Recht doen of recht hebben: een analyse van de rechten van de migrant op bescherming door de staat tegen arbeidsuitbuiting

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Summary

Doing Justice or having Rights.
An analysis of the migrant's rights to state protection against labour exploitation

Introduction

Labour exploitation is a serious problem worldwide, also in Europe and in the Netherlands. There is a broad consensus that migrants are particularly vulnerable to labour exploitation. The book *Ganz Unten* (English translation: Lowest of the Low) by Günther Wallraff, published in 1985, is a denunciation of the exploitation of foreign workers in Germany at that time. Following the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Human Beings (Palermo Protocol) in November 2000, labour exploitation became a form of human trafficking. This has renewed attention for labour exploitation which until the adoption of the Palermo Protocol in international law was mainly addressed as a human rights issue. Over the past two decades, numerous reports by NGOs, articles by investigative journalists, and media coverage, have testified to the sometimes shocking conditions under which migrants work. Excessively long working days under enormous pressure to meet production or picking targets, rewards that are far below the minimum wage, and salary that is not or only partially paid, are just a few examples of such conditions.

The general approach towards labour exploitation nowadays is a criminal approach. However, criminal proceedings often take a very long time and the burden of proof is high. It is questionable to what extent criminal proceedings contribute to the protection of migrants and what migrants who have been victims of labour exploitation gain from the criminal prosecution and possible conviction of their employer. Therefore, the focus of this research is not on the perpetrators, but on the protection of the victims of labour exploitation.

The aim of the research is to provide an answer to the question: what rights vis-a-vis the State does a migrant have to protection against labour exploitation by his employer, in the EU and in the Netherlands in particular?

Defining labour exploitation

The concept of labour exploitation is not clearly defined. Labour exploitation is used as a container term for various abuses in work-related situations. In international law, other concepts are also used, such as human trafficking, slavery and practices similar to slavery, servitude, forced and compulsory labour. Much has been written about the question of what labour exploitation entails exactly. Opinions on this vary considerably; from situations where payment below the minimum wage is considered a form of labour exploitation, to reserving the term exploitation for criminal exploitation in the sense of human trafficking. In this interpretation, other abuses are qualified as bad employment practices. It is clear that two components play a role in defining the concept of labour exploitation: a form of bad and/or unequal treatment and a form of coercion. The scope of the concept of labour exploitation varies enormously on the basis of a broad or restrictive interpretation given to these components. In this study, to avoid discussion about the exact demarcation of situations which can classify as labour exploitation and which situations do not, an inclusive definition of labour exploitation has been chosen. Here, labour exploitation is defined as a situation in which there is poor treatment of a migrant worker in absolute or relative terms by local standards, regardless of the use of coercion.

Different approaches to combatting labour exploitation

Labour exploitation can be approached through different legal mechanisms. The delineation of what constitutes labour exploitation in these various approaches may differ. Furthermore, the response of the State towards perpetrators and victims of labour exploitation depends on the chosen legal discipline. If labour exploitation is defined as a criminal offence, labour exploitation is such a serious breach of the rule of law that it must be tackled through criminal law. The primary focus of a criminal approach is on the prosecution of the perpetrators. The rights of victims are subordinate to the criminal proceedings. In a human rights approach, the rights of the victim should be a central focus point. From a human rights perspective, it is emphasised that various human rights are violated in labour exploitation and all those rights should be taken into account. It is also possible to consider labour exploitation as a violation of norms laid down in labour law. Violations of labour law can be responded to by the State through administrative law. The purpose of labour law is to protect employees in general and to create a level playing field for employers. However, for an individual redress of a violation of labour law, the worker is normally expected to start a civil complaint procedure against the employer. Finally, labour exploitation and migration law are interconnected in different ways. Labour exploitation of migrants

can involve a breach of migration rules on entry into a country, the right to stay and the right to work. A breach of migration rules by the employer can lead to administrative or sometimes even criminal sanctions. However, a violation of migration rules can also have consequences for the migrant, such as the termination of lawful residence and expulsion. At the same time, the way migration is regulated can increase or reduce migrants' vulnerability to labour exploitation.

