



The Italian legal framework against labour exploitation.

A legal assessment, specifically targeting undocumented migrants¹

Written by Maria Francesca Cucchiara and Anna Baracchi, edited by Paola Cavanna

with the contribution of Francesca Nicodemi and Marco Paggi

1. Evolution of the Italian legal framework.

- Legislative Decree No. 286/1998 (Consolidated Immigration Act);
- Law No. 228/2003 implementing the Palermo Protocol of 2000 (amended the Criminal Code, in particular Articles 600, 601 and 602);
- Law No. 108/2010 implementing the CoE Trafficking Convention (further amended the Criminal Code);
- Legislative Decree No. 109/2012 implementing Directive 2009/52/EC on sanctions and measures against employer of illegally staying third-country nationals;
- Legislative Decree No. 24/2014 implementing Directive 2011/36/UE on preventing and combating trafficking in human beings and protecting its victims (amended the Criminal Code, in particular Articles 600 and 601);
- Law No. 199/2016 on countering undeclared work and labour exploitation in the agricultural sector.

2. Relevant criminal provisions.

(a) Slavery

Art. 600, Italian Criminal Code - *Reducing or holding a person in a condition of slavery or servitude*

Punishable conducts:

- to exercise over a person powers corresponding to those of the right of ownership;
- to reduce or hold a person in a state of continuative subjection (realised through violence, threat, deception, abuse of authority or profit from a situation of vulnerability, physical or mental inferiority or a situation of necessity, or by the promise or payment of sums of money or other advantages from who has authority over the person), forcing the victim to perform work or sexual services or to beg or to perform any other illegal activity that involves exploitation or to undergo organ removal.

¹ In most Member States, including Italy, the acts of entering or staying in the territory of the State without the requested authorization constitute a criminal offence: see art. 10 *bis*, Consolidated Immigration Act.

Punishment: 8 to 20 years of imprisonment.

Corporate 'criminal' liability is provided by Art. 25 *quinquies*, Legislative Decree No. 231/2001.² Sanction: monetary penalty from 400 to 1000 quotas.³

Observations:

- The eventual consent of the victim has no relevance, since it could exempt an illicit conduct from liability only when related to alienable rights (i.e. estate related rights) and not when personal rights (such as life, physical integrity, personal and sexual liberty, honour, dignity, personal identity) are involved. However, the CoE Group of Experts on Action against Trafficking in Human Beings considers that stating explicitly the irrelevance of the consent of a victim to the intended exploitation could improve victims' protection.⁴
- Despite the clear criminal prohibition against slavery and the available tools, **prosecutions remain exceptional** at the national level, particularly with regards to legal persons. Barriers to effective investigation and prosecution of slavery – with particular reference to the agri-food sector – include impediments to accessing victims (in the fields) and their testimony, including the reluctance of victims themselves to cooperate for fear of further harm (i.e. imprisonment or deportation); low incentives for conducting costly, time-consuming and often dangerous transnational investigations; social acceptance of slavery despite its formal illegality.

(b) Trafficking

Art. 601, Italian Criminal Code - Trafficking in persons

Punishable conducts:

- to recruit, introduce into the territory of the State, transfer even outside said territory, transport, yield authority over a person to another person, offer lodging to one or more persons who are in the conditions specified in Article 600;
- to perform the said conducts against one or more persons by deceit, violence, threats, abuse of authority or taking advantage of a situation of vulnerability or of a weaker physical or psychic condition or a condition of need, or by promising or giving money or any other advantage to the person having control over that person, for the purpose of inducing or forcing him/her to perform work, sexual services or to beg or, in any case, to perform unlawful activities entailing his/her exploitation or removal of organs;
- to perform the said conducts, even without using the above means, against a minor.

Punishment: 8 to 20 years of imprisonment.

² Legislative Decree No. 231/2001 has introduced the liability of legal entities for certain offences committed in its interest or for its benefit by certain individuals who have specific relationships with the corporation (i.e. corporate officer or employee subject to the direction or supervision of a corporate officer), in addition to the liability of the natural person that materially committed or attempted the offence. Such a corporate liability, though formally defined as administrative, derives from the commission of a crime and is essentially punitive in nature. In addition, the competence to determine the liability of the company lies with the criminal law court which has jurisdiction over the related crimes.

