



# DEVELOPMENTS IN TRAFFICKING IN HUMAN BEINGS FOR THE PURPOSE OF LABOUR EXPLOITATION AND FORCED LABOUR

*Vít Střítecký, Daniel Topinka et al.*



With financial support from the Prevention of and Fight  
against Crime Programme of the European Union  
European Commission - Directorate-General Home Affairs



With financial support of Foundation Open Society Institute



Discovering  
Trafficking



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INSTITUTE  
OF INTERNATIONAL RELATIONS  
PRAGUE



*Vít Strítecký, Daniel Topinka et al.*

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IN HUMAN BEINGS FOR THE PURPOSE  
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Prague 2013



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# INTRODUCTION

*Vít Střítecký, Daniel Topinka, Irena Ferčíková Konečná*

Presented monograph is concerned with the important present legal topic that is the area of human trafficking for the purpose of other forms of exploitation and forced labour. According to the report of International Labour Organization (ILO, 2012) in 2012 20.1 million people on the Earth were the victims of forced labour. This methodologically sophisticated statistic (ILO, 2012b) of “modern day slavery” includes also the cases of human trafficking for the purposes of forced labour and sexual exploitation. Closer look at the above mentioned number indicates that globally speaking approximately 3 people out of every thousand work under threat or pressure in conditions similar to slavery. The latest ILO methodology does not specifically categorize the cases of human trafficking; however, the last global report issued in 2005 mentioned 12 million victims of forced labour in total, from which were 2.4 million subjected to direct trafficking (ILO, 2005).<sup>1</sup>

Depicting the situation in the Czech Republic and other countries of the EU in this book is illustrative of the fact, that forced labour, often interconnected to the human trafficking, is not the prerogative of the developing world. Although the ILO statistics (ILO, 2012: 15–16) is dominated by the Asian-Pacific region (56%), followed by Africa (18%), we could still find approximately 1.5 million of forced labour workers in the developed countries and the EU. From the statistics can be deduced that more than 90% of present day slaves are being exploited within the private sector. Out of this number, approximately one fourth of all cases is sexual exploitation and the rest are victims of forced labour in traditional sectors such as agriculture, construction, production or housework (ILO, 2012: 13–14), which are the major topic of this book. Without looking at discussions questioning the relevance of the above mentioned numbers, it is clear that the phenomenon of forced labour and the interconnected human trafficking requires the attention of civil service of each individual states, as well as, the international organisations.

The analyses of human trafficking in Europe (Ruggiero, 1997; Friesendorf, 2007; Picarelli, 2009) indicate that human trafficking is generating profits irrespective of the employment choice of the trafficked persons. In the context of these cases, the activities of official, semi-official agencies or of unambiguously criminal groups, were proven and frequently all the parties were interconnected. Human trafficking and illegal often forced labour, affected also the important European companies working in the field of textile industry or in the construction industry. These large groups were not participating directly in semi-legal and in the vast majority of cases purely illegal activities, they were doing so through various smaller sub-contracting companies, which were not included in the control mechanisms of established companies. In the end, the illegal activity connected to human trafficking and forced labour affected also the parties with higher ethic and

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commercial standards, which is indicative of the depth and complexity of the whole issue (Ruggiero, 1997: 241–242).

In the context of the relative growth of human trafficking in the past two decades, which is connected to the growing political and economic interconnecting of the different parts of the world; there was also the rise in the activity of the national and international parties in the area of fighting against this phenomenon. The key role in this field is played by the parties working in the law-enforcement agencies, whose goal is the prosecution of the human traffickers and the organizers of the forced labour; the protection of the victims of this kind of criminality and last but not least the prevention of this activity. The character of the human trafficking and extended criminal activities indicates the need of a broad range view of law-enforcement agencies. Aside from the key law-enforcement representatives considered as traditional, such as armed services, police, border service or immigration service, there are included also representatives from the area of justice, the agencies responsible for the control of the armed services or lately emerging private law-enforcement agencies (Friesendorf, 2009). This book is trying to show that different, but still important role is played by the governmental and above all by non-governmental institutions, which offer consulting, social services and protection to the victims. Aside from the traditionally viewed coercive parties it is necessary to understand the importance of non-coercive parties.