The role of the State in protecting against labour exploitation

Labour exploitation involves exploitation within an employment relationship between the migrant and the employer. The employer violates the rights of the migrant by, for example, paying him no salary or insufficient salary, by making him work (far) too long hours or by employing the migrant under unsafe working conditions. Ideally, if there is a conflict between an employee and an employer, the employee can submit a complaint to the civil court, which can decide the conflict with a binding ruling. This requires that an employee is aware of his rights, has knowledge of the legal system, and is not in a dependent position vis-à-vis the employer. In a situation of labour exploitation of migrants, it is precisely these requirements which are often not met. Research in the Netherlands, the United Kingdom and Ireland into the use of a civil claim for damages shows that this is route is hardly ever taken by victims of labour exploitation.

Because of the vulnerable position of a migrant worker vis-à-vis the employer, this study focuses on the role of the State in protecting the migrant from labour exploitation. Three different ways can be discerned in which the State can influence the relationship between the migrant and the employer. Firstly, the State can influence the position of a migrant worker by setting labour standards the employer should adhere to. Secondly, the State can offer protection to a migrant if those labour standards are violated by the employer. Finally, the State can also influence the relationship between a migrant worker and his employer by defining the residence rights of a migrant worker, the right to work and the right to social assistance. A migrant with strong rights in this respect is less dependent on an employer. This makes him less vulnerable to labour exploitation by the employer.

Rights of a migrant worker

This study focuses on what rights a migrant has to protection from labour exploitation. To this end, the concept of what constitutes a right is defined. Based on the definition of Raz, the right of a person presupposes a duty on someone else. This study concerns the rights of a migrant vis-à-vis the State.

However, the obligations of the State depends on the type of right. A right can entail an obligation to act, or an obligation to refrain from action. For this study, only the obligations to act are relevant. To differentiate between the various obligations, a typology of five rights has been developed. The first right is a *right to result*. A right can be defined as a right to result if the migrant's right involves a duty to act on the part of the State that guarantees the result. Secondly, if the duty of the State is limited to a best efforts obligation to enable and possibly facilitate the exercise of the right vis-à-vis another, this is called a *right to an obligation to make an effort*. Thirdly, a right to which conditions are attached, without the State having discretion to grant the right if the conditions are fulfilled, is labelled as a *conditional right*. Fourth, if the State has discretion not to grant the right despite fulfilling the conditions, this is indicated as a *conditional discretionary right*, or fifth, as a *discretionary right*, if no specific conditions have been set, but there is discretion to grant the right or not.

Rights in different legal disciplines

Rights are categorised in different fields of law. This also applies to rights in respect of protection against labour exploitation. Labour standards that apply to an employment relationship which give migrants the right to a certain treatment can be found in labour law. However, in principle these are rights of a migrant worker vis-à-vis his employer and should be enforced by the migrant worker himself in a civil law suit. As concluded before, this is a difficult process and one that is not used often. Labour standards can also be found in other jurisdictions. These are standards that are so fundamental that they are protected not only through labour law, but also in other legal disciplines. This study focuses on the rights of migrants vis-à-vis the State outside the protection of labour law. To this end, four legal disciplines are selected which could offer protection from the violation of labour standards by an employer. These are criminal law, human rights law, migration law for Union citizens, and migration law for third-country nationals. Criminal law contains a prohibition of labour exploitation as a form of human trafficking. In criminal law, the focus is on the perpetrator and rights of the victims are subordinate to the criminal proceedings. In human rights law, a broad range of different rights relevant to labour exploitation (like a prohibition of slavery, servitude, forced labour and human trafficking) and labour standards (like a right to equal pay) are listed. The content of these rights is not always clear, nor are the possibilities to enforce these rights and the obligations of the State deriving from these rights. Migration law for Union citizens defines the right to work in other EU Member States and the conditions under which EU citizens can work in other Member States. Migration law for third-country nationals in the EU is also predominantly EU migration law. It consists of a range of direct-

ives and regulations laying down rules for getting access to the EU territory, for acquiring a right to residence for different purposes and work in the EU, and rules for the return to a country outside the EU. Furthermore, migration law for third-country nationals contains some standards for treatment of these migrants in labour situations. These rights of EU migration law for EU citizens and third-country nationals can influence the position of a migrant worker vis-à-vis his employer in an EU Member State.

