POLSKA AKADEMIA NAUK • INSTYTUT NAUK PRAWNYCH

ZAKŁAD KRYMINOLOGII

ARCHIWUM KRYMINOLOGII

Archives of Criminology

PL ISSN 0066-6890

DOI 10.7420/AK2021.09

2021 • 43(1) • 47-73

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What is labour exploitation? The Belgian and British experience

Co to jest praca przymusowa? Doświadczenia belgijskie i brytyjskie

Abstract: The legal understanding of labour exploitation is a grey area. This paper first outlines some of the obstacles in international and regional law and jurisprudence, as to the understanding of exploitation in the context of human trafficking, slavery, servitude, and forced labour. Secondly, taking into account recent legal reforms in both Belgium and England and Wales, this paper outlines some of the key features that have emerged from the judicial handling of labour exploitation in criminal cases. Drawing on the findings from empirical analysis of criminal cases between 2010–2017 as part of doctoral research, this paper first of all outlines the similarities, differences, and challenges to ensuring a clear understanding of the meaning of labour exploitation in the context of human trafficking. The findings will provide insight into how to strengthen a harmonised and robust response to human trafficking.

Keywords: human trafficking, labour exploitation, forced labour, exploitation, definitions

Abstrakt: Prawne rozumienie pojęcia wykorzystania do pracy nie jest do końca jasne. W niniejszym artykule po pierwsze zostały przedstawione niektóre przeszkody, wynikające z prawa czy orzecznictwa na poziomie międzynarodowym oraz regionalnym, które utrudniają zrozumienie takich zagadnień jak wykorzystanie w kontekście handlu ludźmi, niewolnictwa, poddaństwa czy pracy przymusowej. Po drugie zaś, zostały omówione kluczowe wnioski, jakie wynikają z badania akt spraw karnych dotyczących wykorzystania pracowników do pracy, które przedstawiono przy uwzględnieniu ostatnich reform prawa mających miejsce w Belgii oraz Anglii i Walii. Badania empiryczne objęły lata 2010-2017 i zostały przeprowadzone w ramach badań doktorskich. W artykule pokazano przede wszystkim podobieństwa, różnice i wyzwania odnośnie do opracowania jasnej i zrozumiałej definicji pojęcia

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wykorzystania do pracy w kontekście handlu ludźmi. Wyniki tych analiz pozwolą zrozumieć, w jaki sposób należy wzmocnić zharmonizowaną i zdecydowaną reakcję na zjawisko handlu ludźmi.

Słowa kluczowe: handel ludźmi, wykorzystanie do pracy, praca przymusowa, wykorzystanie, definicje

Introduction

The legal understanding of labour exploitation is a grey area. Indeed, one of the most prominent issues is that labour exploitation is not actually a legal term. Instead, it is often attributed to forms of exploitation that involve the exploitation of the work or services of an individual (COE 2018; COE 2019).[1] However, confusion arises where 'labour exploitation' is co-opted in international, regional, and national fora to denote a type of human trafficking – that is to say, one that is distinct from human trafficking for the purposes of sexual exploitation or organ removal. From a purely legal perspective, the term has to be further dissected and understood in accordance with those forms of exploitation that have been legally defined and/or proscribed in international and regional law, namely slavery, servitude, practices similar to slavery, and forced or compulsory labour that encompass the 'upper limits' of exploitation (Section 2). There is still confusion, however, over the exact scope of exploitation in the definition of human trafficking. The element of (labour) exploitation is not defined, but rather given a categorical and non-exhaustive approach (Section 1).

The brief presentation of the impact this non-definition of exploitation has in law (Section 3) bridges the gap between the international and regional law developments and the approach taken in national legal orders, illustrated by a comparative analysis of Belgium and England and Wales. The criminalisation of exploitation in both formal and substantive national criminal law is examined from a legal positivist approach. After a brief explanation of the methods and justification of the selection of case study countries (Section 4), this article outlines the legislative evolution in both Belgium and England and Wales (Section 5). Findings from empirical analysis of criminal cases between 2010–2017 highlights the similarities, differences, and challenges in the judicial handling of cases dealing with labour exploitation (Section 6).

The added value of this analysis of the domestic criminal law of two national legal orders is grounded in the international and regional legal obligations of states to criminalise and prosecute human trafficking, slavery, servitude, and forced labour. Research has highlighted the fragmented and inconsistent approach

[1] For instance, human trafficking for labour exploitation is used to denote human trafficking for the purpose of forced or compulsory labour, servitude, practices similar to slavery, and slavery, among others. This categorisation is used, for example, by the Council of Europe.

to prohibiting and criminalising slavery, servitude, forced labour, and human trafficking in national legislation (Allain 2014; Stoyanova 2014; Schwarz, Allain 2020). Moreover, where these offences are criminalised, prosecution rates are not yet optimal (EC 2016; GRETA 2017; Weatherburn 2019). The piecemeal approach to prohibiting these forms of exploitation in domestic law further demonstrates that 'lawmakers, judges, legal professionals, and policy makers have a difficulty in applying and understanding the multiplicity of forms of labour exploitation and legal provisions relevant to it' (FRA 2015). This article provides insight into how labour exploitation is applied and seeks to minimise the effects of fragmented national criminal law. This is important to ensure adherence to the principle of legality, wherein 'behaviour which amounts to a criminal offence must be clearly defined in order to provide legal certainty' (UNODC 2010). Above all, the article will provide insight into how to provide a robust law and policy response, not only to human trafficking but also to other forms of exploitation that are prohibited under international law. Whilst the focus is predominantly on the criminalisation of human trafficking, the ambiguity of labour exploitation and where its threshold should be delineated is also of relevance to those who seek to clarify the exact point at which working conditions are no longer decent.

