Working prisoners are trapped in state-mediated structures of exploitation; using them only to fill Brexit labour shortages is a bad idea

Following recent calls for prisoners to be used to fill labour shortages caused by Brexit, **Virginia Mantouvalou** *discusses key legislation around this question. She explains how prisoners – both in the UK and elsewhere – are excluded from protective rules, including those pertaining to wages, workers' rights, and tax and social insurance contributions.*

It was recently reported that the Association of Independent Meat Suppliers was in discussions with the Ministry of Justice, exploring how prisoners could be used to cover labour shortages. The scheme under which this could be done is the 'Release under Temporary License', which permits certain categories of prisoners to work. Another group of prisoners who could work in this context are those coming towards the end of long sentences and who have been idle while in prison.

Work in prison is not part of prisoners' punishment: the European Prison Rules explicitly say that '[p]rison work shall be approached as a positive element of the prison regime and shall never be used as a punishment'. It is typically justified on the basis of other reasons. It is said that it can promote reintegration in society by teaching prisoners new skills and improving their employability, which can also reduce reoffending. It can provide them with income to support their dependents, cover personal needs (such as buying phone credit), and make life less monotonous. Nevertheless, work in prison is often compulsory. A Council of Europe survey that looked at 40 member states found that in 25 of those prisoners are required to work at least in certain circumstances. Those who refuse to work may be sanctioned with reduced visits from friends and family, reduced television or gym time, less or no income and even solitary confinement.

State-mediated structures of exploitation

While real work in prison can be beneficial, working prisoners are trapped in state-mediated structures of exploitation: the state has a major role to play in creating and perpetuating workers' vulnerability by excluding them from protective laws. Prisoners are a vulnerable group, as the European Court of Human Rights has repeatedly ruled, and the authorities have a duty to protect them. That the state creates further vulnerability by excluding them from labour rights should be scrutinised carefully.

In the UK more specifically, the National Minimum Wage Act 1998 excludes working prisoners from its scope. In a report of the Howard League for Penal Reform, it was documented that the average pay for prison service work is £9.60 per week, while it has also been reported that some prisoners work up to 60 hours per week. Certain private companies pay about £2 per hour for prisoners' labour. The Prisoners' Service Order 4460 says that prisoners who work for outside employers doing a job that is not in the voluntary or charitable sector have to be paid at least the minimum wage. The distinction between work in prison and work outside prison is not justified though. Private employers get prisoners to work for them in prison, and avoid in this way their obligations to pay the minimum wage (see further here).

The vulnerability of working prisoners is further compounded by the fact that they would most probably not be viewed as working under a contract of employment. As a result, they may be excluded from other protections. The issue was discussed in a UK Supreme Court decision, where it was pointed that the relationship of the working prisoner and the prison authorities differs from an employment relationship: prisoners do not work on the basis of contract, but because they have been sentenced to imprisonment, and are only paid nominally. However, these features 'rendered the relationship if anything closer than one of employment: it was founded not on mutuality but on compulsion'.

The element of compulsion that the Court recognised makes working prisoners more vulnerable to exploitation than other workers and should ground full protection of labour rights. Moreover, there should be scope for recognising an employment relation for prisoners who are employed *voluntarily* and not under the threat of sanctions.

Are the exclusions justified?

Date originally posted: 2021-09-27

Permalink: https://blogs.lse.ac.uk/politicsandpolicy/prisoners-labour-shortages/

Blog homepage: https://blogs.lse.ac.uk/politicsandpolicy/

Some may think that these exclusions of working prisoners from protective laws are justified because they should contribute to the cost of the running of the facilities. Yet the work that prisoners do often consists of much more than that: it can involve long working hours, the quality of the work does not support their reintegration (prison labour often consists of cleaning, cooking and other work towards the maintenance of the facilities; other times it involves boring and monotonous work for private employers) while private firms make profit from this situation. The fact that this work is linked to structures of exploitation from which profit-making organisations benefit must make us question this supposed justification.

