

**JRF programme paper:
Forced Labour**

Between decent work and forced labour: examining the continuum of exploitation

Klara Skrivankova

November 2010

This paper:

- examines how forced labour is currently framed within national legislations;
- introduces a continuum of exploitation and interventions, ranging from decent work to extreme exploitation and covering both labour law and criminal law;
- uses case studies to demonstrate how the concept of a continuum can be applied in practice in the UK.

The Joseph Rowntree Foundation (JRF) commissioned this paper as part of its programme on forced labour, which aims to influence the development of policy and practice to reduce forced labour in the UK.

ISBN: 9781859357828
© Klara Skrivankova 2010

The Joseph Rowntree Foundation has supported this project as part of its programme of research and innovative development projects, which it hopes will be of value to policy-makers, practitioners and service users. The facts presented and views expressed in this report are, however, those of the author and not necessarily those of JRF or the Forced Labour programme.

Joseph Rowntree Foundation
The Homestead
40 Water End
York YO30 6WP
www.jrf.org.uk

This report, or any other JRF publication, can be downloaded free from the JRF website (www.jrf.org.uk/publications).

© Klara Skrivankova 2010

First published 2010 by the Joseph Rowntree Foundation

All rights reserved. Reproduction of this report by photocopying or electronic means for non-commercial purposes is permitted. Otherwise, no part of this report may be reproduced, adapted, stored in a retrieval system or transmitted by any means, electronic, mechanical, photocopying, or otherwise without the prior written permission of the Joseph Rowntree Foundation.

ISBN: 9781859357828

Contact:
Louise Woodruff
louise.woodruff@jrf.org.uk

Contents

	Page
Introduction	4
Section 1 Defining forced labour	6
Section 2 Forced labour as a stand-alone offence and in the context of anti-trafficking legislation	8
Section 3 Examples of definitions, models and concepts from across the world	10
Section 4 Examining the reality: the continuum of exploitation	16
Section 5 The continuum in practice: case studies from the UK	22
Section 6 Conclusion and recommendations	29
Notes	32
References	35
Acknowledgements and About the author	38

Introduction

Reflection on the social world in general and work in particular shows that for working people there is a continuum of experiences ranging from decent work through minor and major labour law violations, to extreme exploitation in the form of forced labour. In some cases forced labour is an outcome of trafficking. In other cases trafficking is not present.

This diversity of labour situations is complicated by a lack of clear definitions that might help mark the transition points between conditions of work, and the fact that terms such as forced labour and labour exploitation are often used interchangeably.

The absence of a clear definition or dividing line between situations, and the fact that the experience of a person at work is rarely static, makes it difficult to describe the problem, to develop research to understand the problem and its causes, to train professionals to recognise the issues and to elaborate policy and practical responses. For example, a situation of exploitative labour conditions, even serious ones, may require responses quite different to a case of forced labour (for example through labour market interventions such as labour inspections or unionisation). Similarly, people in different situations might be entitled to varied levels of assistance, thereby risking creating a 'hierarchy of suffering' or 'deserving and undeserving' groups of workers.

In the past fifteen years, the international community has become increasingly interested in trafficking. This interest has translated into pressure on governments to focus on trafficking in human beings, legislate against it and take action. Thus, many governments, instead of looking into re-defining established concepts of forced labour and slavery, attempted to define situations either as trafficking or not. In practice, potential correlations and intersections with other forms of violations relevant to someone's working situation have on the whole been ignored.

As a result, the fact that a condition that is not trafficking can still be one of labour rights violation and hence require intervention (albeit by different actors) is often disregarded or considered as irrelevant. But, continual violation of standards can contribute to a more general undermining of the conditions of decent work and enable more extreme forms of violations to flourish, hence contributing to the existence of forced labour.

This paper has undertaken to examine ways in which the blurred line between violation of labour standards and forced labour can be clarified. The reality of forced labour is not a static one, but a continuum of experiences and situations. It is argued in this paper that a continuum should therefore be used to describe the complexity of the exploitative environment and concrete individual situations of workers.

This continuum is not simply related to the acts of exploitation that a worker may experience, but relates also to the types of interventions that are appropriate to remedying the wrongdoing. This method brings the concept of decent work, as the desired standard, and forced labour into juxtaposition. But it does not treat them as binary values: in the world of work it is rarely a question simply of one or the other,

but often of some much more complex mix. The paper concludes that in order to understand and resolve situations of forced labour, they need to be understood through the lens of a continuum of exploitation and interventions.

This paper begins with the trying question:

Where does decent work end and labour exploitation begin, and where does labour exploitation end and forced labour begin?

In the process of finding an answer to this question, the paper offers an overview of selected concepts and definitions from across the world and through these develops the concept of a continuum of exploitation and interventions.

Structure of the paper

The paper is divided into sections that focus on different aspects of forced labour and related issues, as relevant to the UK:

- The first section covers the definition of forced labour.
- The second section looks at the two ways forced labour is framed within national legislations.
- The third section provides examples of models and concepts related to forced labour across the world.
- Sections four and five introduce the concept of a 'continuum of exploitation and interventions' and use case studies to demonstrate how the concept can be applied in practice in the UK.
- The final section draws conclusions and recommendations for practice in the UK.

Methodology

This paper was completed using mainly desk review of existing resources. Where available, cases were analysed in the process. The scheme of the continuum was discussed in the process of its development with two analysts in areas relevant to forced labour.

1. Defining forced labour

International context

Prohibition of forced labour by the International Labour Organization's (ILO) Conventions (in particular No.29 and No.105) dates back to the first half of the twentieth century. The Forced Labour Convention No. 29 (1930) bears particular relevance and defines forced labour as:

- a) all work or service;
- b) which is not voluntary;
- c) and is exacted under the menace of a penalty.¹

At the time of the conception of the Convention(s), the situation in the world was different from today, with trends like increased labour mobility, feminisation of migration and globalisation having a significant impact on the incidence of forced labour. The ILO has provided further clarification as to how to understand the definition in the twenty-first century. Generally, there are two common features that situations of forced labour share: the exercise of coercion and the denial of freedom.

According to the ILO, menace of penalty does not always mean that some form of penal sanction is applied; subtle forms of menace exist, sometimes of a psychological nature; or may take the form of a loss of rights or privileges (ILO, 2005b). Andrees and Besler (2009) argue:

Though successful migrants may have experienced some form of deception and abuse during their journey or final employment stage, they were free to leave without facing threats or the loss of any rights or privileges (e.g., non-payment of wages or threat of violence against them or their family members). (Andrees and Besler, 2009)

While the ILO accepts that the menace of penalty can be of a psychological nature, it has not accepted that it can be applied to broad economic need. That is, the need to keep a job to earn one's living does not constitute a menace of penalty; only when combined with other elements: 'Employer or state is not accountable for all external constraints or indirect coercion existing in practice' (ILO, 2002, p.98).

In practical terms, the menace of penalty relates to the freedom of the worker to leave the abusive employment. The involuntariness of forced labour relates to the freedom of choice. Freedom of choice or consent is internationally widely debated. The *reality* of consent vis-à-vis the situation of the worker at the time when the consent was given, as well as the principle of informed decision, pose difficult questions when trying to objectively evaluate an individual's labour situation. It is also debateable whether when a person is in a situation where s/he has only one opportunity, one choice, freedom of choice can truly be achieved.

Informed consent or freedom of choice in relation to forced labour was elaborated further by the ILO supervisory bodies. They examined the form and the subject of

consent; the role of external constraints or indirect coercion; and the possibility of revoking freely given consent (ILO, 2005a).

A common misunderstanding is that those in forced labour had to be *forced* to work. However, in reality, people often freely agreed to take up work and only once they started working discovered that they were deceived about the conditions or the nature of the work, and that they are not free to leave without repercussions. International law and jurisprudence establish that when deception or fraud is present, the initial consent of a person to do the work is rendered irrelevant. Despite this, in many cases we can see this rule ignored (including through the national referral mechanism in the UK, as demonstrated in a recent NGO-led evaluation).

From the perspective of decent work, freedom of choice means that the worker possesses bargaining power and is able to negotiate with the employer about terms and conditions of employment without facing any punishment. In a situation of forced labour, the power of the employer to impose conditions and rules is absolute and the worker is unable to refuse without facing some kind of punishment, i.e. is under the menace of penalty. 'The issue at stake is the worker's ability to revoke the given consent and the premise that the worker's right to free choice of employment remains inalienable at any given point' (ILC, 2007, para 40).

A list of indicators was developed by the ILO to assist identification of forced labour and to overcome some of the practical confusions around freedom to leave and freedom of choice. The six indicators below point to a forced labour situation. Usually, a combination of these is inflicted on a worker. The ILO² argues that if two or more are present, there is a strong indication of forced labour:

- Threats of or actual physical or sexual violence.
- Restriction of movement and confinement, to the workplace or to a limited area.
- Debt bondage: where a worker works to pay off debt or loan, and is not paid for his or her services.
- Withholding of wages, refusing to pay the worker at all or excessive wage reductions.
- Retention of passports and identity documents.
- Threat of denunciation to the authorities.