³ The amount of each quota - that may go from a minimum of € 258 to a maximum of € 1,549 - is defined by the judge considering the economic and assets condition of the company in order to ensure the efficacy of the penalty.

⁴ GROUP OF EXPERTS ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy*, 2014, para. 50, available at http://unipd-centrodirittumani.it/public/docs/GRETA_Report_concerning_the_implementation_of_the_CoE_Convention_on_Action_against_Trafficking_in_Human_Beings_by_Italy_2014.pdf.

Corporate 'criminal' liability is provided by Art. 25 *quinquies*, Legislative Decree No. 231/2001. Sanction: monetary penalty from 400 to 1000 quotas.

Observations:

- Again, the CoE Group of Experts on Action against Trafficking in Human Beings has urged the Italian authorities to explicitly state the irrelevance of the victim's consent to the intended exploitation.⁵
- No specific provision has been introduced with respect to Article 8 of the Trafficking Directive and to Article 26 CoE Trafficking Convention providing for non-punishment of trafficking victims involved in criminal activities they have been compelled to commit as a direct consequence of being trafficked.
- To date, **no case** in which legal persons have been held liable for trafficking offences have been referred to.

(c) Forced labour

The definition of forced labour is not explicit under Italian criminal law. However, other criminal provisions might apply in a case of labour exploitation, including extortion (Art. 629 of the Italian Criminal Code) or maltreatment of family members or cohabitants (Art. 572 of the Italia Criminal Code).

This section will focus on the offences which seem to address forced labour cases more specifically, i.e. Art. 603 *bis* of the Italian Criminal Code and Artt. 12 par. 5, art. 22, par. 12 and 12 *bis* of the Consolidated Immigration Act.

Art. 603 *bis*, Italian Criminal Code – *Illicit intermediation and work exploitation* (the so called *caporalato* provision).

Punishable conducts:

- to recruit workers on behalf of third parties under exploitative conditions, taking advantage of the workers' state of need;
- to use, hire or employ workers – including by the means of the intermediation activity referred to above – exploiting them and taking advantage of their state of need.

Indicators of exploitation are (par. 3):

- 1) repeated payment of wages excessively below the level fixed by national collective agreements or anyway disproportionate to the quantity and quality of performed work;
- 2) repeated violation of regulations concerning working time, weekly-off, compulsory leave and holidays;
- 3) violation of safety and hygiene regulations in the workplace;
- 4) degrading working conditions, methods of surveillance or housing conditions.

Punishment: 1 to 6 years of imprisonment + € 500 to 1.000 fine for each recruited worker, 5 to 8 years imprisonment + € 1,000 to 2,000 fine for each recruited worker if the crime is committed by means of violence or threat.

⁵ GROUP OF EXPERTS ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy*, 2014, para. 50, available at http://unipd-centrodirittiumani.it/public/docs/GRETA_Report_concerning_the_implementation_of_the_CoE_Convention_on_Action_against_Trafficking_in_Human_Beings_by_Italy_2014.pdf.

Specific aggravating circumstances are provided under par. 4:

- the number of recruited workers is more than three;
- one or more recruited persons are minors of non-working age;
- the offence has been committed exposing exploited workers to seriously dangerous situations, given the characteristics of the tasks to be performed and working conditions.

Article 603 *ter* CC also provides for particularly severe accessory punishments: (a) disqualification from managing corporations and enterprises; (b) disqualification from entering into contracts with the public administration for works, fiduciary task-work contracts [cottimo fiduciario], contracts for the supply of works, goods or services, and related subcontracts; (c) exclusion for a period of two years – or five years when the fact is committed by a repeat offender under Article 99, para. 2, n. 1) and n. 3) – from benefits, loans, grants or subsidies from the State or other public bodies and from the European Union relevant to the field of activity in which the exploitation took place.

Corporate ‘criminal’ liability is provided by Art. 25 *quinquies*, Legislative Decree No. 231/2001. Sanction: monetary penalty from 400 to 1000 quotas.