1. Definition of the problem: Non-definition of (labour) exploitation in (human trafficking) law

Labour exploitation – or indeed, the concept of exploitation – is not defined in law. Instead, national legal orders predominantly tackle labour exploitation through the criminalisation of human trafficking (Schwarz, Allain 2020). Human trafficking is defined in international law under Article 3(a) of the Protocol to prevent, suppress, and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime from 2000 (the Palermo Protocol).

> Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

The internationally agreed definition of human trafficking consists of three constituent elements, namely the action, the means, and the purpose of exploitation. Whilst the definition requires the presence of all three elements for a situation to be recognised as one of human trafficking, it is the third element – the purpose of

exploitation – that is fundamental to the trafficking experience (EWCA 2011: Para. 24). However, this element remains ambiguous, as it did not receive much attention during the drafting of the Palermo Protocol. One reason for this oversight is that human trafficking only requires an intention to exploit another person, meaning that *actual* exploitation does not have to occur (Kotiswaran 2015; Wijers 2015). Notwithstanding, the element of exploitation is the main focus of the current paper, wherein the definition of human trafficking does not expand upon the meaning of the concept. Instead, the definition lists forms of exploitation: 'Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs' (Article 3(a) Palermo Protocol 2000).

Furthermore, the use of the wording 'at a minimum' means that the list is open-ended and can be extended at the discretion of State Parties when criminalising human trafficking in their own national criminal law. In practice, this means that an activity might be illicit in one country but not in another, leading to inconsistencies and varying interpretations in national legal orders (Allain 2009). The non-exhaustive nature of this approach also resonates in regional anti-trafficking law. For instance, the EU Anti-Trafficking Directive 201/36/EU added 'new' forms of exploitation that do not appear in the Palermo Protocol definition, namely forced criminality and forced begging (Article 2(3)).

The purpose of exploitation in human trafficking has been delineated between three main forms: for sexual exploitation, for the purposes of labour exploitation, and for the purpose of the removal of organs. Unfortunately, a lack of international and regional jurisprudence means that there has been no further occasion to clarify the scope of human trafficking for the purposes of labour exploitation. Indeed, we only have a handful human trafficking cases from the European Court of Human Rights (ECtHR) as a point of reference, since there has been no other engagement from other senior courts, and although the implementation of these judgments on human trafficking are restricted to Council of Europe (COE) State Parties, they are regarded as providing unique guidance to states beyond the COE (Milano 2017). Of course, an initial obstacle for the ECtHR was the absence of human trafficking as one of the practices prohibited in Article 4 (namely slavery, servitude, and forced or compulsory labour). Nonetheless, the Court overcame this barrier by ruling, in *Rantsev v Cyprus & Russia* (2010), that human trafficking fell within the material scope of Article 4.[2] The body of case law is also limited in that the main focus of the Court has been on developing positive obligations (Stoyanova 2012; 2014;

[2] There have been other cases adjudicated under Article 4, but the Court examined compliance with positive obligations in lieu of a further elaboration of the material scope of the prohibited practices. See, for example, *L.E. v Greece* (2016) and *J. & Others v Austria* (2017). The same assimilation was adopted in *M. & Others v Bulgaria* (2012) and *S.M. v Croatia* (2018), where the Court reiterated that there is no need to examine the scope of Article 4 & human trafficking.

2017) rather than interpreting the material scope of the provisions.[3] With regard to the latter, it appears that the ECtHR is unlikely to adopt such a role; however, brief snippets of the Court's understanding of one of these prohibited practices are beginning to emerge: the Court clarified, in *Chowdury & Others v Greece* (2017), that restriction of movement is not *sine qua non* for identifying forced labour and the Grand Chamber in S.M. v. Croatia (2020) affirmed that forced labour also includes forced prostitution (ECHR Para. 330). Regardless, it is unfortunate that the Court itself perpetuates confusion by conflating terms, for example, the interchanging of 'exploitation' and 'trafficking' in *Chowdury* and an understanding of slavery as the 'exercise of powers attaching to the right of ownership' in *Siliadin v France* (2005) and affirmed in subsequent case law (cf. *infra* Section 2.1). Overall, scholars have expressed disappointment in the Court's approach and reasoning (Piotrowicz 2012; van der Wilt 2014; Milano 2017).

This paper will place an emphasis on determining the legal understanding of exploitation in the context of labour and will use the following forms of exploitation, listed in the Palermo Protocol, as a starting point: forced or compulsory labour or services (hereinafter, forced labour), slavery or practices similar to slavery, and servitude. These forms of exploitation are defined in international law and jurisprudence, though – as discussed above and below – there is still a lack of clarity as to how these forms are understood.

It is important to provide clarity of the meaning and scope of these forms of exploitation and of exploitation as a concept in its own right for two reasons. Firstly, as mentioned above, the forms of labour exploitation listed in the Palermo Protocol definition are non-exhaustive and as a result it is possible for someone to be exploited during their trafficking experience, but the exploitation to not be severe enough to meet the threshold of forced labour et al. The second reason is relevant to the understanding of the concept beyond the human trafficking paradigm; not all labour exploitation amounts to human trafficking as reiterated by the EU Commission in 2018 when reporting on the implementation of Directive 2011/36/EU: 'The Commission notes however that not all exploitative situations in the EU labour market are a result of trafficking in human beings' (EC 2018). Thus, it is possible for someone to be a victim of labour exploitation, but not human trafficking. Although it is not the focus of this article, we must heed the applicability of the concept of exploitation beyond human trafficking. However, for the concept to be well understood, a necessary first step is to clarify its scope and meaning in the context of human trafficking law.

[3] Indeed, Stoyanova has called for this as an alternative approach, whereby an emphasis is placed on clarifying the material scope of the actual prohibited practices in Article 4 (Stoyanova 2014; 2017).