Indicators are the most commonly used method of identification of forced labour in practice. In addition to the initial set of indicators, the ILO further developed a Deplhi model (ILO, 2009c) to be applied to identify a situation of forced labour as an outcome of trafficking. In the Netherlands, the so-called barrier model was developed as an analytical tool to assist the observation and recording of multiple-dependencies of migrants that increase their risk of exploitation (BNRM, 2009). The use of indicators is common and provides guidance for various actors and enforcers. However, their application is still often problematic in practice when it comes to determining the extremity of a situation. This is because the majority of cases occupy the middle ground between the two extremes and are hard to fit into a straightforward 'exploitation – yes/no' category.

2. Forced labour as a stand-alone offence and in the context of anti-trafficking legislation

Many countries enshrined the prohibition of forced labour in the constitution or in national human rights legislation. Prohibition of forced labour through general or international legal norms is very difficult to enforce and prosecute unless there is a corresponding criminal offence created in the national law. Despite the requirement for the states that ratified relevant ILO Conventions³ to ensure that ‘the illegal exaction of forced or compulsory labour shall be punishable as a penal offence’,⁴ not many countries have introduced straightforward criminal legislation against forced labour.

The introduction of criminal offences of forced labour has been marked by two quite different approaches:

- Some countries introduced legislation on slavery, servitude and/or forced labour.
- Others legislate against forced labour only as an outcome of trafficking in their anti-trafficking laws.

The approach to outlaw forced labour within the anti-trafficking laws has been more prominent in the past fifteen years, reflecting the increasing concern of the international community about trafficking in human beings. A criminal offence of trafficking in human beings for the purpose of forced labour was introduced into criminal legislation in a number of countries. Thus, in these countries, forced labour is punishable only as an outcome of trafficking. In other countries it is still possible to prosecute forced labour even in cases where trafficking is not present. Often the two concepts are confused – to the disadvantage of those who might have been victims of forced labour but who were not trafficked. These people are excluded from protection and assistance programmes designed for victims of trafficking, and where there is no stand-alone forced labour offence, often even not recognised as victims of crime. Trafficking and forced labour are two linked but distinct concepts, and it is important to understand that not all forced labour is a result of trafficking.

On the one hand, forced labour is written into the international definition of trafficking as one of its purposes (included among the list of forms of exploitation for the purpose of which people are trafficked as defined by the Palermo Protocol⁵). Trafficking is a process of bringing someone into a situation of exploitation, a series of actions with the final purpose being a form exploitation (such as forced labour). There are three constitutive elements of trafficking⁶ and various forms of coercion are included. The whole process is exploitative, although this is not always evident, especially at the initial stages of the process.

An important aspect of trafficking is the intended purpose:

- Even if the purpose (forced labour) has not occurred yet, trafficking can be found and prosecuted, when it is clear that the intended purpose is exploitation.

- Once the process of trafficking has reached its intended purpose, in our case forced labour, that's where the two phenomena of trafficking and forced labour correlate – forced labour is sometimes an outcome of trafficking.

On the other hand, forced labour means maintaining someone in a situation where services or work are exacted under menace of penalty to which a person has not offered himself or herself voluntarily. Indicators of forced labour (listed in the previous section) describe situations and conditions people commonly find themselves in and that the ILO and others recognise as identifying situations of forced labour. Although not every single indicator signifies forced labour, their concentration (usually two or more) suggest a situation of forced labour. Furthermore, they can be both indications of a trafficking and non-trafficking situation. While forced labour is a criminal offence, it is also an outcome of the imbalance of power, poor regulation of labour market and inadequate enforcement of labour rights. Consequently, those who were subject to forced labour should be seen as workers whose fundamental rights (including labour rights) have been violated, be treated as claimants of rights and be able to access criminal justice as well as labour justice.

In identifying situations of forced labour we also need to take into account the perceptions of those affected. People in forced labour often do not see themselves as victims, but rather as workers in a difficult situation. Unfortunately, the influence of the anti-trafficking discourse in the area of forced labour has resulted in the use, or sometimes overuse, of the word victim. While the word 'victim' is relevant in criminal justice, when forced labour (or trafficking) is dealt with as a criminal offence, its use often leads to a perception of passive and helpless victims who suffered coercion and deception at the hands of their exploiters and who should behave as such, rather than perceiving them as claimants of rights and subjects in the access to justice. However, workers are an active party in the labour market, rather than passive victims. No matter how difficult the situation, international experience and research show that many workers strive to regain control over their lives, want to do away with the web of dependence in which they find themselves and restore their dignity.

In summary, trafficking is a sub-set of forced labour (TUC, 2006), rather than a synonym of forced labour, as sometimes erroneously understood. The existence of forced labour, independent of trafficking, implies that if forced labour is punishable only when linked to trafficking, those in non-trafficked forced labour find it even more difficult, if not impossible, to seek justice.

3. Examples of definitions, models and concepts from across the world

A number of countries, some which are mentioned in this section, have linked their national legislation on forced labour with the violation of human dignity. This link stems from the understanding that the relationship between employer and employee is based on humanity, to which retention of human dignity is central (Allen *et al.*, 2007, p.2). The close connection between human dignity and work has its foundation in the Universal Declaration of Human Rights, in particular in Article 23.⁷

This section explores various definitions, concepts and their usage in selected countries across the world. Examples show how different codification and interpretation of notions such as forced labour, human dignity or vulnerability are used in legislating and describing situations of forced labour. The country examples were selected in order to inform understanding and help conceptualise the reality in the UK, to benefit research, discourse and eventually law and enforcement against forced labour and rehabilitation of those in forced labour.

Each of the six countries applies its own valid approach. All the examples aid the development of the idea of a continuum as a concept for use in the UK. The following section demonstrates not only the use of concepts and definitions in particular countries, but also shows underlying principles and approaches that classify the issue into the realm of either criminal justice or labour justice and inform policy-making and intervention in the UK.

Brazil

Brazil is one of the few countries that officially recognised in 1995 that slavery exists on its territory and has been vigorously introducing measures to tackle the problem. Many, including the ILO, consider Brazil and its approach an example of good practice.

The Brazilian approach re-introduces the notion of slavery into the discourse that addresses the issue of forced labour. In Brazil, the term used is 'slave labour'. While essentially based on the concept of forced labour as set out in ILO standards on the subject, it includes the notion of degrading conditions of work (ILO, 2009a).

Brazilian criminal law punishes acts of 'reducing someone to conditions analogous to that of a slave, namely: subjecting a person to forced labour or arduous working days, or subjecting such a person to degrading working conditions or restricting, in any matter whatsoever, his mobility by reason of a debt contracted in respect of the employer or a representative of that employer'. The offence also extends to restriction of the freedom of movement of workers by various means, such as surveillance or document confiscation.⁸

The Brazilian approach emphasises that slavery is a violation of human dignity. The offence is included in the section of the criminal code that covers crimes against individual freedoms. 'Conditions analogous to that of a slave' are understood as

forced labour, degrading labour, but also labour conditions in which the freedom of the worker is restricted.⁹

The good practice of the Brazilian concept lies in the combined intervention of criminal law and labour law, recognising that in most instances the crime of forced labour goes hand in hand with other violations of labour laws. A particular tool of enforcement has been the special mobile labour inspection units that were created as a specialised agency under the Ministry of Labour in 1995.

Practical measures link Brazil's efforts to eradicate forced labour directly to the state's global commitment to decent work. The ILO has commended Brazil for creating a response that combines legal sanctions for unscrupulous employers within legal and policy frameworks, with the responsibility taken by the authorities for broader improvement of working conditions as part of the decent work agenda.

India

The definition of forced labour in India is interesting, especially given the historical links of the legal system with the UK, its membership in the Commonwealth and its struggle to eradicate systems of bonded labour within its territory.

Prohibition of forced labour is anchored in Article 23 of the Indian constitution: 'Traffic in human beings and *beggar*¹⁰ and other similar forms of forced labour is prohibited and any contravention of this provision shall be an offence punishable in accordance with the law'.

The application of the law in India is particularly relevant to the debate that tries to ascertain when exploitation is so severe as to establish forced labour. A case was brought to the Supreme Court of India in 1982 by workers whose bosses made excessive deductions from their wages, resulting in them being paid under minimum wage. The court considered the question of whether payment under the minimum wage can be a form of forced labour. It ruled that force can also be understood in the context of compulsion of economic circumstances, leaving the person with no choice but to work for payment even below minimum wage (ILO, 2009b).

