Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD)
15(1):02-21, janeiro-abril 2023
Unisinos - doi: 10.4013/rechtd.2023.151.01

From 'refugeeization' of labour exploitation to debt bondage: developing the subversive content of protecting the victims of exploitation *

Da 'refugiação' da exploração laboral à servidão por dívida: desenvolvendo o conteúdo subversivo de proteção das vítimas da exploração

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Abstract

The article uses Italian law as glasses to point out that dichotomy forced/voluntary migrants affects the opposition regular/irregular migrants: in Italy the victims of trafficking (forced migrants par excellence) are eligible for a protection permit under Article 18 of the Immigration Law. Given that trafficked people are also exploited through debt-bondage, and given the polymorphism of migration routes, a distinction between regular and irregular migrants based on the mode of entry seems illogical. The crisis of the dichotomy between regular and irregular migrants is deepened by the provision according to which the same residence permit should be granted to victims of labour exploitation. On the basis of Mauss's analysis of the gift, it is then argued that the "refugeeization" of exploited labour makes it clear that the gift-bondage emerges itself as a pivotal element of the system of exploitation and should therefore be considered as a justification for protection, and a reason for reviewing its content.

Keywords: Legal/illegal migrants, Forced/voluntary migrants, Trafficking, Labour exploitation, Debt-bondage, Gift-bondage.

* I would like to thank Salomé Archain, Chiara Bianchi, Carlo Botrugno, Claudio de Martino, Angela Suprano, Bianca Cassai, Chiara Stoppioni, Filippo Ruschi, Lucia Re, Letizia Palumbo and Sofia Ciuffoletti for reading and correcting an earlier version of this article. A special thanks goes to Gianmarco Gori who not only read and corrected the text but also provided some important data for the development of my argument.
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Resumo

O artigo utiliza a lei italiana como óculos para salientar que a dicotomia migrantes forçados/voluntários afeta a oposição migrantes regulares/irregulares: na Itália, as vítimas do tráfico (migrantes forçados por excelência) são elegíveis para uma autorização de proteção ao abrigo do artigo 18 da Lei de Imigração. Dado que as pessoas traficadas também são exploradas por meio da servidão por dívida, e dado o polimorfismo das rotas migratórias, uma distinção entre migrantes regulares e irregulares com base no modo de entrada parece ilógica. A crise da dicotomia entre migrantes regulares e irregulares é aprofundada pela disposição segundo a qual a mesma autorização de residência deve ser concedida às vítimas de exploração laboral. Com base na análise da dádiva de Mauss, argumenta-se então que a "refugiação" do trabalho explorado deixa claro que a escravidão da dádiva surge como um elemento central do sistema de exploração e deve, portanto, ser considerada como uma justificação para proteção e uma razão para rever o seu conteúdo.

Palavras-chave: migrantes legais/ilegais, migrantes forçados/voluntários, tráfico, exploração laboral, servidão por dívida, servidão por dádiva.

Ideological/methodological premise: 'research-action'

The reflections developed in the following pages are strongly influenced by a particular mode of investigation, 'research-action',[2] which has characterised my work on labour exploitation in recent years. As its name suggests, this mode of investigation aims to combine research and social action. It is what characterises *L'altro diritto*, a research centre on prison, deviance, marginality and governance of migration which today brings together 16 Italian universities: Florence, Sant'Anna (Pisa), Roma Tre and La Sapienza (Rome), Federico II and Suor Orsola Benincasa (Naples), Salerno, the University of Calabria, Palermo, Bari, Ferrara, Modena e Reggio Emilia, Genoa, Turin, Milano Statale (Milan), Venice. In the idea that inspires the Centre's work, 'research-action' is, on the one hand, aimed at the immediate use of its results in defence of the rights of people in the areas on which the Centre's attention is focused: people undergoing criminal prosecution, or considered deviant, or socially marginalised, as well as migrants channelled into the various paths provided by the Italian legal system. The Centre's 'research-actors' undertake to immediately pass on the knowledge acquired through their work to operators in the territory and to personally monitor its use. 'Research-action' develops in a circular fashion from the feedback of the practical use of its results. The knowledge acquired suggests some interventions and the analysis of their results is used to refine the study of social phenomena and the possibilities of intervention that can be derived from the legal system. This is meant to give life to a heuristic-hermeneutic circle

[2] I use this definition rather than that of "action research" normally used to describe a set of approaches developed in psychology (cooperative inquire, clinical inquire, action science, action inquiry) significantly different from each other in terms of theoretical orientations and methodological options. While the methodology adopted takes these experiences into account, it departs from them in fundamental aspects from an epistemological and ideological/methodological point of view.

that allows us, in a continuous progression, at the same time to interpret social reality and to change it by improving the effectiveness of marginalised people's rights.

History and glory of protection against exploitation in the Italian legal system

Since 1998 the Italian legal system has provided for protecting victims of '*violence and serious exploitation*', through Article 18 of the immigration law.[3] The first paragraph of that article reads:

> When, during police operations, investigations or proceedings for any of the crimes as mentioned under article 3 of law n. 75 dated 20 February 1958, or those provided for by article 380 of code of criminal procedure, or during aid interventions carried out by the social services of local bodies, there is the ascertainment of situations of violence against an alien or his serious exploitation and actual danger for his safety emerges, due to the attempt to avoid the conditionings of an association devoted to one of the above mentioned crimes or of statements given during preliminary investigations or trial, the Questore, also upon the proposal of the Public Prosecutor, or with favourable opinion of the same authority, issues a special residence permit to enable the alien to avoid the violence and conditionings of the criminal organization and to participate in a programme devoted to assistance and social integration.

As pointed out several times by Maria Grazia Giammarinaro who, in her capacity as "Special Rapporteur on trafficking in persons, especially in women and children" for the UN, has been the most thorough commentator on the evolving interpretation of this article and one of the most convinced supporters of its 'massive' use for the protection of victims of exploitation, this provision is exceptionally innovative. This is mainly due to the fact that from its text, and from the text of Article 27 of Presidential Decree 394/1999,[4] which regulates the specific procedure of the protection, it was possible to derive a rule that, through the so-called "social path", unties the protection of victims from the need for them to cooperate with justice.