It is the activity of non-coercive parties that can be important from the view of overcoming the reluctance or the fear of victims to share their story and help to reveal the specific criminal activity. The cases of trafficking in human beings for the purpose of forced labour are not the example of “criminality without victims”, which is typical for example the area of the illegal drug market, where nor seller nor buyer do not have the motivation for contacting the police. In a broader view, this fact indicates a big problem, which are inherent to the data collection from trafficked persons. Although, it is without a doubt a global phenomenon (UNODC, 2006), some states undoubtedly deliberately reduce the extent of this issue for the purposes of improving their own image or because they don’t have effective capacities allowing to map this phenomenon. The groups of experts are forced by this to rather extrapolate the verifiable data.

The important point of this publication (that needs to be emphasized right at the beginning) is its focus on the area of trafficking in human beings for the purposes of forced labour and other forms of exploitation. According to the above mentioned UNODC Report (2006: 6) approximately 79% of recorded cases connected to sexual exploitation, have been for a long time de facto considered the same as the issue of trafficking in human beings (Bellak in this book). In recent years well-deserved attention devoted also to the forced labour, according to UNODC (2006:6) 18% share in the cases of trafficking in human beings. Despite of this fact, compared to the sexual exploitation the issue of forced labour is still one of the least explored areas, such as servitude and forced marriages, organ removal and exploitation of children for the purposes of begging, sex work or warring.

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These fundamental safety and human rights issues are not overlooked by the EU, which in 2011 accepted The Regulation of prevention in trafficking in human beings, the fight against it and of child protection (EU Regulation, 2011). This Regulation, will be implemented in the near future into the national laws, reflects the long-term direction of the EU politics in this area defined in the Stockholm programme (Stockholm programme, 2009). In agreement with the Stockholm programme, the EU is trying to apply the holistic perspective on the prevention, child protection, and persecution of criminals and development of the partnership among the individual national and international parties that are involved in this area. The key point of the strategy of the EU is also the focus on the human rights standards connected to this type of criminality.

A part of the broader European initiatives is also a programme of La Strada Czech republic, o.p.s. (further on abbr. La Strada CZ), which initiated the project called, “Discovering the trafficking in human beings for the purposes of forced labour and labour exploitation” is the only non-governmental non-profit organisation in the Czech republic that explicitly specializes in the issues of trafficking in human beings. La Strada CZ offers its services to trafficked and exploited persons; it is concerned with the prevention and education about the phenomenon of trafficking in human beings. It also tries to protect the rights of trafficked and exploited persons by lobbying and legal activities. La Strada CZ is a member of the group La Strada International, which is the leading European framework trying to fight against trafficking in human beings through consistent use of human right principles. This book was created as the part of the project that was based on three pillars. It combined (1) the work of non-profit organisation that through strategically placed advocating of trafficked persons tested the obstacles that in practice prevent the trafficked persons from access to justice, with (2) the analytical activity of the public service organ, which creates and coordinates the politics of the fight against trafficking in human beings, as well as the education of judges and state representatives through (3) the Academy of Justice, whose goal was to mediate the latest findings obtained through the project to these experts. The presented publication is trying to mediate the conclusions of first two pillars of this project – strategically advocating and legal analysis.

This publication is built on the multidisciplinary methodological approach that allows the realisation of its major goals. First of all, it offers in the first chapter the comprehensive presentation about the development of the concept of trafficking in human beings. Within this context, it points out to the sizeable diversity of different forms and types of trafficking in human beings that concerns various legal or illicit sectors, while it pays attention to the latest trends, and experiences. Within the scopes of the discussions about the definition and concept that are going on among experts, policy makers, and practitioners, it represents many dilemmas, which at least partial solution is the requirement of effective international collaboration, in the area of the fight against this phenomenon. Aside from the illustration of an emerging discourse connected to the issues of trafficking in human beings, the chapter clearly points out many areas that give the space to conceptual and practical inputs from all

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relevant participants, mainly in the area of human rights within the scope of this phenomenon.

While the first chapter offers the necessary context of current discussions about the concept in the area of trafficking in human beings, the second chapter includes unique comparative analysis of legal regulation and case law in the area of trafficking in human beings, for the purpose of labour exploitation. For this analysis was collected data and case law from nine European countries (incl. Czech Republic), which represents interesting and sufficiently variable sample. Before the analysis of received case law itself, the chapter is focused on the comparison of individual national legal regulation based on key terms connected to the issue of labour exploitation. The result of the research is not only the identification of legal differences in theory or application, but also the formulation of specific legal and executive actions, which should make the running of Czech legal and law-enforcement systems more efficient in this area.