Structure of the study

This thesis is based on four articles which discuss the possibilities for the protection of migrants against labour exploitation in the four legal disciplines mentioned above. These articles form the basis of Chapters 2 to 5. For each legal discipline, an inventory is made of which labour standards are included and how these standards are interpreted. Furthermore, for each discipline, the obligations of the State to protect compliance with the standards are discussed and the rights a migrant can derive.

In Chapter 6, the various rights of migrants in the four legal disciplines are compared and analysed based on the division of the three different ways a State can influence the migrant worker/employer relationship. The first category of rights relates to labour standards themselves. These entitle a migrant to a certain treatment by his employer in an employment relationship. The second category of rights relates to the right to residence, access to social assistance, and the right to work. A migrant with strong rights in these areas is less dependent on his employer and therefore less vulnerable to exploitation by this employer. The latter category consists of rights that a migrant has if the labour standards, which are included in the first category, have been violated. The rights are evaluated as rights towards the State. They are classified based on the typology of rights listed above.

Chapter 7 provides an answer to the research question and a final conclusion.

Protection against labour exploitation in human rights law

Human rights law consists of a wide range of instruments and contains the broadest set of labour standards of the four legal disciplines. The various instruments belonging to this area of law provide, on the one hand, for standards prohibiting a form of labour exploitation (slavery, practices comparable to slavery, servitude, forced labour and trafficking in human beings). In this respect, three sources of law have been evaluated specifically. These are Article 4 of the European Convention of Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR), the prohibition of

forced labour as laid down in the ILO C029 – Forced Labour Convention, 1930, and the P029 Protocol of 2014 to the Forced Labour Convention, and finally the Council of Europe Convention on Action against Trafficking in Human Beings (ECTHB). The different instruments and concepts clearly mutually influence each other. Furthermore, the definition of human trafficking in the ECTHB is modelled on the definition of this concept in the Palermo Protocol. However, the demarcation of the content of the various forms of labour exploitation in these different instruments is not unambiguous. Common factors are that a minimum level of severity of maltreatment is necessary to qualify as a form of labour exploitation and that some form of coercion is exercised. Coercion can entail a form of physical or psychological violence, but also deception or abuse of a vulnerable situation.

On the other hand, human rights instruments provide for several norms relating to a right to a certain treatment in an employment relationship, like favourable labour conditions or a right to equal payment and equal treatment. Relevant instruments in this respect are the ILO C111 – Discrimination (Employment and Occupation) Convention, 1958, the International Covenant on Economic, Social and Cultural Rights and the recommendations of the Committee on Economic, Social and Cultural Rights (CESCR), and the European Social Charter and rulings from the European Committee for Social Rights. For a violation of these rights, no specific minimum level of severity is required, nor the use of a form of coercion. Although these rights to a particular treatment in an employment relationship are prima facie formulated in clear language, the scope of these rights is limited.

In respect of the second category of rights (residence, access to work and social assistance), human rights law does not provide for strong rights for migrant workers. The right to compensation as laid down in the ECTHB is closest to a right to result. With a few specific exceptions, the granting of a right of residence, a right to work and a right to assistance, falls within the competence of the State.

Also, the rights vis-à-vis the State that can be derived from human rights instruments in the event of a violation of labour standards are limited. Here again, a distinction must be made between the prohibition of different forms of labour exploitation on the one hand, and the labour standards which formulate a right to a certain treatment on the other hand. In respect of the prohibition of different forms of labour exploitation as listed in Article 4 ECHR, some rights can be distilled from the case law of the ECtHR. These rights mainly centre around criminal investigation and prosecution. Also, a right to compensation and back pay can be derived from the case law of the ECtHR. The ECtHR refers in this respect to the ECTHB, which also provides for a right to compensation. The ILO 2014 Protocol likewise contains an obligation to compensation by the perpetrator. A right to residence and social assistance is only explicitly addressed in the ECTHB. The obligations contained in these instruments can be understood as a right for the victim. However, only the right

to compensation as formulated in the ECTHB can be understood as a right to a result. The right to residence can be qualified as a right to result in respect of the reflection time. In regardd of the subsequent right to a residence permit, the State is left some discretion. Furthermore, it is not regulated how these rights can be enforced if the employer or the State does not comply with these obligations. Possibly, a complaint to the ECtHR, who referred in respect of the protection of victims to the ECTHB, could be used to enforce compliance with the obligations of States under the ECTHB.