In order to explain the wording of Article 18 and its initial application (the one that defined its first meaning, the 'norm' to be derived from it) it must be borne in mind that it was approved at a time when the international instrument of reference for combating trafficking in human beings was still the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* adopted by the General Assembly of the United Nations in December 1949 and opened for signature in New York in March 1950. As its name shows, this Convention considered only one type of trafficking, that aimed at the exploitation of prostitution, and ended up identifying trafficking with international actions leading to, or favouring, this form of exploitation. The Convention commits the Parties to "punish" anyone who "procures, entices or leads away" a person for the purpose of using him or her, even with

[3] On the fact that, since its approval, Article 18 of the immigration law was intended to cover victims of any kind of "violence or serious exploitation", see Giammarinaro (2014); Nicodemi (2017).
[4] *Regulation laying down rules for implementing the consolidated text of provisions governing immigration and rules on the status of aliens.*

his or her consent, for prostitution and in any case exploits anyone who carries out this activity (Art. 1) as well as anyone who participates in the management of places where prostitution is practised (Art. 2). In Italy, these indications were transposed by the famous Merlin Act (Law 75/1958) in its Article 3 (cited in Article 18 of the Consolidated Act on Immigration), well before Parliament authorised Italy's accession to the Convention, by Law 1173/1966, and more than twenty years before the instrument of accession was deposited by the Italian Government in 1980.

This data explains why for years the (scarce) applications of Art. 18 have been almost entirely traceable to the crimes of exploitation of prostitution or trafficking for prostitution and sexual exploitation. The available data on residence permits granted by the police under Art. 18 do not help to understand who the beneficiaries were, but it is possible to reconstruct their typology thanks to the calls for programme funding issued by the Department for Equal Opportunities. These provide that protection is intended for "victims of trafficking for the purpose of sexual exploitation" (Article 4 of the 2000 call). Although the group of persons entitled to protection identified by the text of Art. 18 includes the victims of all crimes for which arrest *in flagrante delicto* is provided, besides exploitation of prostitution, only the victims of trafficking (Art. 601 Criminal Code) and of reduction/maintenance in slavery/servitude (Art. 600 Criminal Code) were considered eligible for protection. It is worth pointing out that, when Law 199/2016 included labour exploitation with violence or threats (art. 603-*bis* § 2 Criminal Code) among the crimes for which arrest *in flagrante delicto* is provided, it was immediately taken for granted that the victims of this crime are eligible for protection. Once again, the significant indicator are the calls of the Department for Equal Opportunities which, starting from 2018 (Art. 3 § 9), referring to Law 199/2016 on labour exploitation in agriculture, urge to 'orientate' the applications so as to "formulate more projects related to this issue".

There is another important genealogical note to be made. When the immigration law was passed, trafficking, as it was defined in the former Art. 601 of the Criminal Code, could only concern persons already enslaved or those who would be enslaved by the perpetration of the crime. It follows that only a person enslaved or about to be enslaved could be eligible for protection. In order to identify these persons, the notion of slavery was therefore of fundamental importance. Article 1 of the *Slavery Convention*, adopted in Geneva in 1926, was interpreted by most legal scholars as requiring that slavery be identified exclusively with the legal ownership of a person. As a result, the offence of reduction/maintenance in slavery could only be committed in a very few foreign countries, since the Italian legal system, like that of most states, did not consider persons as objects of the institution of property. This interpretation changed mainly due to the 1956 United Nations *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*. This included *debt bondage* among the "institutions or practices similar to slavery". It was defined as: "the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined (Art. 1)".

Thanks to this change, today it is undisputed, and it was already when Article 18 came into force, that debt bondage (or bonded labour), a very current and worrying practice, must be assimilated to slavery (Brhane, 2015, p. 134). Moreover, this practice is now also considered relevant for the purposes of the configurability of trafficking, as redefined since the Palermo Protocol and, most recently, by Directive 2011/36/EU *On preventing and combating trafficking in human beings and protecting its victims*. On the one hand, indeed, this practice is a clear indication of the abuse of the victim's vulnerable position (Giammarinaro, 2012, p. 17). On the other hand, as the ILO *Guidelines* on human trafficking and forced labour exploitation (ILO 2005) point out, it is considered an element configuring a situation of forced labour which, in turn, is codified as one of the constitutive purposes of the crime of trafficking.

According to the ILO *Guidelines*, debt bondage lies on the borderline between forced labour and slavery, and implies that the individual works partly or exclusively to repay the debt incurred not only to pay for transportation from one country to another, often including irregular entry into the destination country, but also for accommodation, food, or recruitment.

Protection from exploitation and its inconsistency with the migration policy paradigm

Debt bondage is certainly a practice which, since it falls within the scope of Article 600 or 601 of the Criminal Code, entitles the victims to social protection under Article 18 of the immigration law. This conclusion is strengthened by the fact that in 2014, the Italian parliament, in the name of the symmetry of this crime with that of trafficking, included the exploitation of a situation of vulnerability also among the conducts constituting enslavement.[5]

This configuration of debt bondage, however, has the important and always overlooked characteristic of being at odds with the principles that have underpinned migration policies in the North-Western world in recent decades, acting as a 'formant' of regulatory measures and as a pivot of their accompanying rhetoric. In particular, it radically challenges the fundamental opposition between smuggling and trafficking, i.e. between voluntary irregular migration and forced migration.

Migration policies and the rhetoric accompanying them for three decades now have configured a discursive plan that can be organised through two Cartesian axes. The first is identified by the dichotomy regularity/irregularity of entry. This dichotomy, if we want to simplify the reasoning, is usually followed by that of regularity (for a more or less long period of time) and irregularity of the stay. This first axis, the fundamental one, is indicated in the table below with the ordinate, because it represents the main 'ordering' criterion of migration

[5] For an application of this amendment, see Court of Cassation 17.6.2016, no. 31647 (in the *DeJure* database) which clarifies that, for the crime of reduction or maintenance in slavery or servitude to exist, what is crucial is the "*situation of weakness or material or moral deficiency of the passive subject, capable of conditioning his personal will, in accordance with the provisions of EU Framework Decision 2002/629/JHA on combating trafficking in human beings (of which Law no. 228/03 is an implementation), where it intends to protect positions of vulnerability. This latter notion must be borne in mind when interpreting Article 600 of the Criminal Code*", since it constitutes a condition capable of radically compromising "*the freedom of choice of the victim, who has no choice but to submit to the abuse*". This last statement seems to configure the situation of vulnerability as a state capable, in itself, of determining that "continuous subjection" considered as a constitutive element of the crime.

policies. The second axis, auxiliary to the first one, is identified by the dichotomy voluntary migration/forced migration. This axis is indicated with the abscissa, by virtue of its Latin etymology (from *abscindo*, to cut) because it carves out an accessory distinction relegated in rhetoric to the discourse of "humanitarian reasons".