2. Labour exploitation in international and regional law

States have a legal obligation to prohibit and criminalise the following forms of labour exploitation: slavery, servitude, practices similar to slavery, and forced labour. As mentioned above, these are the forms of labour exploitation that are listed in the human trafficking definition. In this section, the current understanding of the material scope of these prohibited practices will be outlined with reference to both law and jurisprudence.

2.1. Slavery

Slavery is defined in Article 1 of the 1926 League of Nations Convention to Suppress the Slave Trade and Slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.' The definition of slavery is now considered to be one of customary international law. The Convention did not go as far as securing the prohibition of slavery (*de facto*), but its scope was limited 'to bring[ing] about, progressively and as soon as possible, the complete abolition of slavery in all its forms' (Article 2(b)). Subsequent international and regional treaties recognised *de facto* slavery as requiring an obligation not only of abolition but also of prohibition, that is, absolute and non-derogable in nature.[4] Slavery is also referred to in international criminal law in the 1998 Rome Statute of the International Criminal Court with the offences of enslavement as a crime against humanity (Article 7(1)(c)) and sexual slavery as a crime against humanity (Article 7(1)(g)) and a war crime (Article 8(2)(b)(xxii)).

Notwithstanding the recognition of states' obligation to prohibit slavery, none of the subsequent treaties elaborated on the meaning of the 1926 definition, which as a result remains the point of departure (Rijken 2013). Therefore, the definition of slavery and the meaning of 'exercise of powers attaching to the right of ownership' has required further scrutiny through judicial interpretation.

[4] Article 4, Universal Declaration on Human Rights (1948): 'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.' Article 4(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950): 'No one shall be held in slavery or servitude.' Article 8(1) of the International Covenant on Civil and Political Rights (1966): 'No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.' Article 5 of the African Charter on Human and Peoples' Rights (1981): 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman, or degrading punishment and treatment shall be prohibited.' Article 6(1) of the American Convention on Human Rights (1969): 'No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.' Article 5(1) of the Charter of Fundamental Rights of the European Union (2000): 'No one shall be held in slavery or servitude.'

Slavery jurisprudence is, however, limited. Some key cases have emerged from the ECtHR and other regional courts, such as the Economic Community of West African States (ECOWAS), the Court of Justice and Inter-American Court of Human Rights (IACtHR), and the International Criminal Tribunal for former Yugoslavia (ICTY). What follows is a chronological presentation of the evolution of the understanding of the meaning of slavery both in relation to *de jure* and *de facto* slavery as 'the exercise of powers attaching to the rights of ownership' and the emergence of a contemporary interpretation of the 'powers of ownership' that is premised upon control.

The first case is an appeal from the ICTY *Prosecutor v Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic* (2002). Here, the international tribunal accepted that the traditional concept of slavery has advanced to encompass various contemporary forms and the right of ownership is impossible due to the abolition of *de jure* slavery. However, the court did adhere to the language of 'powers of ownership' and interpreted this to mean the 'destruction of the juridical personality' of the individual in recognition of the prohibition of *de facto* slavery. However, subsequent cases took a step back towards the classic meaning of *de jure* slavery. In *Siladin v France* (2005), the ECtHR referred to a genuine right of legal ownership that reduces the individual's status to that of an 'object' – a position that was reinforced by the Strasbourg Court in its subsequent judgment in *Rantsev v Cyprus & Russia* (2010) and reiterated by the ECOWAS Court of Justice in *Hadijatou Mani v Niger* (2008). The understanding of both *de jure* and *de facto* slavery in the 1926 Convention was again entrenched by the IACtHR in *Hacienda Brasil Verde v Brazil* (2016), which recognised that the exercise of powers of ownership distinguishes slavery from other forms of exploitation, but that it is necessary to render slavery 'virtually meaningless'.[5]

Significantly, a contemporary interpretation of the powers of ownership as control has emerged from the aforementioned slavery jurisprudence. First, in *Kunarac* (2002), the ICTY provided a number of indicators for powers of ownership, which were applied by the ECOWAS in 2008, including[6] control of movement, control of physical environment, psychological control, and control of sexuality. The role of control as a key feature was also touched upon in the Third-Party Intervention of the Aire Centre in *C.N. & V. v France* (2012), where it was described as being a 'crucial common element'.

More recently, the IACtHR case of *Hacienda Brasil Verde v Brazil* (2016) assimilated the exercise of powers of ownership to 'control as possession', by referencing the academic engagement with the property paradigm of slavery in the Bellagio Harvard Guidelines (2012), which state that possession is the *sine qua non* of slavery, and by outlining that control over a person in such a way as to deprive

[5] Reiterating the judgement of the Australian High Court in *R v Tang* (2008).

[6] Other indicators include measures to prevent/deter escape, force, threat, or threat of coercion, duration, assertion of exclusivity, subjection of cruel treatment and abuse, and forced labour.

them of individual liberty. This does not require physical restraint, but can amount to dependency that results from other means, such as the withholding of identity documents or wages.

2.2. Servitude and practices similar to slavery

Servitude is not defined in law (Allain 2009), but is categorised as 'practices similar to slavery' under Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery from 1956. The Convention proscribes four practices that are similar to slavery, namely debt bondage, serfdom, forced marriage, and child exploitation. The genesis of the Supplementary Convention emerged from the assessment of the 1926 Convention's failure to sufficiently capture all forms of exploitation, including those that do not meet the threshold of exercise of powers attaching to the right of ownership. Nonetheless, Article 1 of the 1956 Supplementary Convention does affirm that the definition of slavery in the 1926 Slavery Convention is accurate and adequate. To date, the only case that refers to the material scope of the four practices that are defined as practices similar to slavery is the IACtHR case *Hacienda Brasil Verde v Brazil* (2016), where the court again referred to the exercise of control that amounted to a significant deprivation of the individual's autonomy.

