under 18 years account for between 40% and 50% of all victims of forced labour.

The International Organization for Migration (IOM) has provided assistance between 1999 and 2007 to 12,627 victims, mostly from Ukraine, Moldova, Belarus and Romania.

Several EU Member States were identified as countries of destination of victims: Italy (500 victims), Greece (105), Germany (136), Czech Republic (303), Bulgaria (204), Austria (101), Poland (778). As regards Italy, in particular, the victims would be sourced from Nigeria (4.150), Romania (3.157), Moldova (910), Albania (873), Ukraine (691), and also Russia (390), and Bulgaria (190). The deep socio-economic inequality that characterizes the various areas of the planet causes continuous migration from the poorest to the richest in the world, too often run by organized crime.

For this reason, it is not only a metaphor saying that the victims of trafficking are enslaved in their vulnerability and their legitimate human need for survival: it is significant that in the national and international legislation they emphasize the functional link between trafficking in persons and slavery. More specifically, trafficking in persons now is one of the most prevalent and insidious forms of "*neoschiavismo*", subject of a complaint and prosecution at the international level, as a crime against humanity and particularly harmful to the dignity and status of the personal freedom. This status of vulnerable victim is first legal reference in the *Framework Decision of March 15, 2001* on the standing of victims in criminal proceedings, where *article 2* - establishing the victim's right to respect for personal dignity and recognition of the rights and legitimate interests with particular reference to criminal proceedings - states: "*Each State shall ensure that particularly vulnerable victims benefit from specific treatment best suited to their situation.*". But before, the first - in order of time - text on vulnerability, significantly, is to be found in *art. 2 of the UN Protocol to the Palermo Convention against Transnational Organised Crime of December 2000*, which defines trafficking as a kind of "abuse of a position of vulnerability". Such inclusion should give consideration to all factual situations of

inferiority of the taxable person of trafficking, mostly migrants, inferiority be linked not only to a mental disability, but also established a socio-cultural situation of underdevelopment, though not deductible sic et simpliciter from poverty or need. *The following Framework Decision 2002/629/JHA* provides measures for a joint commitment of states to combat trafficking. For example Italy has fulfilled reformulating the case of trafficking under Article 601 of the Criminal Code. The most recent *Council of Europe Convention on action against trafficking in human beings, opened for signature in Warsaw May 16, 2005*, where they introduced several provisions which require a more effective action to prevent and protect victims of trafficking, speaking on victims of trafficking refers to the possibility that the victim is in a “vulnerable position”. The Convention provides an effective system of assistance to victims of trafficking, including measures for the protection of personal data, hypotheses for granting residence permits (by Italian law already provided under Article 18 of the consolidated text referred to Legislative Decree on Immigration July 25, 1998, No 286), legal aid, and the fund for the victims of trafficking.

About the concept of a vulnerable victim, we have to mention the *Recommendation on assistance to victims of crime adopted by the European Committee on Crime Problems of the Council of Europe in the plenary session of April 3-7, 2006*. Under Art. 3 par. 4, Member States should ensure that victims who are particularly vulnerable because of their personal characteristics or the circumstances of the crime, can benefit from special measures specially prepared for their situation. The lines of development of protecting victims of crime in international and European level is proceeding along two lines: one is also discussed above, on the position of the victim in situation of crime. The other one relates to the issue of damages suffered by the victims. Already, the *Framework Decision of March 15, 2001* includes the obligation for Member States to ensure that victims of crime to obtain in the course of criminal proceedings a decision in a reasonably short time, some compensation from those responsible for the crime committed their damage. After the presentation by *the European Commission of a Green Paper on compensation to victims of crime, April 29, 2004* the Council of Ministers of Justice and Home Affairs, has approved the Directive 2004/80/EC relating to victims of crime, in order to provide compensation for victims of crime by the State. The directive on compensation to victims of crimes, however, applies only to EU citizens and persons legally resident in. Protection of human rights of the vulnerable victim of trafficking it has been identified as a strategic priority, not only because it responds to the need to ensure justice to victims of crime, but also because it responds to need of repression of delinquency. *The European Commission Expert Group on Trafficking in Human Beings was established in 2003* with the task of analyzing the phenomenon of human trafficking, stated in *a report - submitted in December 2004* - the tools to strengthen EU action against trafficking in human beings. The report placed the emphasis on cross-cutting issues such as the need to adopt an approach based on respect for human rights, the importance to keep out the specific needs of children and the importance of an integrated and multidisciplinary approach to the subject. Then it focused on three main areas: prevention, care and protection of victims, strategies to combat trafficking. In particular it suggests:

1) measures to protect trafficked persons who take as witnesses in criminal proceedings, such as: A) the testimony by video through pre-recorded or written statements b) the testimony by videoconference, c) the person's traffic-examination by a judge or a lawyer appointed by the Court, without the accused or of the defence lawyer d) the anonymity of the witness of the offender;

2) standards for interrogations of victims in order to avoid even the secondary victimization. In some jurisdictions it is possible the video recording of the testimony, which can be used in proceedings before the court;

3) an investigative approach "intelligence - led", one of the winning strategies on trafficking in human beings, a special strategy, already in use in investigating organized crime, taking in account the need to protect the dignity of the victim;

4) the importance of ensuring the privacy of trafficked persons, prohibiting the media to publish details that can easily lead to the identification of a trafficked person, including names, addresses or photographs, where this can be risky for safety or may infringe the right to privacy.

Law enforcement should also pay particular attention to the conduct of investigations so as not to permit identification, exclusion social risks for the victim, his friends and family. *On March 29, 2010, the European Commission presented a proposal for a directive on the prevention and combating trafficking in human beings and the protection of victims, repealing 2002/629/JHA Framework Decision (COM (2010) 95).* The proposal Directive aims to establish minimum rules concerning the definition of criminal sanctions in the area of trafficking in human beings and to introduce common rules to strengthen crime prevention and victim protection. It intends to incorporate the provisions of the existing Framework Decision, together with the provisions of the Council of Europe Convention of 2005 on combating trafficking in human beings. Article 10 provides that Member States take the necessary measures to ensure that victims receive care and support before, during and for a reasonable period of time after the criminal proceedings. They will also be provided adequate mechanisms for early identification and support of victims, in cooperation with relevant organizations to support. The measures should aim the institution of a minimum standard of living for victims, by providing them with adequate and secure housing and material assistance, medical care, including psychological support, advice and information in a language they know, services translation and interpreting, if necessary, and access to education for their children. *On February 10, 2010 the European Parliament adopted a resolution on the prevention of trafficking in human beings in which it asked that the Commission and Member States take into account a greater protection of victims regardless of their volunteer to cooperate in criminal proceedings. Also the European Court of Human Rights has ruled on the measures to protect victims of trafficking. According to Article 8 of the ECHR, people are entitled to the protection of their privacy. A model mechanism was discovered during the regular session of the Group's work in UNMIK (United Nations Mission in Kosovo) No. 2001 / 4, which explicitly provides that, other than the President of the Court, it is not possible for a defendant of an accused of trafficking in human beings "to introduce evidence about the personality or personal history of the alleged victim." A defendant may request the President to address the jury or the Court to obtain the admission of such evidence. The*

President then held a hearing in chambers allowing the defendant and the prosecution agency to perform contradictory considerations on the application: the introduction of the subject test will be allowed only if the president deems it is so significant that its omission would ultimately be a serious problem for the defendant.

THE PROTECTION OF VICTIMS OF TRAFFICKING IN ITALY

The work done at European level in the protection of victims of trafficking has involved Italy, even if the effective jurisdictional protection does not correspond to the development of the national law. In Italy, the current regulatory framework in the field of legal protection for victims of trafficking has been, until Carfagna Law, the Law no. 75/1958, the so-called “Legge Merlin”, under which prostitution is neither criminal nor unlawful conduct or socially harmful. While exploitation and the facilitation of prostitution are punished, the conduct of priming is also been decriminalized. The current Law “Carfagna” changes the current regulatory framework and proposes a shift towards a policy of criminal prohibition, as we’ll see later. In order to give effective protection to victim of such crime, *the Law on Immigration of 1998* introduced a specific program of social protection and integration. *Att 18* recognizes, in derogation from the rules on entry and stay of foreigners, the possibility that the Police Chief, issue a special residence permit to victims of trafficking regardless of the irregularities of his arrival in Italy.