These two Cartesian axes divide the conceptualisation plane of migration governance into four quadrants: regular migration in the upper part, irregular migration in the lower part, voluntary migration on the right and forced migration on the left.

Map of the discourse on migration governance

Quadrant 1 **Asylum seekers and persons enjoying international protection** *Forced*	*Quadrant 2* *Ordinate* *Regular* **Regular aliens holding an entry visa (where required) and a residence permit** *Voluntary*
Abscissa **Victims of trafficking**[6] *Quadrant 3*	 **Irregular aliens (to be deported)** *Irregular* *Quadrant 4*

[6] In fact, regular migrants, often asylum seekers, can also be victims of trafficking, but their status is not problematic. At most they can change from one residence permit to another or they can be granted protection, to prevent exploitation, with their existing residence permit.

Let us first examine the right-hand side, that of voluntary migration, which is simpler and clearer. In this part of the plane, in quadrant 2, the upper quadrant, we find voluntary migrants, often referred to as economic migrants, but this quadrant also includes people who enter the host state to reunite with their families, to study, etc. The stay of these migrants on the territory of the state is regular and can be extended according to specific procedures.

In the quadrant below, quadrant 4, there are migrants who have voluntarily but irregularly entered the state: their stay on its territory is illegitimate, and their fate should be expulsion. With the Law 941/2009 Italy has even made irregular entry and stay a crime: at first a 'felony'; today they are configured as a 'misdemeanour'.

In abstract, and according to an insistent and persistent rhetoric, the illegality of the entry should be irremediable and the expulsion, which should follow, unavoidable. In fact, in Italy, this irregularity has been remedied through numerous ad hoc legislative measures, usually defined as 'regularisations'. The last one, defined as 'emersion' and rhetorically justified as a tool to combat labour exploitation, was adopted just under two years ago with the Law Decree 34/2020 (converted with amendments by Law 77/2020). Indeed, the Italian system has been based more on the logic of regularisation than of regularity. In fact, given the absurd conformation of the normal channel of entry for work reasons, its procedure has quickly changed from a channel of regular entry of foreign workers to a mechanism of regularisation on an annual basis – or rather, based on the timing of the flow-decrees – of workers already present on the national territory (Santoro, 2010).

The left side of the graph is dedicated instead to forced migration. Quadrant 1, the top one, is occupied by asylum seekers (or, more generally, international protection seekers), who are the forced migrants par excellence due to persecution or situations of danger to their life and safety in their countries of origin. Their stay is absolutely legal, they have the *right* – which is absolutely exceptional in a framework that links sovereignty and border control[7] – to enter and stay in Italy. In accordance with the principle of non-refoulement, even if they show up at the border without an entry visa or enter the country bypassing border checks, their application for asylum immediately makes them legal. This status lasts until it is established that the conditions for international protection are not met.

In quadrant 3, on the lower left, are the only irregular migrants that the dominant policies and rhetoric of the last 30 years have presented as *eligible for regularisation*: trafficked persons.[8] In Italy, illegal aliens who are victims of labour exploitation were added to this group in 2012 by paragraph 12-*bis* of Article 22 of the immigration law. This provision was reinforced by Law 199/2016 which amended Article 603-*bis* and provided, as mentioned, protection for all victims of labour exploitation carried out using violence or threats.

In order for the ordering criteria to hold up and for the governance of migration to appear coherent, this quadrant needs to be that of the 'exceptions'. The cases that fall within it imply, in fact, the questioning – in principle, and not occasionally for specific contingencies – of the fundamental axis of migration policies, that of regularity/irregularity. As mentioned, the

[7] I have discussed this exception in Santoro (2017).
[8] More precisely, as mentioned in the footnote to the table, trafficked persons who entered irregularly.

forced/voluntary migration distinction has been imposed by the language of human rights, by the international conventions that have sanctioned them, by constitutional principles and, especially from the point of view of effectiveness, by the case law of supranational and constitutional courts. If this secondary distinction, reduced to a 'humanitarian' corrective, were to become the ordering element of migration, the dominant rhetoric, centred on the distinction between regular migrants, 'good', and irregular migrants, 'bad', even criminals, would have to be radically changed. All North-Western migration policies, which it has accompanied over the last thirty years, would in turn lose their meaning and would have to be profoundly revised.[9]

The voluntariness/constraint factor of migration with the ensuing distinction between those who force migrants to move by bringing them into the foreign state to exploit them, traffickers, and those who provide the service that allows them to cross the border illegally, smugglers, is codified at the international level by two acts born simultaneously and in the same context. They are the two Additional Protocols to the *United Nations Convention against Transnational Organized Crime* signed at the Palermo Conference in 2000: the Protocol on smuggling and the Protocol on trafficking. These two protocols legally formalise the criterion for dividing the two lower quadrants of the plane of immigration governance policy and rhetoric. In the abstract, the distinction is quite clear. Those who resort to smuggling, and thus are placed in quadrant 4, right, characterised by voluntariness, are 'economic' migrants, tending to be male, who, acting in total autonomy and without being controlled by others, contract the service that allows them to enter a state illegally. Victims of trafficking – which, as we have seen, was originally linked to prostitution and still retains this imprint[10] – are placed in quadrant 3, left: any consent to recruitment expressed by the woman destined for sexual exploitation is considered irrelevant. The difference between the two phenomena can therefore be traced back to the migrant's initiative and conscious participation. In smuggling, the migrant is a rational actor, a (male?) individual who collects information to choose whether to undertake the illegal migration path and the organization to entrust (a choice between criminal organizations, but still a choice). In trafficking, the migrant woman (man?) does not make any choice: her choice being forced by the "use or threat of use" of methods suitable to coerce individuals' wills rules out the active participation of the 'victim'. In the ideal-typical representation, smuggling is a transaction between the trafficker and the trafficked person that is concluded with the migrant's autonomous consent. Both parties imagine that they will benefit from the transaction: the smuggler receives economic or material benefits, the migrant manages to enter the foreign state illegally. Trafficking, on the