Judgement of the Indian Supreme Court is rather unusual and has not been accepted by the ILO¹¹ and reportedly is no longer applied in India either. It is, however, worth noting its impact in terms of subsequent measures introduced to monitor compliance with labour laws. For example, three ombudsmen were instituted and charged to make inspections at the workplaces in question and ensure that the labour law was complied with (ILO, 2009b). The role of activists as well as trade unions, as the actors of emancipation in the labour sphere is characteristic for India, had been and remains very important.

The situation of forced labour in Brazil and India is quite different to the UK, as those affected are likely to be nationals of the respective country, whereas in the UK most of those found in forced labour would mainly be migrants. Nevertheless, measures against forced labour must not discriminate between those who are nationals and those who are not. These two country examples are included here to show how the countries link the eradication of forced labour with labour market and workplace

interventions. Both countries utilise some form of labour inspections to enforce labour law/labour rights in areas where violations (including forced labour) were previously found. This is not only useful in addressing forced labour, but it is also a method of prevention of forced labour that targets its root causes that result from failures of labour market regulation and the permissibility of labour law violations.

USA

The United States is the country with the highest number of forced labour cases brought in front of the courts. Apart from national cases, it has also seen a number of foreign civil cases brought to the US courts, using tort law.

The US legislation distinguishes forced labour as a standalone criminal offence. The US Code definition of forced labour lists a number of actions very similar to the ILO indicators of forced labour: threats by law (for example related to administrative status), threats of or actual violence, restriction on freedom of movement.¹² The US Code also outlaws 'Sale into involuntary servitude' (Section 1584) and 'Enticement into slavery' (Section 1583).

A number of cases have been brought to the courts in the USA; in California and Florida many were related to forced labour in agriculture. Domestic servitude is the second largest form of forced labour outside of the sex industry brought to justice. As well as criminal proceedings, civil proceedings are traditionally used in the USA and in several high profile cases perpetrators have had to pay compensation to those they kept in forced labour.

Europe

In Europe, the prohibition of forced labour and slavery is usually included in countries' constitutions or human rights legislation. The offence of forced labour is often part of anti-trafficking legislation.

In some countries, the way trafficking was defined shifted away from the international definition of trafficking as a three-stage process (in cases of persons over 18 years of age), allowing for prosecution of situations where the focus is laid on the outcome, i.e. 'situation of exploitation' rather than how the person arrived in the situation. Several countries use the concept of violation of human dignity as a determining factor for situations of forced labour.

Belgium

Belgian legislation relating to forced labour uses the concept of 'conditions contrary to human dignity'. The criminal code covers only two elements of trafficking, the acts and the purposes, which includes 'employment in conditions incompatible with human dignity'. The 'means' element of the international trafficking definition¹³ is included in the law as aggravating circumstance (for example the abuse of the position of vulnerability).

Defining what constitutes conditions contrary to human dignity, and when such conditions arise, brings one back to the debate over how severe the exploitation needs to be in order for it to constitute forced labour. The text of the Belgian law implies, when looked at in relation to the international definition of trafficking, that exploitation is the violation of human dignity. The Deputy General Prosecutor, Mr. Frederic Kurz, suggests that the wording of the offence gives the judge the discretion to interpret what constitutes such conditions.¹⁴ He also maintains that the law 'is intended to cover forced labour and slavery, but also situations of very low salaries or of obviously unhealthy or dangerous conditions of labour'.¹⁵ The Dutch National Rapporteur on Trafficking agrees that while there can be an advantage in this definition covering a range of forms of exploitation, it might leave the judge with too broad a field to interpret (BNRM, 2009, p.531).

The available case law in Belgium shows how the definition has been operationalised in practice, linking the precarious status of the workers (their irregular immigration status) to their vulnerability, which perpetrators have abused with the intention of profit, demonstrated by the imposed living and working conditions and levels of remuneration. One of the judgements highlighted the intention to gain profit without any concern about the workers' living conditions, and ruled that the intention to profit was demonstrated by the low wages, working conditions and poor accommodation (BNRM, 2009).

Similar to the Brazilian experience, the inclusion of labour market regulatory bodies (such as the labour inspection and the ministry responsible for labour) are significant in the discovery of cases of forced labour. NGOs that provide assistance to trafficked persons, such as Payoke and Pag-Asa,¹⁶ now report that more than half of their beneficiaries have been exploited outside of the sex industry.

The role of labour inspectors is crucial in the detection of situations of forced labour. In Belgium, specialised labour inspectors carry out visits to workplaces where there are reasons to suspect forced labour. They can then refer a case directly to a labour prosecutor. In many cases, a specialised prosecutor in the area of trafficking and a labour prosecutor work collaboratively. This means that apart from trafficking, the employer will be charged with other labour offences. The involvement of labour courts also means easier access for exploited workers to compensation.¹⁷

France

French criminal legislation does not explicitly define or use the notions of slavery or forced labour. Instead, French legislators deal with the issue in a number of specific offences, in which the notion of 'conditions contrary to human dignity' plays a role. The term 'conditions contrary to human dignity', included in the penal code, is the closest thing France has to a definition of forced labour. Situations of forced labour in France are punishable as a stand-alone offence, without a direct link to trafficking. It is worth noting that the chapter of the penal code under which both trafficking and 'forced labour' offences fall is entitled 'Offences against the Dignity of Person'.

The penal code of France creates offences of 'obtaining the performance of unpaid services or services against which a payment is made which clearly bears no relation to the importance of the work performed from a person whose vulnerability or

dependence is obvious or known to the offender' and of 'subjecting a person, whose vulnerability or dependence is obvious or known to the offender, to working or living conditions incompatible with human dignity'.¹⁸

Practical application, which is reportedly sometimes difficult, shows similar interpretation to that in Belgium, focusing on the irregular status of a worker as a determinant of a situation of vulnerability.

Labour inspectors in France play a role in uncovering situations of forced labour and submit reports to the prosecutor. Aside from the criminal code, those in forced labour are also protected by French labour legislation, which also covers irregular migrants: 'Under the Labour Code, a foreigner who is employed illegally is in the same position as a worker who is working legally with regard to pay, years of service and severance of pay' (ILO, 2010). Workers are able to obtain permission to stay in the country when pursuing a case in the French labour courts.

Germany

No stand-alone offence of forced labour exists in the German criminal code. The criminal code includes elements of slavery, servitude and bonded labour in its provision on human trafficking for the purpose of work exploitation. It is worth noting that the provision only covers 'the purpose' of trafficking under its international definition, i.e. the situation of exploitation. Other elements of trafficking, i.e. the process of trafficking, are covered in a specific article on assisting human trafficking. This would suggest that since the relevant article covers only the forced labour outcome of the offence, despite the title of human trafficking, the German criminal code *de facto* includes situations of non-trafficked forced labour.

The German definition is interesting. It applies two aspects that reflect a) the fact that migrants might be especially vulnerable to abuse by employers; and b) that work exploitation can be detected by comparison with the working conditions of others doing the same work.

Whosoever, exploits another person's predicament or helplessness arising from being in a foreign country to subject them to slavery, servitude or bonded labour, or makes him work for him or a third person under working conditions that are in clear discrepancy to those of other workers performing the same or a similar activity.
(German Criminal Code)¹⁹

As the law is rather new in Germany, there is little experience to date with its practical implementation and enforcement. Research into the issue of trafficking for forced labour commissioned by the Ministry of Labour and Social Affairs is currently underway. Nevertheless, cases of forced labour and violation of labour law involving migrant workers have previously been described and dealt with in Germany. In a number of cases, the trade unions have been active in providing assistance.

The labour courts and labour law in Germany offer protection to migrant workers exploited in the workplace, regardless of their immigration status. A worker who lost his/her job as a result of an irregular status is entitled to compensation at the level of

six-months' wages. While irregular migrants are liable for irregular entry or stay in Germany, employment tribunals do not have the obligation to report irregular workers. Hence migrant workers can bring their cases in the labour courts without fear of deportation.

UK

The UK is one of the few European countries that has a stand-alone criminal offence of forced labour. In 2009, a campaign persuaded the British government that new legislation was needed to protect workers in forced labour in the UK. Consequently, a new criminal offence of holding another person in slavery or servitude or requiring them to perform forced or compulsory labour was introduced in section 71 of the Coroners and Justice Act 2009 ('the 2009 Act') The offence came into force on 6 April 2010.²⁰

Section 71 provides that a person (D) commits an offence if:

- a) D holds another person in slavery or servitude and the circumstances are such that D knows or ought to know that the person is so held, or;
- b) D requires another person to perform forced or compulsory labour and the circumstances are such that D knows or ought to know that the person is being required to perform such labour.

In Scotland, this offence was introduced in section 47 in the Criminal Justice and Licensing (Scotland) Act 2010. The offence has been put in place 'to introduce clear, enforceable offences of servitude and forced labour in order to give further and specific protection to those who may be the victims of forced labour'.²¹ Guidance by the CPS also encourages the use of this offence in cases where human trafficking (in particular the element of intent) is difficult to prove. The guidance provides further confirmation that trafficking and forced labour are separate phenomena, but that in some cases trafficking is a sub-set of forced labour.