The introduction of a specific crime of trafficking, however, sees the light only with the Law no. 228/2003. Amendments to the Att. 600 and 601 Criminal Code, introduced by the over said law; make the crimes of trafficking and slavery among the most serious crimes of Italian law. According to the UN Protocol Additional to Palermo, the boundaries of the crimes are much broader: the crimes are configured when the victim was deceived by false promises (or as a result of an abuse of a position of “vulnerability”), and also if there is not a total deprivation of liberty. For many aspects, it operates equivalence between the treatment of crimes of trafficking and slavery and that given to crimes of the mafia. Specifically, pursuant to att. 600 criminal code, which contains “reduction or maintenance in slavery or servitude” shall be punished with imprisonment from eight to twenty years, everyone has on a person powers corresponding to those of property or the person who maintains or reduces a person in a state continuous subjection, which is accomplished through the compulsion to perform work or begging or sexual or otherwise performance which lead to exploitation. The offense of “trafficking in persons” is punished with imprisonment from eight to twenty years, and is provided by att. 601 criminal code , as amended by Law no. 228/2003. It concerns anyone who commits trafficking of a person who is found in the conditions of Article 600 or, in order to commits crimes in the first paragraph of that article, the leads through deceit or forced through violence, threats, abuse of authority or taking advantage of a position of inferiority or a physical or mental distress, or by promising or giving of money or other benefits to the person who has authority over it”. However, the reform is poorly practiced, certainly because of the scarcity of human and material resources and also because of the inevitable temptation to contest the crimes under the Merlin Law. In fact crimes under the Merlin Law are easier to punish as it is sufficient for it the evidence of the transfer, even if only part, of the proceeds of

prostitution to the torturers. However there is no doubt that the two main institutions that devise effective protection to the victims are art. 18 Consolidation Act on Immigration and art. 13 l. 228/2003. *The innovative reform of the art. 18* consists of the possibility of giving continuity to legal residence of the foreign woman prostitute at the end of the protection program, whether there was a complaint by the victim. The path of social integration is realized when in the course of police operations and investigations on illegal immigration, has been established a situation of violence or serious exploitation and there is a serious and current threat to the safety of the person. The judicial case is activated following a complaint by the victim or, even if no complaint on the proposal of the Prosecutor. The victim of trafficking can also choose the assisted voluntary return to their country of origin, without any administrative order of expulsion from Italian territory. We must say that in several years of life of the institute, it has had to record an extremely heterogeneous behaviour of the police headquarters on the effective recognition of conditions of victims. Other application issues are made by the frequent delays in carrying out procedures for the issue of a residence permit. This prevents the effectiveness of social integration program and prevents access to work in situations of violence. In the legal field, it is very important to ensure legal access to legal aid, according to *DPR 115/2002*. But only the victim and civil party are admitted to legal aid, not the institutions and associations, which can give great help in the fight against trafficking.

Also, we must underline that the Att. 79, 2 of the over said Decree requires the non-EU citizen must produce the certificate of the Consulate attesting the veracity of income determined in accordance with art. 76. This procedure takes a long time and this prevents access to legal aid, as the time taken to obtain such certification it is not always compatible with the onset of the defensive. So, the admission procedure to free legal aid is not so easy. Also we must say that the lawyer is paid by the state with very long years of delay. This discourages the defense

An important instrument for giving more effectively the real protection of the victim is certainly the so called “*incidente probatorio*” through which you can anticipate the testimony of someone already during the preliminary investigation, preventing the risk of a time lag between placement in the protection program and the process.

Under Article no. 392 Code of Criminal Procedure, the victim can refuse to be heard as a witness and this cannot be considered as a serious impediment to the trial, even more if the person is exposed to violence or threat not to give evidence. The anticipation not entirely eliminates, however, the “risk” that the victim should then be resentful whenever the court deems it absolutely necessary. However, the victim not constituted as a civil part has a power of a mere reminder to the Prosecutor. Only in the case of victim constituted as a civil part, it may be proposed for the hearing as a private part, not as a witness. It follows a lower evidential value, but conversely cannot answer certain questions.

We must take account of the *law ratifying the Council of Europe Convention of 2005 on combating trafficking in human beings*. These effects are measured in particular in relation to the following aspects. The definition of the offense is broader than that contained in Article. 601 č.p. and essentially coincides with that Article. 3 of the Additional Protocol against Trafficking in Persons and art. 3 of the Convention of the Council of Europe of 2005, now ratified. Article 10 of the proposed Directive provides a number of

measures of assistance and support to victims of trafficking who basically reproduce those mentioned in Art. 12 of the Convention of the Council of Europe in 2005. The law 228/2003 (measures against trafficking in persons) provided by Art 13 the establishment of a special program to assist victims of crimes of slavery and trafficking (Articles 600 and 601 of the Code penalty). The measures of assistance and support in that scheme, as defined by the Presidential Decree 237/2005, are of lesser magnitude than those required by art. 10 of the draft directive. Article. 11 introduces a number of additional measures to protect trafficked victims in criminal proceedings only partially provided in our system. In particular, we highlight the specific precautions to avoid the cd. secondary victimization: some of these precautions are currently scheduled for the examination of witnesses and collaborators of justice.