Recent evolution of Italian Criminal Law countering <i>caporalato</i>	
Law Decree No. 138/2011	Law No. 199/2016
<ul style="list-style-type: none"> • Introduced the crime of illicit intermediation and work exploitation (art. 603 <i>bis</i> c.p.). • Provided for the first time for the criminal prosecution of the phenomenon. 	<ul style="list-style-type: none"> • Broadens the scope of the crime. • Provides for ‘criminal’ liability of the employer's company.
<p>Victims are workers in need, no matter if regular and irregular migrants, or even EU citizens.</p> <p>The actor of the crime (i.e. the labour broker or the employer) takes advantage of the workers’ state of need, exploiting them.</p>	
<p>Indicators of exploitation:</p> <ul style="list-style-type: none"> • <u>systematic</u> payment of wages excessively below the level fixed by national or local collective agreements or anyway disproportionate to the quantity and quality of performed work; • <u>systematic</u> violation of regulations concerning working time, weekly-off, compulsory leave, holidays; • violations of laws on safety and hygiene in the workplace with <u>consequent exposure of workers to health and safety risks</u>; • subjection of workers to particularly degrading working conditions, surveillance methods or housing conditions; 	<p>Indicators of exploitation have been simplified:</p> <ul style="list-style-type: none"> • <u>repeated</u> payment of wages excessively below the level fixed by national or local collective agreements or anyway disproportionate to the quantity and quality of performed work; • <u>repeated</u> violation of regulations concerning working time, weekly-off, compulsory leave, holidays; • violation of safety and hygiene requirements in the workplace, <u>no matter if this creates a concrete danger for workers' safety</u>; • degrading working conditions. <p>NB: The list is merely illustrative. In general, a single violation is not considered relevant, the index refer to</p>

	a regular practice.
<ul style="list-style-type: none"> • The crime could be committed only by the <i>caporale</i>, that is to say the illegal gangmaster. • The <i>caporale</i> was punishable only in case of an <i>organized</i> intermediation activity. • The employer could be charged with complicity (Article 110, Italian Criminal Code). 	<ul style="list-style-type: none"> • The provision clearly targets both the illegal gangmaster and the exploiting employer, regardless of any brokering activity. • The intermediation of the <i>caporale</i> is not necessarily stable and organized.
<p>The punishable conducts were:</p> <p>carrying out organized brokering activities, recruiting workforce, or organizing work involving exploitation, by means of violence, threats, or intimidation, taking advantage of the state of need or needs of workers</p>	<p>The punishable conducts are:</p> <ul style="list-style-type: none"> • the recruitment of workers on behalf of third parties under exploitative conditions, taking advantage of their state of need; • the employment of workers under exploitative conditions, taking advantage of their state of need. <p>Violence or threat constitute an aggravating circumstance.</p>
<p>Relevant procedural aspects:</p> <ul style="list-style-type: none"> • optional arrest <i>in flagrante delicto</i>; • no clear possibility to access Social Protection residence permit under Art. 18 Consolidated Immigration Act; • no corporate “criminal” liability under Legislative Decree No. 231/2001; • lack of a provision concerning confiscation; • substantially no practical application (up to date just 3 judgments of the Supreme Court concerning this crime – cfr. Cass. Pen. n. 14591/2014; n. 16737/2016 and 2021/2017). 	<p>Relevant procedural aspects:</p> <ul style="list-style-type: none"> • obligatory arrest <i>in flagrante delicto</i>; • access to Social Protection residence permit under Art. 18, Consolidated Immigration Act (see below); • introduction of corporate ‘criminal’ liability under Legislative Decree No. 231/2001; • mandatory confiscation of the proceeds of the crime (see Article 603 <i>bis</i>.2 CC); • in case the suspension of the business activity could create serious consequences on the employment level, <i>judicial control</i> of the company can be ordered instead of confiscation.

Observations:

- As the reframed provision is rather new, there is no experience to date with its practical implementation and enforcement.