[9] In fact, a right is slowly emerging, if not to emigrate, then at least to remain in the country of arrival whenever the protection of fundamental rights requires it. This process was initiated at international level by the Geneva Convention on asylum, and in Italy by Article 10 of the Constitution, which sets out the coordinates of what is known as "constitutional asylum", the implementation of which has, in recent years, been intertwined with the issue of humanitarian protection.

[10] This imprint can be seen in the *Documento di sintesi della discussione svolta sul disegno di legge di ratifica ed esecuzione della Convenzione e dei protocolli delle Nazioni Unite contro il crimine organizzato transnazionale (A.S. 2351), accolto dalla Commissione nella seduta del 23 marzo 2004*, where one reads: "The Protocol against trafficking in persons, especially women and children". Document available at https://www.parlamento.it/application/xmanager/projects/parlamento/file/commissione_antimafia_14leg/convpa.pdf (accessed 5 February 2022).

other hand, has nothing to do with a contractual synallagma: it is based on the control of the trafficked individual. This distinction explains why the former case is considered as an offence against the state, while the latter an offence, primarily, against the person (Jansson, 2015, p. 88). To summarise, going back to the mapping of the space of migration rhetoric and policies: quadrant 3, bottom left, is occupied by 'victims', quadrant 4, right, by people, labelled as 'not-good-people', who have either contracted a breach of law with someone else or perpetrated it themselves.

It is within this framework that the permit issued pursuant to Article 18 of the Italian immigration law should be contextualised: as we have seen, this form of protection is clearly designed for victims of trafficking. Those who used smugglers, on the other hand, were, and are, considered inevitably, on a legislative level, and rightly, on a rhetorical level, destined for repatriation. The repatriation of the foreigner who has irregularly or fraudulently entered the state territory, of the 'clandestine', has been a central element of the migration policies of the North-Western countries and of their accompanying rhetoric since the 1990s. In the Italian legal system, the dichotomy is plastically rendered by the fact that the immigration law, consistently with the policies that preceded and followed it, focuses on the prohibition of irregular entry, providing for the expulsion of its authors (Art. 13) and the criminalisation of those who favour it, either by effectively organising the journey (Art. 12), or by stimulating it, by employing those without a residence permit (Art. 22). The permit provided for by Article 18 for victims of exploitation is intended as an exception, which *must* be used very rarely: in particular when migration has not been voluntary but has been 'forced'. It is normal that the granting of this permit, presupposing a crime, even if, in the case of the social path, not officially formalised, is considered by the law as an exceptional event: no legislator, in spite of Durkheim's teachings ([1895]1979, p. 72-79), considers crimes 'normal'.

The exceptional nature of this permit is highlighted by the text of the provision itself, which defines it as a "*special* residence permit". It is the awareness of this exceptionality and speciality that explains the resistance of the police to issue it without a precise indication from the Public Prosecutor's Office, certifying the exceptional condition that there is a serious crime of which the beneficiary of the permit is the victim, who if anything is collaborating with the investigation.

The codification of debt bondage as a "practice similar to slavery", which took place in 1956, already undermined the dichotomy formalised by the Additional Protocols of Palermo. For it paves the way to consider the migration that begins in a contracted way, in the country of origin, and ends with the compulsion to pay the agreed debt, in the country of arrival, as itself trafficking, forced migration. The stability of the dichotomy, and the connotation of trafficking as an originally forced migration, has been further weakened with the recognition that debt bondage can arise not only from the journey, but also from the agreements stipulated in the country of destination to pay for food, accommodation and remuneration to the intermediaries who facilitate recruitment as a worker.

Five years after the stipulation of the two additional protocols that formalise it, what was intended to be a clear dichotomy, a basis of the migration policies of North-Western countries and an auxiliary 'formant' of their legislation, proves unable to account for the

phenomenology of exploitation. We are gradually realising that the paths of exploitation victims, starting with those of women victims of sexual exploitation, are not so linear as to be clearly placed in one of the two ideal models, in the third or fourth quadrant of the map of migration discourse. In spite of the dichotomous categorisation that tends to hide the phenomenological reality, it is slowly emerging that migration paths can begin on the initiative of the migrant woman who contracts her exit from the country of origin to end up in a situation of exploitation, which can sometimes be foreseen, sometimes taken into account and sometimes accepted.

In order to come to terms with these migratory paths, and with the people undertaking them, we have had to take off the glasses that prevent their perception, to overcome consolidated categories that push to classify individual migratory paths in a clear and dichotomous way, considering them either *voluntary*, and therefore such as to deprive the migrant person of the possibility of being protected, or *forced*, and therefore such as to give her the right to protection. Faced with the phenomenology of the paths, especially because, as mentioned, trafficking is thought of as a phenomenon aimed at the exploitation of prostitution – considered, in itself, as recently reiterated by the Italian Constitutional Court (Judgment 141/2019), following the "spirit" of the 1949 UN Convention, a job that no one can 'freely' want to do – we have slowly come to believe that the outcome of the path confers the right to protection, regardless of the initiative and awareness of those who have undertaken it.

On this point, the Explanatory Report to the *Council of Europe Convention on Action against Trafficking in Human Beings* is crystal clear:

> Article 4(b) states: "The consent of a victim of 'trafficking in human beings' to the intended exploitation […] shall be irrelevant where any of the means set forth in sub-paragraph (a) have been used". The question of consent is not simple and it is not easy to determine where free will ends and constraint begins. *In trafficking, some people do not know what is in store for them while others are perfectly aware that, for example, they will be engaging in prostitution. However, while someone may wish employment, and possibly be willing to engage in prostitution, that does not mean that they consent to be subjected to abuse of all kinds. For that reason Article 4(b) provides that there is trafficking in human beings whether or not the victim consents to be exploited* (https://rm.coe.int/16800d3812, § 97, my emphasis).