As mentioned above, servitude does not have a legal definition, but has been included in subsequent international and regional treaties (often alongside slavery) (Rijken 2013). In order to determine whether a situation of exploitation meets the threshold of servitude, a three-stage test is to be applied. This test emerged from ECtHR jurisprudence, first in *Van Droogenbroeck v Belgium* (1980) and followed by *Siliadin v France* (2005: Paras. 123–124). The test entails i) an obligation to provide one's services that is imposed by the use of coercion, ii) an obligation on the 'serf' to live on the other's property, and iii) the impossibility of changing his status (i.e. a feeling that the condition is permanent and unlikely to change). From this jurisprudence, a hierarchy of exploitation emerges, one which has been reasserted by the ECtHR, who stated in *C.N. & V. v France* (2012) that servitude is an aggravated form of forced labour.

2.3. Forced or compulsory labour

Forced or compulsory labour was first mentioned – but crucially, not defined – in Article 5 of the 1926 Slavery Convention.[7] It was not until the ILO Forced Labour Convention in 1930 where forced or compulsory labour was defined in

[7] Article 5 in fact sought the prevention of forced or compulsory labour from 'developing into conditions analogous to slavery'. Thus, suggesting that a 'hierarchy of exploitation' exists but treading lightly in view of the political stance at the time, e.g. colonisation and the need for state-enforced labour for economic growth.

Article 2(1) as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily' (emphasis added).

Critically, the nature of the prohibition of forced or compulsory labour has evolved as a result of political and economic changes that emerged from both decolonisation and globalisation (Anderson, O'Connell Davidson 2003). Initially, forced labour was permitted under certain exceptions, namely compulsory military service, civic obligations of citizens of a fully self-governing country, work or service as a consequence of a conviction in court of law, work or service in case of emergency, war, or natural disaster, and minor community services. These exceptions took into account the role of the state in perpetuating forced or compulsory labour as a state practice. A shift began to emerge, as can be evidenced by the restrictions on the exceptions in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery in recognition of political changes (Maul 2011). More recently, the ILO Protocol of 2014 and Recommendation No. 203 to the Forced Labour Convention of 1930 reaffirm the definition of forced labour, but also recognise the change in nature and form of forced labour since that time (ILO 2012). This shift in the political understanding of forced labour is also pertinent in the European regional response, where the European Convention on Human Rights (ECHR) in 1950 adopted a restricted approach that recognises how certain exceptions to the prohibition can be contrasted with the EU Charter of Fundamental Rights and Freedoms (2000), which appears to call for an absolute prohibition, but in fact should be understood in light of the 'negative' definitions contained in Article 4(3) of the ECHR.

Further development on the material scope of forced labour has been left to the courts. The provision of work or service must amount to a disproportionate and excessive burden (ECHR 1983). In order to determine the extent to which the situation is disproportionate, it is necessary to assess to what extent the individual's agency has been restricted before and during the exploitation so that there is a lack of alternative or no real choice. The situation must be determined on a case-by-case basis (Prosecutor v Krnojelac 2002). Ultimately, the situation is characterised by a relationship of extreme dependence (IACHR 2016; ECHR 2017). The most recent application of the test of proportionality was in *Chowdury & Others v Greece* (2017), wherein the court took account of the undocumented status of the migrant workers and their risk of detention as well as whether they and their lack of financial means as a result of them not being paid their wages should be brought to the attention of the authorities. Whilst the court produced an objective assessment, they did recognise the need to take into consideration the individual's personal conviction.

3. The impact of exploitation not being defined in law

As described above, the understanding of exploitation in human trafficking law is categorical and not definitional (Allain 2014). As a result, the Palermo Protocol amounts to a compromise ensuring both implementation and political cooperation and should be understood as outlining the minimum standards for Member States to implement in their domestic legal orders (Parkes 2015). However, the non-definition of exploitation in law means that there is still no clear understanding of where to draw the line between exploitation and bad employment practices, especially considering that exploitation is ambiguous and fluid in nature (UNODC 2015).

Three consequences emerge from the non-definition of exploitation that are relevant to the subsequent exploration of the handling of labour exploitation in domestic jurisdictions. Firstly, there is confusion and conflation between the forms of exploitation, as noted above, in judges' use of the terms trafficking and exploitation interchangeably; such labelling can significantly impact victims' rights to remedy (Chuang 2015). The second consequence is the fragmented and inconsistent domestic implementation that results from a lack of clarification.[8] Whilst there is flexibility, it is crucial that such fragmentation does not lead to an anti-trafficking framework that fails to adhere to even the minimum international standards, which could lead to an erosion of the severity of the crime (Rijken 2013; FRA 2015).[9]

The third and final issue is that the lack of clarity can lead to legal uncertainty and 'expansionist creep' (Chaung 2014). The latter can be avoided by a 'broad and consistent interpretation of criminal offences, regardless of the label attached to the prohibited practices (Stoyanova 2014).[10] However, any possibility of reaching a consensus on the interpretation of these crimes has been impeded by a lack of engagement with substantive clarification in law by both regional courts and states, which has led to a 'copy/paste' approach at the domestic level (UNODC

[8] For an analysis of GRETA country reports, including Croatia, Denmark, and Slovakia, see Stoyanova (2014). For an analysis of domestic interpretation, see Allain (2014); For a discussion on the domestic implementation of the Palermo Protocol with an analysis of jurisprudence from the ECtHR, see Eriksson (2013). For a discussion of individual domestic approaches, see Kelly (2007); Anderson, O'Connell Davidson (2003); and Coghlan, Wylie (2011).