As this law is very new, no concrete examples of its application have been documented yet. It is important to note however, that workplace enforcement bodies, such as the Gangmasters Licensing Authority, have not been empowered to prosecute under this law.

The diverse approaches and concepts presented in this section demonstrate that no single straightforward system is at hand. The author considers the German approach the most useful and relevant for discussion in the next section, in particular the comparative methodology used to elucidate whether an individual work situation is exploitative by comparing it to the situation of another worker. However, the continuum presented in the next section benefited from the exploration of all the concepts described in this section.

4. Examining the reality: the continuum of exploitation

Most countries grapple with the same problem – they try to fit a complex reality in either too narrow (e.g. forced labour only linked with trafficking) or too broad (e.g. conditions contrary to human dignity) a concept. The examples in the previous section show how the process of determining a single reality is complicated not only by the dynamic nature of the problem, but also by complex external and individual circumstances. The complexities include legal framework, labour market functions and failures, crime, migration, individual agency and status. While there might be some commonalities in people’s experiences of exploitation, single experiences of workers tend to differ and it is difficult to simply compare individual realities and consider them as binary values: either forced labour or not forced labour, with nothing in between. The plethora of realities of exploitation that exist means that the issue we are dealing with is a complex social phenomenon. Hence, the responses need to be sophisticated.

This paper argues that in order to understand and resolve situations of forced labour, these need to be understood through the lens of a ‘continuum²² of exploitation’. Finding a solution to situations of forced labour is a huge challenge, as those who are in forced labour and the forms of coercion employed are constantly changing. Individual experience can begin as an acceptable work situation, where conditions subsequently deteriorate into forced labour. Furthermore, other factors, such as the subjective assessment of the situation, or the agency of an individual worker, play an important role and must not be overlooked.

The absence of a clear definition of exploitation makes it difficult to draw the line between exploitation in terms of violation of labour rights and extreme exploitation amounting to forced labour. A causal relationship has been established, linking the existence of forced labour to the impunity²³ enjoyed by those who commit the crime/violation and to widespread ignorance of labour legislation and workers’ rights. The continuum of exploitation is a concept that enables the identification of a remedy for any situation in which a worker might find himself or herself that differs from decent work.

Definition of decent work

Alongside the continuum of exploitation, this paper argues for the use of the ILO decent work concept in the discourse about forced labour in the UK. The ILO describes forced labour as the antithesis of decent work. Consequently, achieving a situation of decent work for all workers in the UK should be the answer to eradication of forced labour.

Introduction of the concept of decent work aims at reclaiming the issue of forced labour as an issue of labour and human rights, away from the anti-trafficking framework (heavily associated in the UK with organised immigration crime) that rests mainly in the area of criminal justice responses.

This is not to say that criminal prosecutions are not important. However, they are by definition reactive and operate on a binary logic between victims and offenders, which does not reflect the complex reality of a continuum of exploitation. Andrees and Besler (2009) argue that a narrow focus on criminal law enforcement will not succeed, unless the structural deficiencies such as poor labour inspection, poor enforcement of minimum wage legislation, or insufficient regulation of recruitment agencies of the labour market are addressed simultaneously.

Furthermore, as we have seen and will be demonstrated below, there are a myriad of situations on the axis between decent work and forced labour. Some of them fall under the scope of the criminal law, some of them under the realm of labour law. The analysis from the ground shows that more often than not, the reality is underpinned by two aspects:

- the impunity of those violating;
- the poor access to rights of those exploited.

Consequently, practical responses and policy need to address the problem as a continuum between decent work and forced labour, as an issue of both labour (and human) rights and criminal justice. Otherwise, the causal relationship between forced labour and the impunity of perpetrators and ignorance to the rights of those exploited will remain.

The notion of decent work was first introduced by the Director General of the ILO in 1999 in his report to the International Labour Conference as 'productive work under conditions of freedom, equity, security and dignity, in which rights are protected and adequate remuneration and social coverage are provided' (ILO, 2006, p.15).

The ILO (2006) attributed the following characteristics to decent work:

- it is productive and secure work;
- it ensures respect of labour rights;
- it provides an adequate income;
- it offers social protection;
- it includes social dialogue, union freedom, collective bargaining and participation.

From the perspective of workers, decent work is something they desire – work in conditions of dignity, safety and with adequate remuneration. In the UK, there is a wide range of employment legislation that establishes the rights of workers and the obligation of employers. The laws cover all the common labour standards' areas including terms and conditions work, trade union rights, pay, working hours. In practice, however, certain categories of workers are excluded from protection of the employment law. Many of them would be migrant workers.

Overcoming the problem of absence of definition of exploitation: introducing 'the continuum of exploitation'

Practitioners and academics agree that there is no objective and clear line demarking the beginning and the end of one form of exploitation from another and

that the absence of a clear definition of exploitation is problematic. In the anti-trafficking discourse, forced labour is one form of exploitation. However, forced labour can also be seen as the extreme form of exploitation when compared to 'lesser' forms of exploitation (namely violation of labour laws). This is not only confusing, but in practice can lead to creation of a 'hierarchy of suffering' – which would not only be unhelpful, but also detrimental.

The understanding of the conditions of labour as a binary opposition, with free labour on one side and un-free, i.e. forced labour, on the other side is a concept that is difficult to execute in practice. In general, labour exploitation is work under conditions that violate international and European labour standards, as related to labour and/or human rights. Furthermore, principles of universal human rights apply to all workers. And while some might be limited in access to labour rights due to their immigration status, they should have their basic human rights protected.

This section provides for a positive definition of what labour exploitation entails as a continuum ranging from the positive extremity (desirable situation) of decent work to the negative extremity of forced labour (most serious form of labour exploitation). The concept of a continuum comes in to help us understand how the denial of rights to certain categories of workers (allowing for their exploitation) fills the space between the desirable (decent work) and the unacceptable (forced labour). It has been established that any acts that have the effect of lowering standards will inadvertently affect the general level of standards for all workers. By that token, the continuum represents a sum of situations that need to be addressed in order to:

- uphold the obligations of the state to promote decent work and protect rights;
- protect persons from forced labour;
- provide a deterrent for those that derive their profit from violations.

While the continuum is not a replacement for the missing definition of exploitation, it is a proxy relevant to all possible modes of exploitation. Using the continuum in practice means that all situations that are not decent work are redressed, contributing to the heightening of standards and eliminating the environment conducive to forced labour.

Steinfeld (2009), when arguing for a continuum as a mechanism of understanding, suggests:

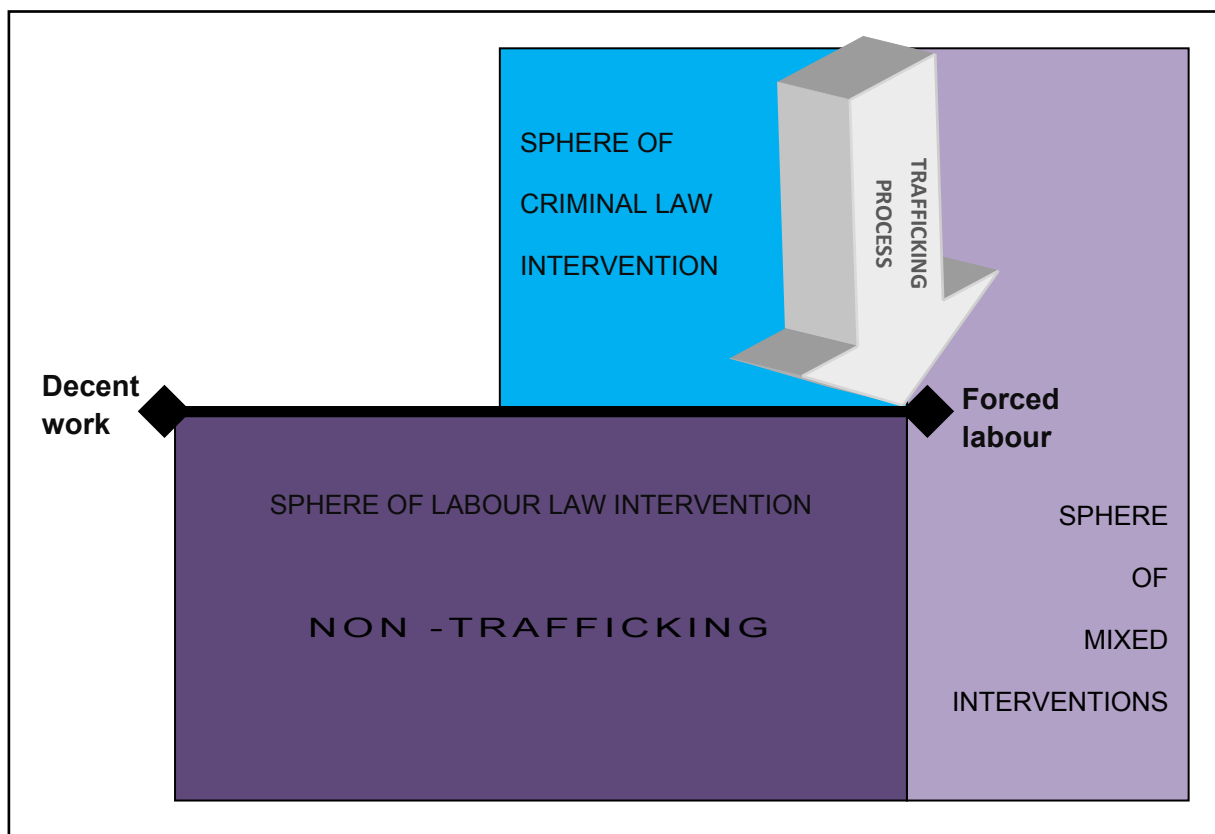
...think in terms of a combined scale of pressures, legal, physical, economic, social, psychological all running along a continuum from severe to mild, rather than falling into a binary opposition. This would not only help us to understand that the various types of pressure employed in eliciting labor are commensurable, operate in surprisingly similar ways at bottom, but also to see that the real focus of inquiry should be upon the choice sets with which individuals are confronted as they make their decisions about conducting their lives, and the ways in which these choice sets may be altered by changing legal arrangements.
(Steinfeld, 2009)