Clearly, the configuration of debt bondage as a form of servitude, equated to slavery, a priori undermines the conceptual dichotomy between the 'clients' of traffickers and their victims, between active users of organisations facilitating illegal immigration, that must be repatriated, and victims that must be protected and initiated into stable social inclusion. Those who use smugglers often develop a debt towards them in order to pay for the services that allowed them to enter a state irregularly: a debt that can easily have the features that the 1956 Convention considers debt bondage. In other words, those who organise their own irregular entry at the time of departure, once entered irregularly can easily turn into persons subjected to and exploited by those who allowed them to enter (Campana and Varese 2015). It is indeed evident that most of those who turn to smugglers are vulnerable people, whose choice to migrate, often, can hardly be said to be *fully* free and voluntary. They agree to travel

in dangerous conditions and, if they do not have the required money, they get into debt with traffickers who, once in the destination country, force them to repay the debt by working in conditions similar to slavery, thus making them fully fall into a situation of debt bondage.

Although these critical issues have not been paid particular attention, the Italian Court of Cassation immediately highlighted that debt bondage undermines the meaning of migration policies in Italy. Ruling on the provisions introduced by the 2003 reform of Article 600 of the Criminal Code, the Court argued indeed that:

> starting from the title of the amending law, the new provision is precisely suited to the hypothesis of taking advantage of the existential need of immigrants from poor countries. And experience shows that these people, who are often unable to meet the costs of travel and find a job, commit themselves to pay the price of emigration (Court of Cassation, 13.11.2008, no. 46128).

The Court recognised that the offence of enslavement/slavery is committed when an irregular immigrant without means and burdened by the debt contracted with his exploiter for facilitating his illegal entry into Italy is subjected to exploitation. In this way, the Court of Cassation has challenged the fundamental dichotomy of migration policies by recognising, albeit implicitly, that those who find themselves in conditions of exploitation due to the debt contracted with smugglers who had facilitated their illegal entry are entitled to protection under Article 18 of the immigration law. The 2016 UNODC *Global Report on Trafficking in Persons*, underlines (p. 17) that smuggled migrants are a category of people particularly vulnerable to being exploited because of the costs incurred (and therefore likely to qualify for protection): "migrants and refugees who have been smuggled are particularly vulnerable to being exploited because of lack of opportunity in the destination country and the costs associated with smuggling". It is worth noting that this statement, by placing migrants and refugees side by side, realistically takes it for granted that the latter must use smugglers to escape from their country: a circumstance that in itself undermines the idea that smuggling has nothing to do with forced migration.

Apparently, debt bondage challenges the separation between the two lower quadrants of the drawn map: that between forced and voluntary migrants. In fact, however, by breaking this distinction and configuring some irregular voluntary migrants as destined not to expulsion, but to integration – moreover, assisted by economic and social support, contrary to what happens to regular voluntary migrants! – debt bondage deeply challenges the basic dichotomy of the migration discourse developed by the North-Western world over the last thirty years, that between regular migrants, who are welcome, and irregular migrants who should not even be given a glimpse of hope of settling down. I have emphasised that the issue concerns "some irregular migrants" because on a political, but I would also say legal, level, the coherence of the overall picture depends on whether the right to regularisation is an exception concerning a few dozen migrants, or is guaranteed to a very high number of people.

The ability of protection to subvert the fundamental dichotomy of immigration policies, legislation and rhetoric has certainly had, and still has, a great weight in explaining the resistance, first of all of the police, to issue a permit functional to protecting victims of

exploitation. This difficulty is reinforced by the 1998 Italian law conceiving, as we have mentioned, this permit as a two-sided permit, corresponding to the two paths provided to obtain it. It can be a justice permit, issued to allow the irregularly staying person to cooperate in the investigation against his/her exploiters, as the provisions of the time on trafficking in some way suggested and certainly allowed. But it can also be a "social protection" permit that allows exploited migrants to start a path aimed at their stable inclusion in Italy. In light of paragraphs 4 and 5 of art. 18 of the immigration law, social assistance is, in fact, meant to make the person fully autonomous and fully integrated in the host community. The residence permit guarantees the rights to welfare services, education, registration in the employment lists, and employment; it can be converted into a study or work permit. It is, therefore, a path capable, first of all, of remedying the main factors that can give rise to a position of vulnerability, i.e. a position in which the exploited person finds himself without any really viable existential alternatives. However, thanks to the convertibility of the permit into a work permit, this path is also aimed at allowing the final stabilisation of formerly irregular migrants.

The problem of the contrast between the protection permits for victims of exploitation and the categorical dichotomies underlying migration policies has been tacitly and paradoxically amplified, on a theoretical level, by the introduction of the residence permit for irregular migrants subjected to particularly exploitative conditions provided by Art. 22, par. 12-*quater*, of the immigration law. In fact this permit, in spite of the aims of the 2009 directive, of which it is a transposition, is itself clearly designed, by taking advantage of the provisions of Art. 18 and of the full extent allowed by the directive's wording, to provide a stable path of social integration. It provides a sort of 'predefined' regularisation for illegal migrants. Although it seems to be designed at first sight as a justice permit, so much so that paragraph 12-*quinquies* states that it "may be renewed for one year or for as long as *necessary for the conclusion of criminal proceedings*", this permit accompanies the exploited person to a stabilisation on the national territory. The following paragraph 12-*sexies*, in fact, clarifies that this permit too, like the one provided for by Art. 18, "allows the performance of working activities and can be converted, upon expiry, into a residence permit for work as employed or self-employed". And with the provisions of Law Decree 113/2018, converted by Law 132/2018, it also foresees material support to the path of social integration, similar to that provided for asylum seekers.