There is another crucial issue. These structures of exploitation are connected to precarious work prisoners find themselves in after they leave the criminal justice system. It has been observed by Erin Hatton that those who have worked in prison 'come to expect – and sometimes embrace – low-wage precarious work outside prison'. In addition, they also face serious obstacles when attempting to find better work because of their criminal record. What we see is that the structure of exploitation in prison extends to structures of exploitation after prison.

Human rights for working prisoners

The exclusions of working prisoners from labour rights may also violate human rights law. One problem, though, is that even in human rights law we find exclusions of prison labour. This includes Article 4 of the European Convention on Human Rights, which prohibits slavery, servitude, forced and compulsory labour. The International Labour Organisation (ILO) draws a distinction between private and public prisons in the Forced Labour Convention No 29 of 1930. It excludes prison work from its scope when it is performed in state prisons, but includes privately-run prisons.

The exclusions of working prisoners from human rights may have seemed acceptable when these legal documents were adopted, but they are not acceptable anymore. The ILO examined in 2007 whether prison labour for private employers complies with the Forced Labour Convention. It said that what is needed is the formal, written consent of the prisoner and working conditions similar to a free labour relationship for labour to be voluntary.

The ECtHR examined prison labour in a case that involved affiliation of working prisoners with an old-age pension system. The finding of the majority was disappointing, as it ruled that lack of affiliation with a pension scheme does not render a prisoner's work forced labour or violate their right to property and the prohibition of discrimination. However, there were powerful dissenting opinions. Judge Tulkens highlighted:

> [C]an it really still be maintained in 2011, in the light of current standards in the field of social security, that prison work without affiliation to the old-age pension system constitutes work that a person in detention may *normally* be required to do? I do not think so. This, in my view, is the fundamental point. Nowadays, work without adequate social cover can no longer be regarded as normal work. It follows that the exception provided for in Article 4 § 3 (a) of the Convention is not applicable in the present case. *Even a prisoner cannot be forced to do work that is abnormal*.

Such opinions should form the basis for the development of the law in the future.

Captive labour and a continuum of exploitation

I want to point to a continuum of exploitation here. I recently wrote on unpaid work requirements that are imposed on certain offenders and managed by profit-making organisations, and on work in immigration detention, arguing that the exclusion of working offenders and immigration detainees from labour rights is not justified. If we take these examples together, we see that the state creates and sustains a *continuum* of structures of exploitation. It systematically increases the vulnerability of captive labour, through legal rules that exclude workers from legal protections. This is not acceptable.

Frances Crook of the Howard League for Penal Reform was right in her recent powerful piece in the Guardian. She explained that prisoners can work for private companies and that this can be valuable for them and for society at large. But for prison work to be fair, radical change is needed: prisoners have to earn real wages, have workers' rights, and pay tax and social insurance contributions. It is only through radical change of the legal framework on working prisoners' rights that their recruitment by private companies can be acceptable. Without that, the authorities will be playing a major role in structures of exploitation and violate the human rights of working prisoners.

Date originally posted: 2021-09-27

Permalink: https://blogs.lse.ac.uk/politicsandpolicy/prisoners-labour-shortages/

Blog homepage: https://blogs.lse.ac.uk/politicsandpolicy/

Note: a longer version of the above was first published on the UK Labour Law Blog.

About the Author

Virginia Mantouvalou is Professor of Human Rights and Labour Law at UCL, Faculty of Laws. This piece is based on her project 'Structural Injustice and the Human Rights of Workers' which is funded by the British Academy through a Mid-Career Fellowship. Her book on the topic will be published by Oxford University Press in 2022.

Photo by Carles Rabada on Unsplash.

Date originally posted: 2021-09-27

Permalink: https://blogs.lse.ac.uk/politicsandpolicy/prisoners-labour-shortages/

Blog homepage: https://blogs.lse.ac.uk/politicsandpolicy/