[9] Suggestions for preventing the erosion of the crime include the application of existing international labour standards (see Allain [2013]); the introduction of exploitation as a free-standing concept (see the Modern Slavery Bill amendments e.g. Amendment 25 in Committee Stage or HL, Marshalled list of amendments to be moved in committee 28.11.2014); or the development of clear guidelines on the current understanding and identification for law enforcement actors (see Paavilainen [2015]).

[10] For more on how a lack of clarity can impact law enforcement and the protection and satisfaction of individuals and how what is needed is consensus on the definition for consistent interpretation rather a broad catch-all, see Nicholson (2010).

2009; Stoyanova 2014). A lack of legal certainty on how the issue is adjudicated in court can lead to a lack of clarity on the whole procedure for all actors (Pope 2010). As Fiona David suggests, 'definitions – and differences between terminology – are the foundations of a justice system that serves all' (David 2015); as such, we now turn our attention to how two national legal orders criminalise and handle labour exploitation in their adjudication of criminal cases.

4. Methodology

The qualitative comparative analysis of two national legal orders adopts a legal positivist approach by examining the legislative evolution of the criminalisation of exploitation and criminal case law. The aim is to examine the domestic implementation of the international prohibition of labour exploitation in both formal and substantive law.

The selection of Belgium and England and Wales as comparison groups reflects two legal orders that have both undergone significant legal reform in the two decades since the ratification of the Palermo Protocol, but which have nevertheless adopted different approaches to criminalising the full spectrum of forms of exploitation that are recognised in international and regional law. In Belgium, there are no stand-alone offences of slavery, servitude, or forced or compulsory labour. Therefore, labour exploitation is solely criminalised in the Criminal Code as human trafficking for the provision of work or services in conditions contrary to human dignity. Notwithstanding, as we will see in the next section, prosecution of the offence of human trafficking for economic exploitation is, in the majority of cases, accompanied by social criminal offences – e.g. non-payment of wages or social security contributions – which is reflective of an anti-trafficking policy that is grounded in social law (Vermeulen 2006: 32). In England and Wales, the current criminal legal framework prohibits slavery, servitude, forced or compulsory labour, and human trafficking for labour exploitation. Notwithstanding the lack of criminalisation of stand-alone offences in Belgium, the understanding of labour exploitation in human trafficking is broader, whereas in England and Wales, the offence must involve an action of arranging or facilitating travel, limiting the scope of its application.

In addition to the different approaches to criminalising labour exploitation and the understanding of the material scope of labour exploitation, the case study countries consist of a civil-law system in Belgium, whereby in complex criminal cases an examining judge [*juge d'instruction*] may direct the investigation and deal with pre-trial matters, and England and Wales, whose common-law system has a judge-led pre-trial hearing whilst the trial itself involves a jury with the role of

the judge being to provide legal directions. Thus, there is a distinction in the role of the judge in the substantive criminalisation of labour exploitation.

The sample included cases where a judgment was handed down between January 2010 and December 2017. The choice of this timeframe is representative, in both jurisdictions, of relevant reforms to the law that deals with labour exploitation in the domestic legal framework, as outlined above. A total of 72 cases were analysed: 25 in England and Wales and 47 in Belgium. It important to note that there are different levels of access to the data sources. In Belgium, the judgments are available on the website of the national rapporteur of human trafficking. In England and Wales, however, the judgments are not made publicly available. Therefore, once Research Access was approved by the Ministry of Justice, the fieldwork was carried out between April 2018 and October 2018, on the premises of 17 Crown Courts.

5. Criminalisation of exploitation in national law

As we have seen thus far, despite some jurisprudence, the legal understanding of the different forms of exploitation lacks clarification, resulting in a number of obstacles. However, as explained above, the non-exhaustive approach to listing exploitation means that states are afforded discretion as to how they criminalise exploitation in their national legal orders. As we stated in the introduction, the failure of states to abide by their international legal obligations to prohibit slavery, forced labour, and servitude leaves it ever more pertinent to ensure that the exact scope of the concept is understood, allowing for legal certainty. As can be seen below, the impact of the non-definition of exploitation in the international and regional legal framework does have a knock-on effect when it comes to how exploitation is reflected in national legal orders.

In Belgium, the Law of 10 August 2005[11] introduced the offence of human trafficking into Article 433 *quinquies* of the Criminal Code, marking a shift away from conflating human trafficking with human smuggling predominantly addressed by immigration law. Previously, Article 77 *bis* of the Law of 15 December 1980 on foreigners had combined the offences of human trafficking, human smuggling, and slum landlords into one provision (Beernaert, Le Coq 2006; Huberts 2006;

[11] 'Loi du 10 août 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil' [Law of 5 August 2005 amending various provisions with a view to strengthening action to combat people-smuggling and trafficking in human beings and the practices of slum landlords].

Minet 2006;). In 2013, the Law of 29 April 2013[12] amended Article 433 *quinquies* and extended the scope and meaning of the offence of human trafficking, with a view to ensuring compliance with and transposition of the EU Directive 2011/36/EU:

> §1 The offence of human trafficking constitutes the recruitment, transport, transfer, housing, harbouring, taking control or transferring of the control over a person for the purposes of:
> 1° the exploitation of prostitution or other forms of sexual exploitation;
> 2° the exploitation of begging;
> 3° carrying out work or providing services in conditions contrary to human dignity;
> 4° the removal of organs in violation of the law of 13 June 1986 on the removal and transplantation of organs, or human tissue in violation of the law of 19 December 2008 on the acquisition and use of human tissue for the purposes of medical applications in humans or scientific research
> 5° or having this person commit a crime or a misdemeanour against his or her will.
> Except in the case referred to in 5, the consent of the person referred to in paragraph 1 to the planned or actual exploitation is irrelevant (Article 443 *quinquies* Criminal Code (as amended)).