The incongruity of these provisions for some years had, as mentioned, a purely theoretical relevance because this permit was introduced in a tacit way, with little social impact. Its 'exceptionality', due to the link with a crime, and the very little recourse to it have concealed the problem of its disruptive incongruity with the ordering principles of migration policies. As shown by the official statistics of the Italian Ministry of Interior, the residence permit under Art. 22, in the period from its introduction to 2019, has been granted in very few cases. When reading the data in the table below, it should be noted that they refer both to newly issued and renewed permits. Considering that the duration of the Art. 22 permit is six months, renewable for one year, it is possible that a permit issued to the same person may be counted several times in the same year. Thus, the beneficiaries of this permit in seven years were very few.

Tab. 1. *Residence permits issued by the police under Art. 22 immigration law* [11]

Year	*Humanitarian reasons Art. 22 Law 286/98*	*Serious labour exploitation – special cases Art. 22 immigration law*
2012	16	-
2013	11	-
2014	3	-
2015	3	-
2016	10	-
2017	4	-
2018	-	-
2019	-	29

The permit under Art. 22 of the immigration law is a paradox that shows how the Cartesian axes of the discourse on migration do not leave room for the protection of migrants' fundamental rights and, as their protection is enriched by an instrument capable of making it effective, the coherence of the overall framework is undermined.

What makes the story of this permit paradoxical is that it was introduced in order to implement a Directive – 2009/52/EC – which, from its very name (*Minimum standards on sanctions and measures against employers of illegally staying third-country nationals*) aimed to discourage the use of smugglers, drastically limiting, through the criminal punishment of the employer, the chance of a foreigner being encouraged to enter illegally into an EU member state with the prospect of finding a job. The permit was conceived by EU legislation as an instrument to strengthen the supporting framework of migration policies. In fact, it was supposed to be a permit for reasons of justice: if the dissuasive effect of the criminal punishment for the employer did not discourage the migrant and he/she had undertaken the journey in the hope of finding a job, even if irregularly, which is very frequent in practice, the migrant was offered an exchange between the sums that the exploiting employer had denied him/her and the cooperation in the prosecution. That, in the intentions of the EU legislator, this is the reward for cooperation, rather than a permit stabilising the migrant on national territory, is made clear by Article 6(5) of the Directive, according to which "In respect of cases where residence permits […] have been granted […] Member States shall define under national law the conditions under which the duration of these permits may be extended until the third-country national has received any back payment of his or her remuneration".

Recital 27 of the Directive states: "Member States should be free to grant *residence permits of limited duration, linked to the length of the relevant national proceedings*, to third-country nationals who have been subjected to particularly exploitative working conditions or who were illegally employed minors and *who cooperate in criminal proceedings against the employer*". This provision makes it clear that, according to the European lawmakers' plan, what must be recognised (granted) is a permit made to allow (and encourage) cooperation in

[11] *Annuario delle Statistiche Ufficiali del Ministero dell'Interno*, 2007-2020. In creating the table, I have retained the denomination under which the data are collected in the different editions of the yearbook. The naming of the permit to "special cases" as of 2018 is due to the changes made to Article 22 of the immigration law by Law Decree 113/2018.

investigations. It is not a permit aimed at stabilising the worker who reports the "particular exploitation". The recital, restated by Article 13(4),[12] however, goes on:

> Such permits should be granted *under arrangements comparable* to those applicable to third-country nationals who fall within the scope of Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

The wording of this rule, together with the provision that states are free to introduce more favourable measures for migrants (Art. 15 of the Directive), allowed Italian lawmakers to devise a permit aimed at stabilising the exploited migrant. The aforementioned Directive of 2004 provided that, also for the victims of trafficking, states should recognise what we can define as a justice permit.[13] Article 4 of the Directive was without prejudice to the power of states to provide for more favourable measures. In 2004, Italy had already had Article 18 for years, which it did not touch, thus making use of this clause. This situation allowed, and perhaps in some ways imposed, lawmakers to design the new permit issued under Article 22, paragraph 12-*quater*, in the likeness of the permit provided for by Article 18.

The result of the new provisions is that, if the employer employs an irregularly staying person, the road to regularisation is opened for the latter. In the light of the logic of the 2009 Directive, this mechanism may certainly appear as an attractor of irregular migration. The exploitation of irregularly staying migrants is, in fact, the textbook case of labour exploitation. From the point of view of those who cling to migration policies centred on the supporting dichotomy of the discourse on migration governance, a cognitive dissonance has been created whereby exploitation becomes a sort of passage towards regularisation (a sort of amnesty).[14] This problem has not emerged in a disruptive way because, as mentioned, it has long been hidden by the very few permits issued under Art. 22, paragraph 12-*quater* and by the choice of the police not to grant the permit under Art. 18 without the endorsement of the prosecutor's office.

The incongruity of a residence permit that accompanies victims of exploitation to the stabilization on the national territory was brought to light by the inclusion of art. 603-*bis*, paragraph 2, Criminal Code, among the crimes that entitle to protection under Art. 18 of the immigration law. In fact, thanks to this inclusion – contrary to what has happened, and still happens, for many other crimes of the same category – the conviction that victims of labour exploitation can and should benefit from the residence permit provided for by Art. 18 of the immigration law has slowly spread. Public prosecutors themselves seem to be progressively internalising this idea.

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[12] "In respect of criminal offences covered by Article 9(1)(c) or (e), Member States shall define in national law the conditions under which they may grant, on a case-by-case basis, permits of limited duration, linked to the length of the relevant national proceedings, to the third-country nationals involved, under arrangements comparable to those applicable to third-country nationals who fall within the scope of Directive 2004/81/EC".

[13] This permit is in fact conditional on "the opportunity presented by prolonging his/her stay on its territory for the investigations or the judicial proceedings" and on "whether he/she has shown a clear intention to cooperate".

[14] If we consider that amnesties are often an opportunity to extort migrants who need to regularise their status, the analogy does not seem too far-fetched.