The continuum explained

It is known that some forced labour situations evolve gradually over time (often as a function of immigration status). In reality, the continuum of exploitation captures not only the complex combination of situations that exist between decent work and forced labour (an environment that permits the existence of sub-standard working conditions), but also an individual work situation, as it evolves over time. The continuum of exploitation aids understanding of the persistent problem of the changing reality of work, captures various forms of exploitation up to forced labour and assists in identifying ways of addressing it. It can be applied also to forced labour situations that are an outcome of trafficking.

We have established that sub-standard working conditions are not forced labour *per se*; neither is the lack of viable economic alternatives that makes people stay in such situations. However, these situations should be examined from the perspective of vulnerability that can be abused to obtain consent, and *de facto* negate the principle of freedom of choice, absence of which is one of the elements of forced labour. All these situations are covered in the scheme of the continuum of exploitation and intervention below:

Figure 1 Continuum of exploitation and intervention



The scheme represents the continuum of exploitation, demonstrating situations in which workers might find themselves, ranging from the positive extremity (decent work), to the negative extremity (forced labour). For explanation of the concept, it should be assumed that 'all other things are equal'.²⁴

The space between these two variables is filled with situations that do not comply with the principles of decent work and represent some form of violation of standards, starting from more benign forms (e.g. discrimination, payment under minimum wage, breach of contract), with increasing severity, leading to the most serious form of violation, forced labour. The scheme further indicates where trafficking is present and where not, operating with the concept of trafficking as a process, where forced labour can be one of the outcomes. The situation of decent work and trafficking cannot correlate. However, the purpose of trafficking is exploitation that is achieved through a series of exploitative and coercive actions, one of its forms being forced labour. Cases where forced labour is an outcome of trafficking are signified by the point on the scheme where trafficking and forced labour correlate.

The scheme also shows areas of interventions/remedy provided for by the law, in particular criminal and labour law. Individual situations and elements of violations can be indicated on the scheme, which will then point to a form of intervention that could be available. In practical terms, the continuum can be used in a number of ways. For instance:

- To note individual elements of exploitation and identify whether they are covered by either criminal or labour law or both. For instance, the withholding of a passport as a single act would fall within the criminal law sphere (some acts such as withholding a passport or false imprisonment are criminal offences in their own right in the UK). But if combined with other acts, such as withholding wages and excessive working hours (indicating a forced labour situation), it would fall within the sphere of mixed intervention.
- For comparative analysis of a real situation against the extremities of a desirable and undesirable situation. For instance:
 - To evaluate a situation against the premise of decent work (a situation of freedom, e.g. freedom to leave, freedom of choice), security, dignity, protected rights, adequate remuneration and social protection and against the designation of forced labour (involuntary work under the menace of penalty).
 - To evaluate compliance with basic labour rights e.g. national minimum wage, working hours, terms and conditions.
 - To identify whether any of the forced labour indicators are present.
 - To identify whether any of the indicators that are criminal offences in their own right are present.
- To discuss whether the remedies available are accessible for the individual in question, pointing out any systemic barriers and underlying problems.

It might be useful here to refer to the German model, which examines whether the conditions of a particular worker differ from those of another worker performing similar work (this could also be done by looking at the general standard for the particular sector). A small discrepancy might point to discrimination that can be remedied through labour law; it would be found on the axis close to decent work and occupy the sphere of labour law intervention. Significant discrepancies can lead to

discovery of abuse of a precarious situation of a worker and point in the direction of a dual remedy (mixed intervention sphere on the continuum) in cases of forced labour.

There can be many ways in which the continuum can be used to evaluate labour situations. The concept is not designed to provide an accurate legal definition, but to understand the individual reality, identify the most appropriate remedy and to probe structural causes and underlying problems that allow for various forms of exploitation to occur.

The function of the scheme is also to show that approaching situations of forced labour solely from the perspective of criminal law is rather limiting. It does not necessarily benefit those in forced labour; neither does it address the sum of complex and dynamic situations and their causes or achieve the aim of affronting the antithesis of decent work. Within the complex environment of causes and contributing factors, forced labour should be addressed both as an issue of labour (human) rights as well as through the criminal justice system, looking at the situation of exploitation as the determining factor, when identifying the appropriate interventions:

- Where labour standards are violated, remedies are provided for by the labour law.
- Where a situation of trafficking occurs, remedies are provided for by the criminal law.
- Where a situation of forced labour occurs (as an outcome of trafficking or not), remedies available include both labour law and criminal law. Someone who subjects another person to forced labour can be prosecuted for committing an offence of forced labour, but can also be taken to employment tribunal for failure to comply with labour law.
- Where an indicator that constitutes a distinct criminal offence (such as withholding of passport) is present, but no forced labour can be established – the remedy can still be found in criminal law.

This section shows that a complex situation of labour exploitation, with the most extreme situation being forced labour, can be understood and analysed as a continuum. In addition to this analysis, the concept can assist in identifying remedies available in the law and also point to causalities and underlying problems. In the next section the continuum will be applied to real cases.

5. The continuum in practice: case studies from the UK

In the UK, use of the continuum to understand and address forced labour and situations leading to it can be a way to address the complex reality of the interrelationship of the lack of access to labour rights and impunity of the actors of exploitation. When considering forced labour in the UK, migrant workers represent the group most at risk of finding themselves in this extreme situation. However, British nationals are also vulnerable to exploitation in the workplace and even forced labour.

Previous sections examined various ways forced labour is defined and how the absence of a definition of exploitation is dealt with, using concepts such as 'conditions contrary to human dignity', indicators of forced labour or comparisons between working conditions. All these can be subsumed into the continuum.

In this section, we will no longer assume that 'all things are equal' and show how administrative regulations deny access of some exploited people to remedies that can be identified through the use of the continuum. We will also see how the agency of workers comes into play, impacting on the ability to objectively judge freedom of choice.

It was established earlier in this paper that one possibility of using the continuum is to compare conditions with one of the extremities: for example by looking at the freedom to leave and freedom of choice of a worker. Below we will examine some of these aspects. The limited scope of the paper does not permit more thorough discussion of all the factors, motivations and pressures that influence the workers' agency in the situations described below. However, in practice, where there is scope to include this in the analysis of the continuum, it would be beneficial to do so.

The examples below are simplified in order to illustrate potential use of the continuum. However, it should be noted that between theoretical access to remedy and actual access, there is a difference in the capability to use the remedy that can be ascribed both to the individual as well as to the regulations that either permit him/her the access or limit it. The examples are real cases relating to the UK.²⁵

Case 1

Yi-Song is Chinese. His family paid €15,000 to a snakehead²⁶ to bring him to Europe. They have to keep paying off the debt every month to the snakehead collectors. Delay in payment results in intimidation, threats and a 100% increase in the interest. Yi-Song left China with contact details of people who could facilitate work for him in the UK. In the UK, he contacted one of them who arranged work for him in a warehouse, packing goods.

Yi-Song and ten other people were locked in the warehouse (they were told it was for their protection), slept on the floor, shared one sink and toilet and were given instant soup and tea three times a day. The employer shouted at them. For the first two weeks they were not paid, because they were working too slowly. When they

protested, he threatened to call the police and get them deported. They then worked almost 24 hours, taking shifts at sleeping for 3–4 hours a day to be able to pack more goods. Eventually, they were paid £50 each for a week.