Human rights instruments which address labour standards that give rights to a certain treatment do not contain specific rights in case of a violation of these rights. According to the recommendations of the CESCR, workers are entitled to compensation by the State if their rights to equal or fair treatment is violated. However, the way to enforce these rights vis-à-vis the State remains unclear.

Protection against labour exploitation in criminal law

In criminal law, labour exploitation is a form of human trafficking. The definition of human trafficking in the Palermo Protocol has served as a model for the concept of trafficking in human beings, not only in the ECTHB (as mentioned above), but also in the EU Trafficking in Human Beings Directive (EU THBD). This has resulted in a more uniform legislation in regard of labour exploitation as a form of human trafficking in the national law of the EU Member States. Furthermore, the Palermo Protocol definition has also inspired the ECtHR via the definition in the ECTHB in its interpretation of Article 4 ECHR. This may eventually lead to a more unambiguous interpretation of this concept within Europe and the EU. At the same time, this also entails a risk that the demarcation of situations that fall under labour exploitation will be limited to the possibly stricter interpretation in criminal law and that the focus in combatting labour exploitation will be concentrated on the criminal law approach. This is already visible in the case law of the ECtHR and may limit the rights of victims of labour exploitation.

The interpretation of what is understood by labour exploitation as a form of the criminal offence of human trafficking, can be found in national criminal case law. In Dutch criminal law, two different forms of labour exploitation can be found. One is based on the definition of human trafficking in the Palermo Protocol and the EU THBD. The other form is based on a national definition of what labour exploitation as a form of human trafficking constitutes. In both variants, the level of exploitation must satisfy a certain degree of severity. Over the years, the Dutch courts have established criteria for determining this level of severity. These criteria concern the nature and duration of the employment and the benefits that the exploitation brings to the employer. The use of a form of coercion is also a necessary condition for

both forms of criminal labour exploitation. In Dutch case law, the coercive means of deception or abuse of a vulnerable position is adopted in most cases. In this respect, circumstances which are related to the situation of a migrant worker play an important role, like a weak residence status or irregular stay, lack of knowledge of the Dutch language, norms and rules, and social isolation.

In the Netherlands, of the four jurisdictions compared, criminal law offers the most protection in the event that the norm (human trafficking) has been violated. In addition to a residence scheme for a maximum period of three months, which serves as a reflection period to report human trafficking, the Netherlands has a residence scheme that is linked to the criminal proceedings. This can be seen as a right to result insofar as criminal proceedings are initiated and for the duration of the proceedings. However, from a human rights point of view, this link to the criminal process is questionable and seems to make this right more or less discretionary, because a migrant is dependent on the will and possibility of the authorities to start criminal proceedings. The Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) has repeatedly rebuked the Netherlands with regard to linking the right of residence to criminal prosecution. Furthermore, a victim has the right to claim compensation in the context of criminal proceedings. If compensation is awarded, normally the State will assume the offender's obligation to compensate. A right to compensation can in this regard be classified as a right to result. However, again, this is also a discretionary right, because the court can deny the claim for compensation because it is considered a disproportionate burden on criminal proceedings. Furthermore, it is not clear on the basis of what criteria the court determines the amount of damages.

Protection against labour exploitation in migration law for Union citizens

Union citizens can work in another EU Member State based on three different legal regimes. These are the right to freedom for workers, the right to freedom for self-employed persons, and the right to freedom to provide services. The freedom to provide services is mainly important in respect of posted workers, who are working for an EU company and providing a service in another EU country. The labour standards and rights applicable to Union citizens are different for these three legal regimes. Compared to the other jurisdictions, the applicable labour standards for EU workers are the most comprehensive. They have a full right to equal treatment with the citizens of the host Member State. EU self-employed people also have a full right to equal treatment, but the basic principle for the self-employed is that they themselves are responsible for the conditions under which they work. This is only different if there is a question of false self-employment. In that case, labour standards applicable to EU workers should apply. For posted workers, equal treatment is limited

to a list of basic working conditions contained in the revised Posting of Workers Directive.