In recent years, a phenomenon has developed that the Italian literature has defined as the 'refugeeization' of labour exploitation.[15] Various UN agencies have pointed out that applicants for international protection are overexposed to the risk of exploitation. The 2016 UNODC *Global Report on Trafficking in Persons* highlights that:

> Refugees fleeing persecution or other dangers in their country are particularly vulnerable to traffickers. Similarly, migrants and refugees who have been smuggled are particularly vulnerable to being exploited because of lack of opportunity in the destination country and the costs associated with smuggling. If other elements of trafficking are present, the exploitation may render them victims of trafficking.[16]

The Inter Agency Coordination Group Against Trafficking in Persons links the exposure of asylum seekers to exploitation not only to their vulnerability in the country of origin but also to that which characterises their journey and status upon arrival: "Refugees and asylum-seekers are particularly vulnerable to abuse and exploitation at different stages of their flight, including at their destination".[17]

This phenomenon does not change much the subversive impact of protection, it only complicates the picture. In the mapping drawn, applicants for international protection occupy the first quadrant: they are regular forced migrants. As mentioned above, they must be granted the status of regularity automatically as soon as they express the will to apply for asylum, without any verification, and this status ceases if the verification, which in Italy lasts on average 4 or 5 years, ends negatively. During the entire period of verification, they hold a permit that must be renewed every six months. If the asylum seeker is finally denied the status then, according to the discursive/legislative plane, regardless of the many legal barriers to this outcome, he/she should move in the map drawn diagonally, like the bishop in chess: namely downwards, passing from quadrant 1 at the top left to quadrant 4 at the bottom right, that of irregular voluntary migrants. In fact, the asylum request is considered as a sort of attempt to cheat the state on his condition of being a person eligible for international protection, a victim of persecution or a situation that puts him in serious danger.

After the quadrant transmigration, being a victim of labour exploitation opens up for the person the same path that all irregular voluntary migrants can take since entering Italy. During the status recognition procedure, being a victim of exploitation becomes a way out of the hell of residence permits for asylum to be renewed continuously, for four or five years, while waiting for the recognition of a status that may never arrive. With the inclusion of art. 603-*bis*, paragraph 2, of the Criminal Code among the offences required by Art. 18 of the immigration law, exploited asylum seekers are offered another way, not as an alternative, but

[15] Dines, Rigo (2015); Bilongo, Omizzolo (2019); papers by Sanzo and Ferrarese and by Bilongo in Osservatorio Placido Rizzotto FLAI-CGIL 2020; Omizzolo 2020.
[16] Cf. UNODC, *Global report on trafficking in persons,* 2016*,* p. 17, at https://www.unodc.org/unodc/data-and-analysis/glotip.html.
[17] ICAT (2017), *Trafficking In Persons And Refugee Status*, p. 2, at http://icat.network/sites/default/files/publications/documents/ICAT-IB-03-V.2.pdf.

as a parallel path[18] to the one that leads to the recognition of international protection: to be granted protection under Art. 18 and, after finding a regular job, to convert the protection permit into a work permit.

From debt bondage to gift bondage

It is precisely the 'refugeeization' of exploitation that calls some basic assumptions of the protection system into question and helps to explain some of its paradoxes and weaknesses. If we analyse the phenomenon, the 'refugeeization' generates a cognitive dissonance that pushes us to reconsider the Western way of conceiving social relations; it reveals that it is the 'individualistic' conception, underlying the construction of protection paths, that sometimes makes them unsuitable to meet the life needs of the exploited.

This is especially clear in the case of labour exploitation, a world in which the phenomenological spectrum is very polarised on the side of negotiation, which is by far prevalent over physical coercion. It is no coincidence that the main case of criminalised exploitative conduct, outlined in the first paragraph of Article 603-*bis* of the Criminal Code, does not require violence or threats but the exploitation of the workers' state of need. Normally, victims of labour exploitation simply need to be put in a position to resume their work project, and possibly their migration project. They need support measures that consist mainly of socio-occupational inclusion pathways that free them from their state of need. Precisely because bargaining often prevails over coercion, people subjected to labour exploitation do not normally need the same level of protection as those subjected to sexual exploitation. In most cases they do not need to be physically removed from their exploiters due to the risk of retaliation or violent re-exploitation. In the case of labour exploitation, the exploiters rarely use deception, threats and violence to coerce the will of the exploited into submission to their control, and it is usually the exploited who move, like hobos (Anderson [1923]1997) in the US during the Great Depression, from place to place in search of a job, even under exploitative conditions. To escape exploitation, they do not generally need protection from the exploiter's violence, but from the condition of vulnerability that makes each of them, *coactus voluit*, accept the only working conditions that seem accessible to them.

All existing protection programmes in Italy assume the situation of need/vulnerability as necessarily linked to individual material conditions. The 'refugeeization' of exploitation indicates that a significant number of asylum seekers fall victim to the phenomenon, although they enjoy, or can enjoy, the guarantees that Italian legislation offers them – accommodation, pocket money, but also, often, language courses and some vocational training. This phenomenon seems to show that the condition of need/vulnerability, which pushes people to be exploited or, better, makes them feel they have no option but to accept exploitation, is not (only) linked to migrants' individual material needs in Italy. To asylum seekers, who do not

[18] It is, in fact, clear, regardless of some erroneous ministerial indications, that the permit provided for by Art. 18 of the immigration law or Art. 22, par. 12-*quater*, entails the renunciation of the residence permit for asylum request, certainly not of the procedure, which can also be activated by regularly residing foreigners who certainly do not lose the permit they already hold.

feel threatened and forced to accept exploitation, but still go in search of an exploited job, those programmes, in fact, do not offer, on average, very different conditions from those programmes they start from or may have abandoned to pursue an exploited job. On the contrary, with Art. 12 of Law Decree 113/2018 converted with amendments by Law 132/2018, entitled "Provisions on the reception of asylum seekers", Italy has recently established that holders of protection under Art. 18 and 22, par. 12-*quater* of the immigration law can benefit from the same services provided for refugees, if they do not already enjoy social protection. This re-proposition of the initial conditions as a path of social protection to exit exploitation undermines the appeal of the paths themselves.

Debt bondage is the litmus test that reveals the prejudice that cripples protection paths. The 'western' approach leads us to consider debt arising from a contract stipulated to obtain an illegal service, the unauthorised and possibly very burdensome entry into a country, as a bondage comparable to enslavement, the more so because it is stipulated with a 'criminal' entity and therefore capable of a particularly exorbitant and violent debt collection. The phenomenology of labour exploitation, as reported by the 'research-actors' of *L'altro diritto*, by social workers and trade unionists who work with the exploited, by qualitative research on this issue, shows that there is a mechanism that pushes to accept, even to seek, exploitation, which has completely different characteristics but is equally 'binding' or 'compelling'.