Yi-Song asked the employer to send half of his money home, as he was not allowed out himself. Later he found out that the employer had not sent any money. Yi-Song had worked in the warehouse for three months when it caught fire. They all managed to get out and Yi-Song ran away.

Yi-Song has since been working in various jobs in the UK and in Ireland. He said that non-payment of wages, being threatened with the police and harsh treatment are commonplace and he hopes he will not be locked up again. He said that the employers know that most of the irregular workers have huge debts to pay and tell them that they have no rights in the UK.

Case 2

Pushpa worked for several families in the Middle East and came to London with one of them. She had to work hard, but was happy with the pay and was treated better than by some of her previous employers. After several months the family was due to return and said that they would not need her anymore, as her employer was moving into a high-level job and would have many house staff provided. She was offered contacts of her employer's acquaintances, and received a good reference and assurance that someone would employ her.

Pushpa contacted several of the contacts provided and was taken on by one family as a domestic worker. As soon as she arrived, the employer asked for her passport to notify the Home Office of her changing employer. She has never seen her passport again. The conditions in the house were very different. She had to sleep on the floor in the living room and was told that was because otherwise she would steal things and hide them in her room. Her wages were to be paid only after a probation period, but she was not told how long that would be. She was not allowed to go out of the house and was told that if she ran away, they would report her to the police as an illegal and that she would be deported.

Pushpa's working hours in the house were 6am–8pm. After that, she would be taken by the employer to various office buildings that were cleaned by his contract cleaning firm. She was watched by either the employer or his son and shouted at when she did not do things properly because she was tired. That shift lasted until around midnight. Upon return she could not go to sleep until the employer went to bed, which meant she often got less than 3–4 hours of sleep.

After two months, she was given a cheque for £200. She asked for cash instead, as she was not able to go out of the house to cash it, but was refused. She felt exhausted most of the time and intimidated by her employer, but afraid to run away without her passport. One night, the employer's son brought home some friends. They were drunk and attempted to rape her. She decided to run away because she was afraid that the incident would be repeated. She managed to escape with the help of a security guard at one of the premises she cleaned.

Analysis

Both cases 1 and 2, when examined against the extremity, would qualify as forced labour. In Yi-Song's case, the continuum would point to a mixed remedy, where his employer could be held criminally liable for forced labour and in theory also be liable for violating a number of labour rights. The same would apply to Puspha's case. Both employers would have also committed a series of separate criminal offences.

While both cases represent the extreme end of the continuum, where the most remedies could theoretically be available, they are in fact not accessible to these two workers. Yi-Song would have no access to any of the labour law remedies, given his irregular status in the UK. A similar situation would apply to Puspha, unless her employer actually renewed her visa.

In these cases, the continuum illustrates that the regulatory framework could in theory provide a multiplicity of remedies to those subject to aggravated exploitation, but does not in fact apply to the most vulnerable – and points to the causal relationship between forced labour, the impunity of those who perpetrate and ignorance to the rights of those exploited.

Case 3

F was hired as a chef in an Indian restaurant in the north-west of England on a year work permit. His contract stipulated payment of minimum wage. Food and board was offered by the employer against a fee. F was meant to work six days a week 10am–8pm, but was given the option of working until 11pm to make more money. He took the option, as he had a debt at home (his employer was not aware of this). He was satisfied with the work, the pay, accommodation (room shared with three other people) and food of leftovers from the restaurant – he had the option of renting somewhere else, but his earnings were too low and he was used to living with six persons to one room at home.

After nine months in the job, F's employer asked for his passport in order to renew his visa. F was then also informed that his wages would be lowered, as profits in the restaurant were low. When F objected, his employer gave him the passport back and told him he could leave, as he would find someone grateful to do the job for lower pay. F decided to continue working for the employer (who renewed the visa) because he needed to sustain his income, and did not want to lose his status, as his visa was tied to the employer.

Analysis

Case 3 is a typical situation of conditions deteriorating as a consequence of immigration status – by no means unusual, but also not an extreme situation. Forced labour would be hard to argue, looking at the fact that payment under minimum wage or economic need seemed the crucial factors in F's case. Although his decision was influenced by the fact that his visa was tied to an employer, the employer had not used this to threaten him.

In this case, F has exercised his agency, and while his choices were limited given his status, it would be difficult to establish that he was coerced. As for the remedy, in F's case, employment law is available in relation to the payment under minimum wage and contractual relationship. F's status is regular in the UK, which allows him to seek remedies via the employment tribunals and his treatment could be discovered in the process of labour inspection.

F's case highlights an underlying problem for violation of standards as well as forced labour cases. Visas being tied to a particular employer creates a dissonance of power and seriously limits the negotiating power of a worker. This creates a legalised situation of dependence that is known to often feature in forced labour cases.

Case 4

Endre came to England because he had lost his job in Hungary where he worked as an engineer. He found several agents through the internet who promised well-paid jobs in the UK. With his last savings he came to the UK and started contacting the agents. He did not speak English, so he was glad that one of the agents had an assistant who spoke Hungarian and took him on. The agent told Endre he had to register with the Home Office, but that the agency would arrange this and lend him the money for the fee. He handed over his passport. The contract he signed was in English, which he did not understand, but was reassured that it was a standard contract prescribed by the government.

Endre's first job was as a casual worker at a construction site. He was not provided with any protective clothing and had to buy it himself, again using a loan from the agent. For two weeks, he was not given any money; it was all taken to pay for his loan. He was then paid £80 per week for a 10 hour shift (he was paid by the agent, not by the workplace). The agent also ran a hostel where Endre stayed for £10/week in a bunk bed with ten others in the room.

In three months, Endre was sent to various jobs, which lasted from a couple of days to several weeks. In a number of these jobs he was required to purchase clothing or tools at high prices from the agent. But he did not know where or how to get these otherwise, as he spoke no English, did not know the area, and without the equipment he would not be allowed into the workplace.

Endre was unhappy with the conditions provided by the agent and decided to leave. However, he was told that if he left, he would be illegal without his passport (which the employer claimed was still with the Home Office after four months) and any agent would treat him 'like the Chinese'. The employer also threatened to report him to the police, implying that Endre did not pay his national insurance. Endre was afraid of getting in trouble and decided to stay until his passport came back.

After Endre complained, his pay got even lower and he was physically attacked by men who worked for the agent. Six months into his stay, his passport still was not back. He called friends at home and they advised him he could travel home on his Hungarian ID. As soon as he gathered enough money, Endre returned home.

Analysis

While case 4 does not seem as extreme as cases 1 and 2, when evaluated against the positive extremity of the continuum, looking at violations and examining the indicators, it brings us to a conclusion of a forced labour situation. Even though Endre was not physically confined, his freedom to leave was restricted by threats and passport retention. These factors also contributed to him not being able to revoke the contract. Mixed remedies would have been available for Endre too, and given that he is from an EU country, his access to the employment tribunal would have been possible.

Case 5

Jaeren District Court in Norway gave its first judgement involving labour exploitation on 4 July 2008. The suspects, as well as the exploited persons, were British, from the traveller community. The exploiters recruited vulnerable young people from the street, who often had problems and were homeless. They agreed to work for the suspects. They first worked in the UK, laying asphalt and tiles for private individuals and later in Norway and Sweden.

The exploiters paid for their journey and housed them in a caravan, where four to six people had to share. For a 12 hour working day, six days a week, they were paid €11. The court heard that physical violence and threats of violence were used. The workers' heads were reportedly shaven by the exploiters to demonstrate that they were their prisoners.

Analysis

In case 5 the court ruled that the workers were subjected to forced labour, giving examples of both menace of penalty (absence of freedom to leave) and involuntariness (absence of freedom of choice) present in the case. The abuse of specific vulnerability was also commented on by the court. The court also ordered compensation for emotional injuries to be paid to each of the workers.

Case 6

(Taken from the report *Hard Work, Hidden Lives*, Commission on Vulnerable Employment, 2008)

Julie had done a variety of jobs in her 54 years. After leaving school with no qualifications, she worked in a shop and then a couple of factories. After the birth of her first child, she stayed at home to look after her child for a while, before working as a school dinner supervisor and then for Meals on Wheels. Julie had to stop this work to care for her second child, who has learning difficulties.

When Julie found out about homeworking opportunities through a neighbour, it seemed to represent a way to work and contribute to the household income while still being able to look after her daughter. She worked as a homeworker for the next 20 years. Julie's main home-working job was making crackers. This involved lots of

paper, card and glue. Although the glue and 'snaps' were a health and safety risk, there was no health and safety information or training.

Pay was a cash-in-hand piece-rate of £35– 40 per cracker 'kit'. Kits contained 1,800 crackers and each took around 40 hours to make, giving a pay rate of under £1 per hour. A system of 'quality controls' also meant a kit could be rejected with no pay. There was no sick pay, holiday pay, maternity pay or pension contribution; there were no pay slips or written contract. The work was also insecure and irregular. She often ended up working until 2 or 3 in the morning and conscripting her husband and daughter to help her; she also worked through illness.