Art. 22, par. 12 and 12 *bis*, Legislative Decree No. 286/1998 (Consolidated Immigration Act) – *Employment and exploitation of illegally staying third-country nationals*

Punishable conduct:

- to employ third-country nationals without the requested residence permit under Art. 22, Consolidated Immigration Act, or whose permit has expired without applying for

the renewal in accordance with the law, revoked or withdrawn.

Punishment: 6 months to 3 years of imprisonment + € 5.000 fine for each employed worker.

Par. 12 *bis* provides for aggravating circumstances if the employed workers:

1. are more than three;
2. are minors of non-working age;
3. are subjected to those particularly exploitative working conditions provided by par. 3 of Art. 603 *bis*, Criminal Code [**NB**: the reference to Art. 603 *bis* par. 3 has not changed even after the amendment of that Article. Accordingly, since the current version of Art. 603 *bis* refers to wider indicators of exploitation, it also broadens the scope of the present provision].

Additional administrative sanction applied with the judgment: payment of the average repatriation cost of the foreign worker illegally hired (art. 22 par. 12 *ter*).

Additionally, it applies the administrative sanction consisting in the payment of the costs of returning the illegally employed third-country nationals (art. 22, par. 12 *ter*, Consolidated Immigration Act).⁶ Pursuant to Article 24, para. 6, Consolidated Immigration Act, the same punishments are provided also for the employment of seasonal workers illegally staying on the Italian territory.

Corporate 'criminal' liability is provided by Art. 25 *duodecies*, Legislative Decree No. 231/2001 limited to the offences under Article 22, par. 12 *bis*, Consolidated Immigration Act (i.e. exploitation of illegally staying third-country nationals). Sanction: monetary penalty from 100 to 200 quotas.

Art. 12, par. 5, Legislative Decree No. 286/1998 (Consolidated Immigration Act) – Aiding and abetting of illegal immigration (only third-country national)

It works as a residual provision 'unless the fact constitutes a more serious offence'.

Punishable conduct:

- to facilitate the illegal stay of a third-country national in order to gain an 'unfair profit' from the illegal condition of the foreigner;
- Also making work an irregular migrant in particularly exploitative conditions has been considered as a way to aid and abet illegal migration. Now the crime can be considered implicitly abrogate with the introduction of art. 22 par. 12 *bis*, Legislative Decree No. 286/1998. Art 12 par. 5 can be still applied when the unfair profit it's coming from eg. Unproportioned house rent.

Punishment: imprisonment up to 4 years + fine up to € 15.000

3. Victims' protection, specifically targeting irregular migrants.

OFFENCES	ACCESS TO RESIDENCE PERMIT
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⁶ This is provided by Article 5, para. 2, let. b), Directive 2009/52/EC.

Exploitation of illegally staying third-country nationals (Art. 22, par. 12 <i>bis</i> , Consolidated Immigration Act)	Residence permit in case of judicial cooperation (Art. 22, par. 12 <i>quater</i> , Immigration Law)
Slavery (Art. 600 CC)	Residence permit for 'humanitarian reasons' (Art. 18, Consolidated Immigration Act) + tangible danger for the victim's safety + adherence to a programme of social assistance and protection
Trafficking (Art. 601 CC)	
Illegal intermediation and labour exploitation (Art. 603 <i>bis</i> CC)	

- **RESIDENCE PERMITS FOR SOCIAL PROTECTION REASON – ART. 18 CONSOLIDATED IMMIGRATION ACT (Legislative Decree No. 286/1998) + art. 27 and 28, Presidential Decree No. 394/1999** (as amended by Legislative Decree No. 24/2014 transposing Directive 2011/36/EU).

It is a special residence permit 'for humanitarian reasons' given to third country nationals subject to **violence** or **serious exploitation**. There are two ways to obtain the residence permit granted by Article 18: a '**judicial path**' that is dependent on the **victim's report** and a '**social path**' that is no way subordinated to the victim's obligation to report the crime but to the participation in a program of social assistance and inclusion.