The offence of trafficking in persons has also evolved in England and Wales. It was first introduced in 2002 as an immigration offence of Trafficking for Prostitution (s145 Nationality, Immigration and Asylum Act 2002). The exclusion of labour exploitation in the statute was justified because existing measures were deemed sufficient to cover any possible exploitation of work or services (House of Commons Library, 2003). Then in 2004, the immigration offence of Traffic for Exploitation was introduced and encompassed the forms of exploitation listed in Article 4 of the ECHR (forced labour, slavery, and servitude), organ removal, or a service provided as a result of force or threat (s4 Asylum and Immigration [Treatment of Claimants, etc.] Act 2004). Whilst the inclusion of the forms of exploitation from the ECHR was a welcome shift, it still meant that labour exploitation that occurred outside of human trafficking and in a non-immigration context was not prohibited by law (Balch 2012). In 2015, all legislation relating to human trafficking was consolidated into one criminal law provision:

> (1) A person commits an offence if the person arranges or facilitates the travel of another person ('V') with a view to V being exploited.
> (2) It is irrelevant whether V consents to the travel (whether V is an adult or a child).

[12] *Loi du 29 avril 2013 visant à modifier l'article 433quinquies du Code pénal en vue de clarifier et d'étendre la définition de la traite des êtres humain* [Law of 29 April 2013 amending the Article 433 *quinquies* of the Criminal Code with a view to clarifying and extending the definition of trafficking in human beings].

> (3) A person may in particular arrange or facilitate V's travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.
> (4) A person arranges or facilitates V's travel with a view to V being exploited only if—
> (a) the person intends to exploit V (in any part of the world) during or after the travel, or (b) the person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the travel (Section 2, Modern Slavery Act 2015).

In both countries, the composition of the human trafficking offences diverges from the international and regional definitions by only including two out of the three constituent elements, the action and the purpose. In Belgium the means are aggravating factors (Article 433 *septies*), whereas in England and Wales the means are not listed as a constituent element, but are partially integrated into the exploitation element. A further key distinction in England and Wales is that the action element is limited to arranging or facilitating the travel of a person with a view to being exploited, thus requiring the movement of a person, inconsistent with the international and regional legal understanding.

The statutory presentation of the exploitation element of the offence adopts an exhaustive approach, that nevertheless appears to provide for flexibility when it comes to its interpretation. Unlike the international and regional definition, the exploitation element in Belgium and England and Wales is categorical and exhaustive and does not include the phrase 'at a minimum'. Both countries recognise human trafficking for the purpose of sexual exploitation, labour exploitation, and the removal of organs; however, the offences also proscribe additional forms of exploitation, such as forced begging and forced criminality in Belgium and securing services by force, threats, or deception in England and Wales.

When it comes to labour exploitation, the same categorical, exhaustive approach is adopted but does hint at some flexibility. This is especially true of the Belgian offence of human trafficking for economic exploitation, wherein a person provides work or services in conditions contrary to human dignity (Article 433 *quinquies* § 1(3). There is no specific reference to the forms of labour exploitation discussed above, as it was deemed that the reference to 'human dignity' was sufficiently broad to cover all forms of labour exploitation required by European and international law (Kurz 2008; Cleese 2013). Furthermore, the intentionally broad framing of the scope of the offence sought to encompass not only slavery, servitude, and forced labour, but also situations where workers are paid an extremely low salary or are required to work or live in unhealthy dangerous conditions (GRETA 2017). The term 'human dignity' is not defined but seeks to determine a minimum level of severity (CPP 2007). Guidance on the understanding of putting a person to work in conditions contrary to human dignity has been given with a focus on 'the enslavement or the degradation of a human being by the violation of their

physical and mental faculties in such a manner as to be manifestly incompatible with human dignity' (CPP 2007; GRETA 2017).

In England and Wales, human trafficking for the purpose of labour exploitation includes slavery, servitude, and forced or compulsory labour (s3(1) Modern Slavery Act 2015) that are to be interpreted in accordance with Article 4 of the ECHR (s1(2) Modern Slavery Act 2015). However, to fully grasp the (potential) scope of labour exploitation, it is necessary to examine the provision of the Act that criminalises slavery, servitude, and forced labour as 'stand-alone' offences (s1 Modern Slavery Act 2015), i.e. situations of exploitation that do not amount to human trafficking. It is to this provision that we will now turn.

> (1) A person commits an offence if—
> (a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or (b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.
> (2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention.
> (3) In determining whether a person is being held in slavery or servitude or required to perform forced or compulsory labour, regard may be had to all the circumstances.
> (4) For example, regard may be had—
> (a) to any of the person's personal circumstances (such as the person being a child, the person's family relationships, and any mental or physical illness) which may make the person more vulnerable than other persons; (b) to any work or services provided by the person, including work or services provided in circumstances which constitute exploitation within section 3(3) to (6).
> (5) The consent of a person (whether an adult or a child) to any of the acts alleged to constitute holding the person in slavery or servitude, or requiring the person to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour (Section 1, Modern Slavery Act 2015).

Section 1 of the Modern Slavery Act 2015 – replacing Section 71 of the Coroners and Justice Act 2009 – criminalises holding another person in slavery or servitude or requiring another person to perform forced or compulsory labour. This provision specifically states that 'regard should be had to all the circumstances when determining whether a person is being exploited' (s1(3) Modern Slavery

Act 2015). Crucially, this includes 'any work or services provided by the person, including work or services provided in circumstances which constitute exploitation within section 3(3) to (6)' (s1(4)(b) Modern Slavery Act 2015). Thus, by reading the provisions of the Modern Slavery Act together (namely s1(1), s1(4)(b), and s3) human trafficking for the purpose of labour exploitation is (potentially) extremely broad, including sexual exploitation (s3(3)), removal of organs or tissue (s3(4)), securing services etc. by force, threats, or deception (s3(5)), and securing services etc. from children and vulnerable persons (s3(6)).