Julie was entirely unaware of her employment rights until she saw a piece in a newspaper on the national minimum wage (NMW). This prompted her to contact the National Minimum Wage enforcement body and, through it, the National Group on Home-working (NGH). With NGH's support Julie reported her case and confronted her manager. Under pressure, the employer brought in a 'fair estimate agreement'. However, the 12 1/2 hours per kit stated was so far off a fair estimate that Julie refused to sign. Julie is disappointed that nothing came of her reporting the company to the Minimum Wage Enforcement Unit. However, with the support of NGH she also put forward a tribunal claim and, after a year, was finally given a hearing. The firm settled out of court.

Case 7

(Taken from the report *Hard Work, Hidden Lives*, Commission on Vulnerable Employment, 2008)

Imran is 29, British-Bangladeshi and educated to NVQ Level 2. During a period when he was out of work and claiming Job Seekers Allowance, Imran was referred by Jobcentre Plus to an employment agency specialising in placing unemployed clients in work. Through them, Imran undertook a voluntary placement before being passed to the regular employment agency side of the operation. The employment agency found a job for him as a housekeeper and porter for a large public service provider. While he was employed, Imran mostly worked nights from 10:30pm to 5am. Imran's agency did not provide him with a uniform or health and safety equipment, so he paid for them himself.

Imran says that he enjoyed his job, worked hard and was informed by management that he was doing well and had a good chance of being asked to become a permanent worker. The problems began when Imran was not paid for two weeks' worth of work and also noticed that he had not received the premium rate he was due for working on public holidays. When he queried this, he was told by the agency that they did not have his clock-in card, which would have an electronic record of the hours he had worked, but that they would check his bank statements (which he provided) and get back to him in two days' time. For a few weeks he was told that he would receive a payment by the end of the week. However, despite Imran's repeated phone calls, the payments never came. Eventually Imran received a call from the agency to say that he had never been on their pay roll system, that they did not have his clock-in card or pay slips and that his employment had been terminated.

Imran claims that his agency co-workers were also being underpaid but did not speak up about it because they were afraid of being sacked. He thinks that the agency lost his clock-in card and pay slips and was trying to cover this up because they did not want to pay him what he was owed or to admit they had made a mistake. Imran also suspects that the incentive system in the agency's contract with Jobcentre Plus meant they were interested only in getting people into work and not in dealing with people's concerns once they were in the job. Not getting his proper pay was particularly difficult and stressful for Imran because he was already in a substantial amount of debt. He had to borrow money from his parents, brother and friends. Things got so tight that Imran's wife and daughter had to go and live with his in-laws in another city because he couldn't provide for them. He is upset that he cannot afford to visit them. The stress involved with his pay problems and dismissal has affected Imran's physical and mental health.

Analysis

Cases 6 and 7 represent situations of exploitation, where labour laws have been violated. They are by no means extreme situations of abuse, however the impact of violation is significant on the workers' lives and well-being. While they would be found further away from the extreme on the continuum, they represent crucial examples of systematic failures of enforcement of labour standards. As such, they demonstrate some of the underlying causes that create an environment permissible to forced labour.

All the above cases represent situations covered by the continuum. Moreover, in a number of the cases, the continuum reflects the situation of the individual over time. The concept of the continuum assists in identification of a remedy for each of these situations, by analysing the violations they have suffered. It also determines some of the underlying problems and contributing factors – such as the fact that some labour market mechanisms expose migrant workers to highly exploitative practices.

However, we need to remember that in practice concepts cannot be applied to human realities merely as theories sanitised of any complexities. No matter how harsh the situation and the conditions workers have to suffer are, they have and exercise their agency and should not be treated as passive victims, in particular in their claims for rights.

6. Conclusion and recommendations

The persistence of forced labour in the UK today suggests that a more sophisticated response is needed. Forced labour needs to be addressed through a multi-layered approach that joins labour and criminal justice responses and integrates the aspect of protection of human and labour rights into policy and practice. Policies should include a combination of criminal justice, labour market regulation and enforcement measures and enable the access of all those affected to remedies in both spheres as well. Labour justice should focus on enforcement of labour standards for all workers and restoring the imbalance of power that is created by the limited bargaining power and access to remedies of certain categories of workers.

The motivation, demand and socio-economic factors allowing the exploitation to happen need to be addressed too. That way we can come closer to resolving the underlying problem of impunity enjoyed by those who exploit and the ignorance of labour legislation and workers' rights. Exclusive focus on extreme situations ignores underlying causes of real situations, where the permissibility of lesser forms of violation ensures the existence of forced labour.

This paper examined various definitions and approaches to dealing with forced labour and the intricate reality of labour exploitation. It presents the argument that in order to understand and resolve situations of forced labour, these need to be grasped through the lens of a continuum – that not only subsumes all the various situations that occur on the axis from decent work to forced labour, but links them within the existing regulatory framework from which remedies can be derived.

The 'continuum of exploitation' is demonstrated here as a concept that could be beneficial for understanding the issue of forced labour and to advance responses in the UK. Application of the continuum to several cases related to the UK demonstrates how the broad spectrum of realities (including the dynamic nature of a situation of an individual) can be captured and addressed using the continuum. The concept offers itself to further testing as to the benefit to those affected by the various levels of exploitation.

The obvious benefit of this approach that broadens the scope of intervention into a multiplicity of remedies is somewhat obscured by the fact that some remedies are not accessible to people in certain positions (e.g. those in irregular situations). On the continuum, this demonstrates that unless some element of a particular situation falls under the realm of criminal law, the opportunity for justice is minimal and the problem persists.

If all workers were able to access employment law remedies, this might encourage more migrants to report forced labour cases. Consequently, if more employers were obliged by employment tribunals to pay penalties and unpaid wages, they would be deterred from involvement in exploitative practices in the first place.

It is important to acknowledge that in practice limited time and lack of information available about a specific situation can complicate a thorough assessment; the use of the continuum might also not be realistic or the most appropriate in certain

situations. The continuum approach is meant to inform policy, so that it takes into account all relevant contexts and interrelationships. This in turn would ensure that the derived practice is formed and framed by the concept of a continuum.

In the long-term, the introduction of the continuum and consequent application of a combined criminal and labour justice approach should ameliorate the systemic and causal problem – an outcome which an approach that focuses only on a small number of the most severe cases would struggle to achieve.

Recommendations

- The main recommendation of this paper is to ensure that forced labour in the UK is seen primarily as a labour market concern to which a combined labour and criminal justice approach is applied; and that this approach be developed using the concept of a ‘continuum of exploitation and interventions’ to ensure that the causalities and complexity of the whole exploitative environment is addressed.
- People affected by forced labour should be seen as workers, active players in the labour market, rather than passive victims. Workers that are vulnerable to forced labour should be empowered to act and supported by institutions through which they can claim their rights by lodging complaints.
- The new offence of forced labour should be robustly enforced. Comparative analysis of situations on the continuum should be considered as a method to define the situation of a particular worker. The German approach that compares one worker’s situation to another to identify the extent of violations is a useful example to reflect on.
- A system should be set up linking criminal justice and labour justice actors, so that the variety of situations found anywhere on the continuum are redressed. In practice, this would mean that if a worker is found not to be in forced labour, but s/he would still have a claim under other laws, s/he would be referred to the relevant actors for assistance.
- Conditions that prevent some exploited workers from claiming their rights, and are seen as conducive to forced labour, need to be changed in order to make the concept of a continuum usable in practice. In particular:
 - A labour market regulation approach needs to be embedded into responses and any regulations that create situations contributing to exploitation, such as the tying of work permits to a particular employer, reviewed.
 - The doctrine of illegality needs to be removed, to ensure access (including through regularisation) of all those affected by labour rights violations to employment tribunal remedies and to ensure punishment of rogue employers.
 - Those who inspect workplaces should be empowered: Labour inspection should be extended and the mandate should include investigation and prosecution of forced labour. This should also include

the extension of the remit of the Gangmasters Licensing Authority and its mandate to prosecute forced labour.

- In order to achieve these recommendations, a time-bound, national dialogue is necessary; led by the government and involving key stakeholders, particularly from government, including police and labour inspection agencies, business and civil society including trade unions and non-governmental organisations working on forced labour and trafficking. This should aim to ensure the establishment of efficient and effective systems and institutions to address the issue of forced labour in its entirety rather than the ineffective and piecemeal fashion which is currently exemplified by British policy and practice.