Conditions to obtain the permit:

1. A) police operations, investigations or court proceedings involving any of the **offenses set out in art. 3 of Law No. 75/ 1958 (on countering exploitation of prostitution), or in art. 380 of the Code of Criminal Procedure (obligatory arrest flagrante delicto)**⁷-
Or
B) situations of **abuse or severe exploitation** identified by social services of a local administration;
2. the safety of the victim seems to be endangered as a consequence of attempts to escape from the situation of abuses or conditioning perpetrated by the criminal organization or as a consequence of statements made during preliminary investigation or in the course of court proceedings);
3. the victim has to **participate in a social assistance and integration program**.

Which kind of permit:

- six months duration;
- may be renewed for one year or for a longer period if required for justice's reasons;
- enables access to social services, educational institutions as well as enrolment in the Employment Bureau and the possibility of access to employment, providing that minimum age requirement is met (sixteen, once the compulsory schooling is abided);
- can be converted into a residence permit for education or for work;

⁷ Concerning labour exploitation crimes under articles 600 (slavery), 601 (trafficking in persons), 603 *bis* in its own new formulation (illegal intermediation and labour exploitation) and 629 CC (extortion).

- revoked if the holder drops out from the social program or engages in behaviours which are incompatible with the program's goals, or if the other conditions that initially warranted the issuance of the residence permit no longer apply.

How to get the permit:

- A) '**Judicial path**' that is **dependent on the victim's report** - the permit is issued by the Chief of the Police [Questore] upon request of the Public Prosecutor following the criminal proceeding brought by the victim's complaint;
- B) '**Social path**' that is **independent from reporting** the exploiters to the law enforcement authorities by the victim, but it is dependent on the participation to an assistance and social integration programme - the residence permit follows the request of an accredited 'Article 18' association or NGO and the prosecutor's opinion is not required.

NB_ The protection under Article 18 is now suitable for EU citizens as well (art. 8, Legislative Decree No. 24/2014 and par. 6 bis of art. 18, Consolidated Immigration Act). Although they do not need a residence permit, they can still access the programme of social assistance and protection and benefit from all the services offered.

Rationale: Challenging the dominant crime control-centred approach, the programme under Article 18, Consolidated Immigration Act is aimed at assisting and helping victims of violence or severe exploitation to regain their physical and psychological autonomy as a matter of priority.

Other measures introduced by Legislative Decree No. 24/2014 transposing Directive 2011/36/EU:

- protected procedures for the pretrial evidence hearing [incidente probatorio] also for adults in conditions of particular vulnerability (see art. 398, par. 5 *ter*, Italian Code of Criminal Procedure);
- specific training modules on issues concerning trafficking in human beings for concerned officials;⁸
- standard compensation (€ 1,500) following the institution of an Anti-trafficking measures Fund;⁹
- adoption of the National Action Plan Against Trafficking and Serious Exploitation of Human Being (the Italian Action Plan has, indeed, been adopted in February 2016);
- one single programme of emergence, assistance and social integration, envisaging the merging of art. 13 and art. 18 projects;
- rule of reference, according to which the administrations dealing with the protection and assistance of trafficking victims and those competent for asylum shall identify coordinating measures among the institutional activities for which they are respectively competent, also for the purpose of establishing mechanisms of reference between the two system of protection.

ASGI's OBSERVATIONS:

- diverse application practices across the national territory, especially with regards to the 'social path';

⁸ It would have been appropriate to explicitly refer to recital 25 of the EU Trafficking Directive, which includes - at least - police officers, border guards, immigration officials, Public Prosecutors, lawyers, members of the judiciary and court officials, labour inspectors, social, child and health care personnel and consular staff.

⁹ The CoE Group of Experts (GRETA) has urged the Italian authorities to reconsider whether the envisaged fixed amount of 1,500 euros corresponds to the severe human rights violations victims of trafficking suffer and the cumbersome procedural path they have to follow until they are granted such a compensation

- the granting of a residence permit under art. 18 has been made *de facto* conditional on a victim's co-operation in criminal proceedings;
 - current system, mainly based upon the human trafficking patterns of the 90s where sexual exploitation involving women coming from non-EU countries represented the target, is not well equipped to address the needs of labour exploitation victims;
 - difficulties on renewing the permit after 18 months;
 - difficulties for the victims to obtain compensation.
- **HUMANITARIAN PERMIT UNDER ART. 22, PAR. 12 QUATER, CONSOLIDATED IMMIGRATION ACT (Legislative Decree No. 286/1998)**

Conditions to obtain the permit:

1. particular work exploitation as mentioned under paragraph 12 *bis* (see above)¹⁰,
2. the victim **has to make a complaint against the exploiting employer and cooperate in the related criminal proceeding;**
3. Issued by the Chief of the Police [*Questore*], upon proposal or with the approval of the Public Prosecutor.