But the practice is different: we must say that from 1 August 2010, 14 local social organisations have been blocked for the lack of the funds for the initial contact and reintegration of victims. A system that has helped 14,000 people in six years is likely to disappear.

And also we must say about the several doubts and misgiving on *the new Law to reform the Law Merlin proposed by the Minister Carfagna* (Bill 1079, amending the Act of February 20, 1958, No 75). Article 1 of the bill, which introduces two paragraphs of Article 1 of the Law of 20 February 1958, No 75, cd. Merlin Law, providing for the prohibition of prostitution and to make use of sexual services in public place or place open to the public, does not seem to take into account the need to maintain standards in our legal system to protect victims of prostitution and trafficking humans, crimes often linked to the phenomenon of prostitution. Criminalizing the practice of prostitution in public places or open to the public implies the absolute equalization (or rather the absolute irrelevance) of the distinction between being a victim of trafficking or a person who freely exercises prostitution.

Also, Art 2, paragraph 2 of the Law establishes accelerated and simplified procedures for the adoption of the provision of assisted repatriation of unaccompanied minors who have practiced prostitution. In accordance with the obligations assumed by the Italian State, the respect and promotion of children's rights, as primarily goals by the Convention on the Rights of the Child (CRC, 1989), should form the basis for any action in favour of migrant children. The *United Nations Committee on the Rights of the Child, in General Comment No. 6 (2005) "Treatment of unaccompanied and separated children outside Their country of origin"*, has provided guidance to States on how unaccompanied minors must be treated in compliance with the obligations under the Convention, addressing in particular the theme of reunification family and assisted repatriation (paragraphs 81-88).

In particular, a child should be returned to his/her home country only if such measure is the implementation of the child's best interests. According to the information and recommendations contained in General Comment No. 6 of the UN Committee on the Rights of the Child and in the "Statement of Good Practice" prepared by Save the Children Alliance and United Nations High Commissioner for Refugees, it is necessary that: there shall be a 'thorough and careful assessment of risks associated with a possible return of the child and / or his family possible flee, with particular attention to the risks of persecution or revenge, involvement in armed conflict, violence, abuse, or exploitation of family

circumstances, social and economic developments in the country of origin of the child; this assessment can be made by official organizations and independent experts, who carry out an assessment of the child's best interests in each case. The return will be safe without the violations of fundamental human rights of the child, parents (or other close relatives of the child to whom he/she was previously given). There should be considered socio-economic conditions which must be in compliance with minimum standards prior to removal. The child and his family should be properly prepared, and their contact must be facilitated and finally the child is accompanied by an adult legally and professionally competent.

So the Carfagna Law is not conforming to the international convention subscribed by Italy. Also, we must say that in addition to the Carfagna Law, part of the wider group of measures known as "*security package*" requires the application of provisions relating to the assisted repatriation of Article. 33, paragraph 2-bis of Act no 286/98 on unaccompanied minors EU citizens, thus giving jurisdiction over the Committee for Foreign Minors. This provision is in conflict with the *provisions of Regulation (EC) n.2201/2003 of the Council of 27 November 2003* concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. Under Article. 8 of the Regulation, the competence to take decisions on parental responsibility (including decisions regarding return of the child) is attributed to a court. Based on the criterion of proximity, the Regulation provides that the competent Court is generally that one of the State of habitual residence (a concept that is not defined in the Regulations, but must be determined by the court from time to time in this case on the basis of evidence).

In conclusion, the protection of victims of trafficking should be guaranteed through a legal process that should give an answer as soon as possible, taking into account the primary need to protect the dignity of the victims inside and outside the Court. The question is whether such a trial makes procedurally effective the protection of human rights as enshrined in the various texts, such as the right to freedom before all. If this vision exists, we must ask whether our legal systems are able to give legal protection to these victims, vulnerable victims. The effective protection of human rights in the criminal trial includes the protection of the victims and the consideration of personal dignity. This is not only a daughter, but also the mother of democracy.