We can see that, in both countries, the domestic legal framework is characterised by a shift away from immigration to criminal law and with a more expansive understanding of labour exploitation to include abusive working conditions. However, the two jurisdictions do illustrate the fragmented approach that arises when prohibiting human trafficking and stand-alone offences in domestic criminal law. In addition, the scope of exploitation is broadly understood – despite a categorical and exhaustive approach – and requires further clarification to avoid confusion. The following analysis of criminal cases in Belgium and England and Wales seeks to contribute to such clarification.

6. Judicial handling of labour exploitation

What follows is a brief presentation of the similarities, differences, and challenges of the judicial handling of a 'novel' area of law (EWCA 2011: Para. 47; EWCA 2013) in a domestic context that will contribute to future engagement with the concept of labour exploitation and strengthen anti-trafficking responses.

In both jurisdictions, the domestic judges recognise that the legislature's objective, when criminalising these offences, is to ensure compliance with regional obligations. However, the sources of law differ. In Belgium, the judiciary refer to the transposition of the EU Directive 2011/36/EU (GRETA 2013; Huberts, Minet 2014), whereas in England and Wales, the courts refer to compliance with obligations stemming from Article 4 of the ECHR (Weatherburn 2019). As a result, the way in which exploitation is interpreted differs. Courts in England and Wales use the jurisprudence of the ECtHR, in particular *Siliadin v France* (2005), as the main source of interpretation. The Court of Appeal in *R v SK* (EWCA 2011: Paras. 22 and 39) used the *Siliadin* judgment to interpret slavery, servitude, and forced labour. By contrast, the Belgian judges, in interpreting the meaning of 'conditions contrary to human dignity', use sources that have been developed as part of the domestic legislative process, namely the preparatory works [*travaux préparatoires*], as we will see below.

Despite the different sources that assist judges in their handling of labour exploitation, similarities emerge. For instance, the threshold of exploitation is to

reach a 'minimum level of severity' that requires more than breaches of labour law or the non-payment of wages to amount to criminal behaviour (EWCA 2011; Liège Court 2013; 2016). In Belgium, the prohibition of human trafficking seeks to tackle situations that are more serious than labour market abuses, such as those that arise on the informal labour market [*travail en noir*] (CRB 2005). Whilst it goes without saying that since we are focussing on the application of criminal offences, the analysis did reveal that abuses which are more likely to be attributed to labour law violations are taken into account. For instance, the non-payment or withholding of wages is of great value in determining the existence of factors, as it may point to coercion, an inability to change the workers' circumstances, and the involuntary nature of the work.[13] Thus, the non-payment or withholding of wages is an indicator of exploitation. The case file analysis reveals that a variety of indicators are instrumentalised by the courts in order to determine whether or not a particular situation reaches the threshold of exploitation. In Belgium, indicators listed in the preparatory works and other legislative guidance documents are used to determine whether conditions related to remuneration and working conditions are contrary to human dignity (CRB 2005). Additional guidance has been provided by the College of Public Prosecutors in the form of indicators of exploitation, namely displacement, identity and travel documents, the working conditions of trafficking victims, the income of trafficking victims, accommodation, violation of the physical integrity of victims, victims' freedom to move, and links with the country of origin of the presumed victims of trafficking (CPP 2004; 2007). The analysis revealed that the judicial application of these indicators requires more than one indicator to be present for a situation to amount to exploitation.[14] Overall, the most significant factor that emerges from the judicial use of indicators is that the focus is very much on the totality of the situation, not just the working conditions.

Judges will also pay attention to the worker/victim's living conditions, access to health care, and access to subsistence.

Whilst the totality of the situation of the individual is taken into account, the criminal case file analysis reveals that there are nevertheless some differences in the type of factual circumstances that trigger an investigation and subsequent prosecution for labour exploitation. In England and Wales, cases predominantly

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[13] *R v S.K.* (unreported, 16 March 2011) Southwark Crown Court; *R v W.C., J.J.C., J.C., M.C., J.C.* (unreported, 12 July 2012) Luton Crown Court, *R v J.C., J.C., M.C., W.C., B.C.* (unreported, 19 December 2012) Bristol Crown Court, *R v D.D., T.D., D.D.* (unreported, 24 October 2014) Cardiff Crown Court, *R v W.C., P.C., P.J.C., L.C.* (unreported, 24 May 2016) Cardiff Crown Court, *R v H.C., M.J., C.J.* (unreported, 31 August 2016) Oxford Crown Court; Liège Court of First Instance, 14 January 2013 (*14ème ch.*); Mons Court of Appeal, 10 February 2016 (*4ème ch.*); Liège Court of First Instance, 8 February 2016 (*18ème ch.*). See also FRA research findings with workers, where issues with pay were identified as one of the main labour law violations in cases of severe labour exploitation, in FRA (2019).