The migration path of most exploited people starts with funds provided by family members, that are often very small and only cover the beginning of the path. These funds are not 'lent' to the migrant. Even if the person who undertakes the path is often chosen within the family because she is seen as the member who has more chances or perspectives of success, the group does not think of the money made available for the migratory project as an investment that will then make a profit, as we imagine the smugglers' organisation does. The family group gives a 'gift' to its member who undertakes the migration path. Max Weber's analysis of contractual freedom and its difference from other freedoms in the liberal tradition is fundamental to understand the dynamics by which the situation of vulnerability drives one to submit to exploitation, to understand why the exploited *coactus voluit* the conditions in which he finds himself working.[19] In order to understand why asylum seekers accepted in the CAS submit to exploitation or why exploited workers refuse or abandon protection programmes, the teaching of another great anthropologist, Marcel Mauss, seems fundamental to me. The mechanism behind the migration project and the feelings it arouses in migrants seem to be much more understandable in the light of his famous analysis, dating back to 1924, of the social practice of gift-giving in the indigenous societies of Oceania (Mauss, 2002, p. VII), than of theories based on the economicist concepts of 'investment', 'contract' and 'debt'.

The most common conception – which can be traced back to a certain ideological but, for decades, mainstream reading of Adam Smith's theses and is not alien to the Marxist approach (Godbout, 2008, p. 117) – leads us to consider, almost automatically, modernity and even more so the era of globalisation as the time when contract becomes the instrument par excellence that allows people to pursue their own interests and therefore the reference point

[19] I argued for the importance of Weber's analysis as a heuristic tool to understand the situation of vulnerability in Santoro 2020.

of every social relationship.[20] Since Hobbes, Western thought has held that the exchange through which the parties' interests are pursued must take the form of a contract that allows the agreement to be given a legally coercive value and not based solely on mutual trust. Without a threat (not necessarily a state one, Santi Romano *docet*) to ensure compliance, agreement is not considered a source of obligation. Social sciences and legal systems believe that one cannot speak of an obligation without the provision of a sanction, which is more serious than the simple loss of the counter-performance (Eisenberg 1997). This logic gives rise to the idea that debt bondage coerces people's will, depriving them of their freedom. Entering into an agreement with a party, the criminal association, which has made the investment to guarantee the journey in exchange for the profit derived from the payment of the agreed sum and has a strong power to sanction the person who has obliged himself, possibly affecting his family members at home, configures that person as no longer free.

In Western legal systems, however, gift is not the source of a binding corresponding obligation. Western thought contrasts the contract that gives rise to an obligation with the gift thought of as a completely disinterested "giving" which, as such, does not generate any *obligation* to reciprocate. To put it in the terms of legal doctrine, it does not generate a synallagma. In the 'West' gift is viewed almost as a category of the spirit, characterised by 'purity'.[21] It is not a means of pursuing one's own interests and, therefore, cannot be the basis of a social relationship stabilised by the legal system.

In his 1924 essay, Mauss analyses a way of conceiving social relations that is far removed from this approach. Examining the societies of Oceania, the French anthropologist shows how 'gift' is a practice that gives rise to a social relationship, regulated by social norms, and is therefore not a 'pure' act, free from expectations (Mauss, 2002, p. 28-32). The gift is freely "given" but it is part of a social practice whereby one *knows that* one will receive in return, from another partner in the community, a gift that will be given with equal freedom (Mauss, 2002, p. 117-124). This happens without any form of coercion by the state or by any organisation (criminal or otherwise), but the giver has the absolute confidence of being given. The gift, therefore, gives birth to a social relationship, creates binding expectations that satisfy both the receiver and the giver, who knows that he will be reciprocated with what, in the Maori language, is called *hau* (Mauss, 2002, p. 108).

As Jacques T. Godbout has pointed out, much of Western literature, assuming that a social relationship with an economic content cannot take forms other than those taken in the "North of the World" (Mauss 2002: ch. XVI), has for decades labelled Mauss as an 'animist', downplaying the significance of his anthropological analysis. However, this analysis is particularly illuminating when Mauss (2002: 87) describes a ritual in which 'competitive' gifts are given,[22] which the partner can never reciprocate, with the aim of humbling him and making him feel forever in debt. Gift normally creates a debt that the giver has the capacity to

[20] References for this thesis can range from H.S. Maine's famous work, *From Status to Contract*, to Becker's (1976) analysis, to seeing the last two decades as the era in which *lex mercatoria* became the framework for state sovereignty.
[21] Because of this, Jacques Derrida (1996) conceives of the gift as a figure of the impossible.
[22] Mauss, whose analysis is strongly characterised by comparison, cites the famous potlatch of the Indians of the Pacific Northwest coast.

repay: it results in a relationship based on obligations that is a 'normal' condition of life. But 'gift' can also give rise to a pathological relationship that can humble the party unable to reciprocate it, creating a feeling of despair.

Mauss' analysis helps us to understand that the migrant who is given the money to start the journey – a sum that can be objectively small, but tends to be enormous in a subjective perspective, often amounting to the savings of a family, sometimes even of several generations of that family – does not feel subject to a lesser debt than the one stipulated with the smugglers, which the concept of servitude ratified by international agreements considers a 'constraint' capable of preventing self-determination. The forms of protection we have built seem incapable of coping with this 'constraint', whose strength still seems culturally alien and therefore inconceivable to us today. Any protection programme that does enable the migrant to 'donate' 400 or 500 euros a month to his family in his country of origin (this figure is what exploited migrants usually say they send to their families), will not be able to free him from what could be defined as gift bondage, the social constraint created by the enormous gift received. If we do not take the existence of this bond into account, we cannot understand why asylum seekers are particularly vulnerable to exploitation, especially labour exploitation, despite being included in social care programmes until the end of the procedure. This 'constraint', gift bondage, is a key element in explaining the 'refugeeization' of labour exploitation and should lead us to review our understanding of the situation of vulnerability and the design of social programmes meant to address it.

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Submetido: 12/03/2023
Aceito: 15/09/2023