If there is a breach of standards for EU workers and self-employed persons, the State has no specific obligations to assist EU citizens on the basis of free movement legislation for Union citizens. Union citizens are also equal to citizens of the Member State in that respect and are presumed to be able to regulate protection themselves. However, practice in the Netherlands and in, for example, the United Kingdom and Ireland, shows that little use is made of national possibilities for claiming back payment of arrears of wages. These procedures do not seem to be effective remedies for migrants. With regard to posted workers, the Posting of Workers Directive 1996 includes (and retains in the revised Directive) the obligation that States must allow access to procedures in the event of a breach of the standards by the employer. This obligation is further elaborated in the Enforcement Directive. However, a complicating factor in enforcing labour standards is that the formal employer is primarily liable. Since this is the foreign employer who is not established in the country where the work is carried out, there is always a cross-border element – both if proceedings are initiated in the country where the work was carried out, and in the event that a claim is brought in the country where the employer is established or in the country of origin of the posted worker.

Union citizens have strong rights to access to employment and residence. As legally resident workers or self-employed persons, they may also claim equal treatment in the field of social assistance. However, the right of residence is linked in the first years to the maintenance of the status as an employee or self-employed person. The criteria for maintaining the status as an employee or self-employed person are not completely clear. This limits the protection they can derive from this right.

The position of an EU posted worker is less favourable in all areas. Not only does he not enjoy a full right to equal treatment, his residence position in the host Member State is also linked to the length of service and he is not entitled to social assistance in that Member State.

Migration law for third-country nationals

For most third-country nationals (TCNs), migration legislation includes standards for equal treatment with regard to basic working conditions. However, labour standards do not apply equally to all categories of TCNs. Most TCNs with a residence permit are entitled to equal treatment as regards basic working conditions. This applies to TCNs with a residence permit on the grounds of asylum, family reunification, a form of employment or as long-term residents. For some groups of TCNs, this standard does not apply on the basis of migration law. This concerns TCNs who are staying unlawfully or who are lawfully staying but are not allowed to work, who are in the EU on the basis

of a short-stay visa, or who are staying in the EU for a maximum of six months. In addition, this right does not apply to au pairs and trainees who do not work on the basis of an employment contract.

For migrants without lawful residence, two other standards could be derived from the Employers' Sanctions Directive. These are a right to salary based on the applicable collective agreement or minimum wage and a prohibition of work-related exploitation. The latter standard is linked to the concept of trafficking in human beings, but there is no case law to explain the exact boundaries of this concept.

The rights of TCNs to residence, access to work, and to social assistance are differentiated, but overall weak in comparison with EU citizens. Access to a first right of residence for all categories of TCNs depends on the fulfilment of different conditions. For TCNs residing unlawfully in the territory of the EU, it is particularly difficult to obtain a legal right of residence under EU law. This makes them dependent on an employer. Asylum status holders and long-term residents have the strongest rights, both in terms of protection against loss of the right of residence, as well as in terms of access to employment and the right to social assistance. This strengthens their position vis-à-vis an employer. As a rule, family migrants do have access to work. Recourse to social assistance can have consequences for the right of residence of family migrants. TCNs with a work-related residence permit are dependent on keeping their job for the continuation of their right of residence. The residence status of seasonal workers is weaker than that of other TCNs residing in a Member State on the basis of an employment permit.

When it comes to protection in the event of a violation of the labour standards enshrined in migration law for TCNs, the picture is also diffuse. For TCNs who do have a right to equal treatment, migration law does not provide for specific protection in the event of a breach of that standard by the employer. They are dependent for protection on the facilities that are also available to the State's own citizens. However, the protection for back payment to unlawfully staying TCNs goes further. To facilitate proof of the duration of the work, the Employers' Sanctions Directive assumes a reversed burden of proof. In principle, it is assumed that an unlawfully staying migrant has worked for a period of three months, unless the employer or the migrant can prove otherwise. Furthermore, this right potentially goes beyond the right to compensation in criminal proceedings, since a standard for the amount is given, based on the amount which the employer would have paid if the migrant worker had legal residence. If a victim of work-related exploitation cooperates in the criminal proceedings, he may be granted a temporary right of residence for the duration of the criminal proceedings. The State has an obligation to use its best efforts to facilitate access to this right, but States have no obligation to guarantee the right. The Seasonal Workers Directive also provides for some extra protection. These rights have been incorporated to compensate for their weaker residence position. Seasonal workers who lose

their work and right of residence as a result of a breach of migration rules or other rules by their employer, are entitled to payment of the salary they would have earned over the remaining period. This is a right vis-à-vis the employer. The Directive does not provide for a mechanism obliging the State to guarantee payment to the seasonal worker in the absence of compliance with this obligation by the employer.