[14] For full description of the multiple indicators used by the judiciary, see Weatherburn (2019).

emerge following interventions in the domestic or private domain, whereas in Belgium, the majority of cases are identified following labour inspections of commercial or business premises. In both countries, the nature of the businesses involved contrast between those that operate in the formal labour market and those that operate in the shadow economy. For the latter, these are small businesses that are mainly run by individuals or small family units.[15] In both jurisdictions, the overlap of the public and private domain leads to complex factual circumstances that are reflected in the composition of the indictment and the offences which are included, in addition to the offences discussed above. In Belgium, the offences that are added to the indictment are predominantly related to violations of labour market standards and amount to violations of social criminal law provisions (such as illegal employment of undocumented workers, non-payment of wages, non-payment of social security contributions, etc.)[16] and fraud. In England and Wales, whilst there are some fraud offences, the indictments often include offences against the person and sexual offences.[17] The latter reflects the ill and degrading treatment that many of the victims encountered, such as having their heads shaved (*R v W.C., J.C., J.C.* [unreported 7 January 2013, 30 May 2013] Southampton Crown Court), forced drug use (*R v G.P., V.J., A.P.* [unreported, 11 December 2015] Nottingham Crown Court), and other forms of humiliation exacted through verbal and psychological abuse and physical and sexual assault (*R v D.D., T.D., D.D.* [unreported, 24 October 2014] Cardiff Crown Court). The factual circumstances that lead to the composition of the indictment as a whole are also taken into account when determining the existence of exploitation and, as mentioned above, the need to consider more than just the working conditions is recognised.

The need to assess the totality of the situation in the judicial handling of labour exploitation in criminal cases raises a challenge that is not yet fully resolved and may not be without further clarification by senior courts such as the ECtHR or the IACtHR. The *Siliadin* judgment articulated the prohibited practices in Article 4 as a hierarchy of exploitation when determining the nature (or existence) of exploitation: slavery is the full control of status/condition, servitude is control of living and working conditions, and forced labour is control of working conditions. The same approach was followed by the Court of Appeal of England and Wales in 2011:

[15] For a full description of the types of exploitation, the perpetrators and their networks, the economic sectors, and the way in which cases were identified, see Weatherburn (2019).

[16] The Belgian Social Criminal Code harmonised all legislation into one coherent framework in June 2010, which comprises administrative and criminal sanctions for violations of employment, social security, and industrial relations laws in Belgium. The code introduces four levels of sanctions, ranging from minor violations that are not criminalised but sanctioned by administrative fines to major violations that are sanctioned by imprisonment.

[17] For a full overview of offences in criminal case analysis, see Weatherburn (2019).

> Hierarchy of denial of personal autonomy … in descending order of gravity, therefore, 'slavery' stands at the top of the hierarchy, 'servitude' in the middle, and 'forced or compulsory labour' at the bottom (EWCA 2011: Para. 24).

The adherence to a hierarchy of exploitation, however, does not preclude the possibility of the different forms of exploitation being mutually exclusive. It is possible to encounter a 'duality of circumstances' (Allain 2013) whereby the factual circumstances can amount to two forms of exploitation. This was applied in England and Wales, where the indictment reflected parallel offences (requiring a person to perform forced labour and holding another person in slavery), and not just alternative offences (requiring a person to perform forced labour or holding another person in slavery).

Finally, the hierarchy of exploitation is not only of relevance to determining the nature (existence) of exploitation, but is also applicable when it comes to determining the degree (severity) of exploitation. This became apparent when analysing the judicial approach to sentencing. Importantly, the courts recognised that the sentence can be higher for a 'lesser' form of exploitation.

> Where the circumstances were broadly similar, slavery was the gravest offence, followed by servitude, followed by forced or compulsory labour, but it was wrong to suggest that a sentence for forced labour would always be lower than for the other offences [emphasis added] (EWCA 2013: Para. 23).

Both jurisdictions illustrate this – to a certain extent – in their approach to sentencing. In Belgium the sentence cannot be dissected according to the other offences that may be on the indictment and for which the defendant is found to be guilty. As such, it is not known to what extent the degree of exploitation is taken into account in the sentencing, unless explicitly stated in the sentencing remarks as aggravating factors. Similarly, in England and Wales, whilst a defendant will be handed a sentence for each offence for which they are guilty, the overall sentence is then calculated depending on whether or not each custodial sentence is concurrent or consecutive.

Concluding remarks

This article has demonstrated that there is a lack of a 'critical mass' of case law at the international and regional levels (Esser, Dettmeijer-Vermeulen 2016; Gallagher 2016); therefore, further insight into the scope and meaning of exploitation can only emerge from national jurisprudence. To contribute to this, the article has

presented insight into how the judiciary of two European national legal orders handle cases of labour exploitation.

Despite concerns raised in the literature of the fragmentation of the formal prohibition of exploitation in national criminal legal orders, the substantive handling of labour exploitation by the judiciary is nevertheless similar. In both Belgium and England and Wales, significant emphasis is placed on the totality of the situation (not just the working conditions) and the need for the factual circumstances to pass a threshold of severity in order to amount to a criminal offence. However, we have also seen how labour law violations such or delete hyphen towards end of sentence as non-payment of wages, and the Belgian social criminal law model, which combines human trafficking with other social criminal offences – are of evidential importance. The use of indicators, including non-payment of wages and other factors, also has a dual role in both determining the nature (existence) of exploitation and assessing the degree (severity) of the exploitative circumstances. Notwithstanding the formal understanding of labour exploitation in Belgium as 'conditions contrary to human dignity' and the affirmation of a 'hierarchy of exploitation' in England and Wales, there is no attempt made to further define exploitation.

Calls for definitional clarity have been made both within the EU (2018) and the Council of Europe (2019). In the meantime, domestic criminal law in other European Member States is evolving, with the introduction in 2020 in the Swedish Criminal Code of the offence of Human Exploitation (Section 1b) and ongoing consultation in the Netherlands about the introduction of an offence of severe labour exploitation (Ministry of Justice and Security 2020). In the absence of clarity of the material scope of exploitation by regional courts, the insight from domestic jurisprudence will contribute to the developments flowing from such reforms. It will also facilitate the role of not only judges but also prosecutors, labour inspectors, and law enforcement actors in national legal orders when confronted with factual circumstances that may or may not amount to labour exploitation.

Declaration of Conflict Interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of the article. The author(s) received no specific funding for this work.

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