Notes

1. '[...]all work which is extracted from any person under the menace of any penalty for which the person has not offered himself voluntarily' (ILO 1930: Article 2(1))
2. See ILO (2004) *Human Trafficking and Forced Labour Exploitation: Guidelines for Legislators and Law Enforcement* in Anderson and Rogaly (2005) p.16.
3. There are a number of other international treaties that include articles on prohibition of forced labour or have relevant provisions included, such as the European Convention on Human Rights and the International Covenant on Economic, Social and Cultural Rights.
4. Convention No.29, Article 25.
5. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention on Transnational Organised Crime (2000)
6. The three elements of trafficking of adults, based on the definition of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, are: acts, means, purpose. Trafficking in persons is:
 - the action of recruitment, transportation, transfer, harbouring, or receipt of persons;
 - by means of the threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim;
 - for the purposes of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices, and the removal of organs.
7. Universal Declaration of Human Rights, Article 23 '(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work ... (2) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity'
8. Section 149 of the Brazilian Penal Code, quoted in ILO (2009a), p.14.
9. Ibid
10. 'Beggar' or 'begar' is a form of forced labour traditionally extracted by landlords in India, Nepal and Pakistan from women, children and old people, who must clean and feed animals, and clean the landlords' houses. Failure to do this work would lead to eviction.
11. ILO Global Alliance against Forced Labour, para. 13: 'Forced cannot be equated simply with low wages or poor working conditions. Nor does it cover situations of pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives'. ILO Human

trafficking and forced labour exploitation: Guidance for legislation and law enforcement, p.19 'Clearly, "forced labour" encompasses activities which are more serious than the mere failure to respect labour laws and working conditions. For example, the failure to pay a worker statutory minimum wage does not constitute forced labour. However, action to prevent the worker from leaving the workplace will normally come within the ambit of forced labour'. In ILO (2009b), p.43.

12. US Code, Title 18, Section 1589 Forced Labor

13. '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. 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, The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 2000)

14. Presentation at the conference of the *Alliance against Trafficking in Persons* on Human Trafficking for Labour Exploitation/Forced and Bonded Labour, Vienna 16–17 November 2006.

15. As quoted in ILO (2009b), p.58.

16. Payoke and Pag-Asa are NGOs active in anti-trafficking and assistance to trafficked persons in Belgium. They are two out of the three NGO service provision centres for trafficked persons officially recognised by Belgian ministerial decrees. For more information see www.payoke.be and www.pagasa.be

17. Presentation by Pag-Asa at the conference of the *Alliance against Trafficking in Persons* on Human Trafficking for Labour Exploitation/Forced and Bonded Labour, Vienna 16–17 November 2006.

18. French Penal Code, Section III, Working and living conditions which infringe human dignity, Articles 225–13, 225–14. English translation accessed at <http://www.equalrightstrust.org/view-subdocument/index.htm?id=67> on 25 July 2010.

19. German Criminal Code, Section 233, Human trafficking for the purpose of work exploitation. English translation accessed at http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P233 on 30 July, 2010

20. This offence applies in England, Wales and in Northern Ireland.

21. Crown Prosecution Service Guidance on the new offence.

22. Some analysts and experts, such as Beate Andrees, Petra Burcikova and Blanka Hancilova, have previously used the notion of a continuum when discussing the topic of trafficking in human beings and forced labour.
23. Impunity is generally defined as exemption from punishment. In this paper, impunity is understood as the absence of punishment or accountability for actions by those who impose forced labour or exploit workers. It reflects the reality described by many experts and practitioners where the enforcement strongly focuses on enforcement against illegal working, leading to expulsion of irregular migrants, rather than enforcement focusing on the very situation of exploitation – which would lead to uncovering the violation of labour laws and/or crimes such as forced labour.
24. All other things being equal – in the context of this paper, for the explanation of the concept of the continuum, all other factors (such as individual immigration status) that could interfere with the examination and determining intervention are ruled out.
25. The cases were obtained from legal representatives, NGOs, literature and personal contacts of the author. All persons concerned gave consent to use their stories. Details, such as names and locations, have been altered to protect the anonymity of the persons concerned.
26. A 'snakehead' is a type of Chinese gang involved in human smuggling.

References

- Allen, R., Beale, A. and Crasnow, R. (2007) *Employment Law and Human Rights*. Oxford: Oxford University Press
- Anderson, B. and Rogaly, B. (2005) *Forced Labour and Migration to the UK*. Centre on Migration, Policy and Society in collaboration with Trades Union Congress
- Andrees, B. (2008) *Forced Labour and Trafficking in Europe: How people are trapped in, live through and come out*. Geneva: ILO
- Andrees, B. and Besler, P. ed (2009) *Forced Labour. Coercion and Exploitation in Private Economy*. Geneva: ILO
- Besler, P. (2005) *Forced Labour and Human Trafficking: Estimating the Profits.*, Special Action Programme to Combat Forced Labour. Geneva: ILO
- Blanpain, R., Bisom-Rapp, S., Corbett W.R., Josephs, H.K, Zimmer, M.J. (2007) *The Global Workplace. International and Comparative Employment Law – Cases and Materials*. Cambridge: Cambridge University Press
- Commission on Vulnerable Employment (2008) *Hard Work, Hidden Lives: The Short Report of the Commission on Vulnerable Employment*. London: Trades Union Congress
- Cyrus, N. (2006) *Menschenhandel und Arbeitsausbeutung in Deutschland*. Geneva: ILO
- Dutch National Rapporteur on Trafficking in Human Beings (BNRM) (2007) *Trafficking in Human Beings. Fifth Report of the Dutch National Rapporteur*. Den Haag: BNRM
- Dutch National Rapporteur on Trafficking in Human Beings (BNRM) (2009) *Trafficking in Human Beings. Seventh Report of the Dutch National Rapporteur*. Den Haag: BNRM
- Human Rights Watch (2010) *From Tiger to Crocodile. Abuse of Migrant Workers in Thailand*. New York: Human Rights Watch
- International Labour Organization (2001) *Stopping Forced Labour*. Geneva: ILO
- International Labour Organization (2002) *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A)*, International Labour Conference, 90th Session. Geneva: ILO
- International Labour Organization (2005a) *A Global Alliance Against Forced Labour*. Geneva: ILO

International Labour Organization (2005b) *Human Trafficking and Forced Labour Exploitation. Guidance for Legislation and Law Enforcement*. Geneva: ILO

International Labour Organization (2006) *Decent Work: Objectives and Strategies*. Geneva: ILO

International Labour Organization (2007) *Report III (Part 1 B), General Survey concerning the Forced Labour Convention, 1930 (No.29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, International Labour Conference, 96th Session, Geneva

International Labour Organization (2008) *Forced Labour and Human Trafficking. Handbook for Labour Inspectors.*, Special Action Programme to Combat Forced Labour. Geneva: ILO

International Labour Organization (2009a) *Fighting Forced Labour. The Example of Brazil*. Special Action Programme to Combat Forced Labour. Geneva: ILO

International Labour Organization (2009b) *Forced Labour and Human Trafficking. Casebook of Court Decisions*. Special Action Programme to Combat Forced Labour. Geneva: ILO

International Labour Organization (2009c) *Operational indicators of trafficking in human beings: Results from a Delphi survey implemented by the ILO and the European Commission*. Geneva: ILO

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf

International Labour Organization (2010) *Concealed Chains. Labour Exploitation and Chinese Migrants in Europe*. Special Action Programme to Combat Forced Labour. Geneva: ILO

International Trade Union Confederation (2009) *How to Combat Forced Labour and Trafficking. Best practices manual for trade unions*. Brussels: ITUC

Malpani, R. (2006) *Legal Aspects of Trafficking for Forced Labour Purposes in Europe.*, Special Action Programme to Combat Forced Labour. Geneva: ILO

Nussbaum, M.C, (2007) *Frontiers of Justice*. Cambridge, USA: Harvard University Press

Organisation for Security and Cooperation in Europe (2006) *A Summary of Challenges Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region*. Vienna: OSCE

Ryan, B. ed. (2005) *Labour Migration and Employment Rights*. London: Institute of Employment Rights

Sen, A. (2010) *The Idea of Justice*. London: Penguin Books

Steinfeld, R. (2009) *Corecion/Consent in Labor. Working paper No. 66*. Oxford: Centre on Migration, Policy and Society, University of Oxford

Trades Union Congress (2006) *Tackling trafficking through workers rights: TUC response to the January 2006 Home Office consultation*. London: TUC

Conference presentations

OSCE Alliance Against Trafficking in Persons, High-Level Conference on Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Prosecution of Offenders, Justice for Victims, Vienna, 16–17 November 2006

ESRC seminar series on Unfree Labour, Political Economy Institute, University of Manchester, 2009–2010

Acknowledgements

The author would like to thank friends and colleagues who offered advice and helped develop thinking when conceiving this paper. In particular, thanks to Dr Blanka Hancilova and Dr Aidan McQuade.

About the author

Klara Skrivankova is Trafficking Programme Coordinator at Anti-Slavery International.