CONCLUSION

States can offer different forms of protection to migrants against labour exploitation by employers. Firstly, by strengthening the position of migrants in respect of a right to residence, access to work and a right to social assistance. Secondly, by setting labour standards employers should adhere to. Finally, they can offer protection when labour standards are violated. The aim of this study is to identify the rights of a migrant vis-à-vis the State in respect of these three areas.

Human rights law does not provide for (strong) rights to migrants in respect of residence, work or social assistance. Although EU workers and EU self-employed workers have strong residence rights, during the first years of residence, their right to residence and access to social assistance is dependent on being employed. This can contribute to their vulnerability to labour exploitation. TCNs without legal residence or with a weak residence right are also prone to exploitation. However, in respect of the possibility to strengthen the position of a migrant vis-à-vis the employer, by giving the migrant strong rights to residence, access to work and to social assistance, the importance attached to controlling migration by EU Member States limits the possibilities for strengthening the rights of migrants.

There is a large degree of overlap between the four legal disciplines with regard to the standards that must be observed in an employment relationship. The prohibition of labour exploitation in various forms is included in several human rights instruments, criminal law and migration law for third-country nationals. This is not surprising, considering these norms are fundamental human rights. Furthermore, the right to equal and favourable working conditions can be found in human rights law, free movement for Union citizens and migration law for TCNs. These standards, drawn from human rights treaties and Union law, are applicable in all Member States of the EU. The rights of some categories of migrants are less favourable. In respect of free movement of Union citizens, the same labour standards do not fully apply in the case of posted workers. In migration law for TCNs, labour standards for illegally staying migrants and some categories of short-stay migrants are less favourable than for the other categories of TCNs and nationals of the Member State. However, the exclusion of these categories of migrants from

the right to equal working conditions is contrary to the right to equal treatment as laid down in various human rights instruments.

When it comes to migrants' rights to State protection from employer labour exploitation, the picture is nuanced. There is a clear dichotomy between the two categories of norms: on the one hand, the more serious forms of labour exploitation such as trafficking in human beings, forced labour, servitude or slavery and, on the other hand, the standards relating to certain working conditions. Both human rights law and criminal law include rights with regard to compensation, residence and social assistance in the event of violation of the relevant standards. These rights are formulated in part as a right to result or a conditional right. The enforcement of rights through human rights instruments is less well regulated. As noted earlier, filing a complaint with the ECtHR may be a means to improve enforceability. Protection in the event of violation of the other standards is less well or not elaborated. The rights that migrants have under human rights law are fragmented across different instruments. They are often formulated not as a highly enforceable right of the migrant, but as a call for States to facilitate rights. With a few exceptions, migration law instruments do not include any specific rights to protection of the migrant in a situation where labour standards have been violated. This means that migrants are often dependent on national facilities and procedures, which are difficult to access.

This great disparity in protection connected to the two different types of labour exploitation is undesirable for several reasons. Firstly, given the difference between the rights linked to these two types of labour standards, the importance of being included among the more serious forms of labour exploitation is high. This can put enormous pressure on the criminal procedure. Secondly, where rights are linked to criminal proceedings, this also means that in order to realise the rights, every victim must be included in a case. This can seriously complicate and delay the proceedings. Thirdly, there is no hard dividing line between serious labour exploitation at one hand and violations of other labour standards at the other hand. In this situation, it is difficult to justify to make this hard distinction in granting rights in case of a violation of labour standards. A more coherent approach to labour exploitation in all its forms could be achieved by decoupling rights to protection in a situation of labour exploitation from criminal proceedings. This would create more options for a migrant to realize his rights.