Which kind of permit (art. 22, par. 12 *quinquies*):

- residence permit 'for humanitarian reasons' pursuant to art. 5, par. 6, Consolidated Immigration Act;
- six months duration;
- it can be renewed for one year or for a longer period depending on the necessity of the criminal proceedings;
- it is revoked if the holder engages in behaviours which are incompatible with the permit's goals, or if the other conditions that initially warranted the issuance of the residence permit no longer apply.

Rationale: The residence permit under art. 22, par. 12 quarter, Consolidated Immigration Act is granted to undocumented migrant who decide to cooperate with authorities in denouncing the exploiting employers. It is a special permit lasting from six months to the entire duration of the criminal proceeding and it clearly provides less protection than the permit under Article 18.

OTHER RIGHTS OF EXPLOITED THIRD-COUNTRY NATIONALS INTRODUCED BY LEGISLATIVE DECREE No. 109/2012 IMPLEMENTING DIRECTIVE 2009/52/EC:

– **right to outstanding remuneration:**

Before: Art. 3, Legislative Decree No.109/2012 (only payment of remuneration, taxes and social security limited to presumption of at least three months duration) + 2126 Civil Code.
 Now: Art. 1, Decree 10 February 2017 remuneration as high as the wage provided for by collective agreements + an amount equal to any tax and social security contribution that the employer would have paid had the third-country national been legally employed, including penalty payments for delays and relevant administrative fines (see Art. 6, Directive 2009/52).

– **right to social security contributions, also in case of repatriation:**

¹⁰ With the modification of art. 603 bis comma 2 by Law n. 199/2016 there has been an enlargement and an harmonisation of the notion of 'particular work exploitation'. However, art. 22 comma 20 *bis* still fails to include in the definition of particular work exploitation the cases of labour exploitation on the ground of discrimination and the hypothesis of "a striking disproportion" compared with the terms of employment of legally employed workers.

The third-country national maintains the national insurance and social security rights matured and can benefit from these regardless the existence of an agreement of reciprocity upon the maturing of the requisites provided for by the laws in force, upon turning sixty-five years old, also in derogation to the minimum contributive requisite provided for by art. 1, par. 20, of Law No. 335/1995 (art. 22, par. 13, Consolidated Immigration Act);

– **right to be informed:**

Illegally employed third-country nationals should be systematically and objectively informed about their rights (Art. 2, Decree 10 February 2017).

Directive 2009/52/EC has not been fully transposed in Italy:

- **no facilitation of complaints by third-country nationals in illegal employment to receive back payment** of outstanding salary **neither** ‘safe channels’ to lodge complaints against the employer, either directly or through third parties such as trade unions or other relevant associations (art. 6 and 13);
- **no additional measures** such as the loss of entitlement to public benefits, aids or subsidies; the exclusion from participation in a public contract; the recovery of public benefits already granted to the employer; the temporary or permanent closure of establishments that have been used to commit the infringement or the temporary or permanent withdrawal of a licence to conduct the business activity in question (art. 7 of the Directive);
- **no provision for a ‘reflection period’** (art. 6 of the Directive) though it is granted in practice;¹¹
- **lack in the obligation of inspections that should be** based on targeted areas and production sectors at greater risk of exploitation (art. 14 of the Directive);
- **no adequate operational guide to competent offices:** Decree 10 February 2017 has introduced a leaflet for workers but without giving legal instruction to competent offices, without offering translation of the leaflet and without informing workers about the possibility of having a working permit

¹¹ EUROPEAN COMMISSION, *Communication from the Commission to the Council and the European Parliament on the application of directive 2004/81. 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*, 2014, p. 5.