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# NEW DEVELOPMENTS IN THE CONCEPTUAL DISCUSSION OF TRAFFICKING IN HUMAN BEINGS

*Blanka Bellak*

## Abstract

This chapter deals with the development of the discussion of trafficking in human beings. Since 2000, when the UN Trafficking Protocol was adopted, trafficking has become an umbrella term for a wide range of forced and exploitative labor practices. Today, there is greater awareness of the diversity of forms and patterns of trafficking in human beings into various legitimate and illicit sectors (UNODC, 2012d: 16). There is ongoing discussion among experts, policy makers and practitioners about the meaning and practical application of several key concepts, including abuse of the position of vulnerability, and exploitation. Also, the principle of non-punishment of trafficked persons for acts committed while being trafficked continues to be hotly debated, in particular in the context of emerging forms of exploitation and trafficking, such as cannabis cultivation. Experts, states and international organizations are yet not clear, however, whether the element of movement should be considered a defining characteristic of trafficking in human beings, distinguishing it from other types of exploitation. Meanwhile, states are increasingly concerned with labour exploitation as opposed to sexual exploitation, and with emergent forms of trafficking including trafficking for the purpose of organ removal, trafficking for forced marriage, trafficking for the purpose of child bearing and trafficking for the purpose of organized begging, drug cultivation and involvement in petty crime as well as trafficking for the purpose of benefit fraud. The chapter shows that there are still numerous key areas open to further conceptual developments providing room for a continuation of discussion about conceptual and practical dimensions of human trafficking. This also presents an opportunity for human rights advocates to engage in this discussion in a critical way that is capable of contributing to the advancement of human rights of all stakeholders, including those who have been trafficked.

## 1. INTRODUCTION

The aim of this chapter is to provide a brief overview of recent key developments and directions in the discussions about trafficking in human beings, with a focus on new forms of trafficking, as opposed to those historically understood as trafficking (i.e. sexual exploitation of women and children). The text draws primarily on the European context.



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Following this aim from a methodological perspective the research was based on a desk review of international and regional legislation on trafficking in human beings, including travaux préparatoires of the UN Convention on Transnational Organized Crime and its Protocols, review of relevant issue and background papers written by independent experts and international organizations and face-to-face and online consultations with experts on trafficking in human beings.<sup>2</sup>

The chapter is structured as follows. The opening part presents the context of the text and the methodology. Next, the text charts discourses and concepts that have informed the definition of trafficking in human beings and its interpretations. It particularly explains the issue of “definition that does not define”. The chapter then proceeds to discuss new insights and recent developments, including the discussions on movement of trafficked persons, abuse of “position of vulnerability”, the principle of non-criminalization and non-punishment of trafficked persons, and several emerging forms of exploitation and trafficking in human beings. The chapter concludes that given the lack of precision in the current agreed definition, many questions remain to be settled, and the ongoing discussions are likely to expose the opposing interests of various stakeholders, for example the law enforcement authorities and service providers

## **2. TRAFFICKING IN HUMAN BEINGS – MAKING SENSE OF THE CONCEPT IN PRACTICE**

The UN Protocol to Prevent, Suppress and Punish Trafficking in human beings, especially Women and Children, adopted in 2000 (further the UN Trafficking Protocol), supplementing the United Nations Convention against Transnational Organized Crime, contains the first internationally agreed definition of human trafficking. According to the UN Trafficking Protocol, the crime of trafficking in human beings has three constituent parts: (1) The act (recruitment, transportation, transfer, harbouring or receipt of persons), (2) the means (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), and (3) the purpose of exploitation. In the case of children, only the act and the purpose are required to establish that trafficking has taken place.

This definition, the result of difficult negotiations, was widely considered a major step forward in establishing a basis for an international response (Ditmore–Wijers, 2003: 79; Ekberg, 2004; Ould, 2004; UNODC, 2012a: 11). Significantly, this definition clarified that men, children and women can be trafficked to be exploited not only in the commercial sex industry<sup>3</sup>, but also in a variety of other legal and illicit sectors, and that trafficking can occur without crossing international borders (UNODC, 2012a: 11).

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In the years following the adoption of the UN Trafficking Protocol, more data was collected and new insights on trafficking emerged. Numerous practitioners, including law enforcement representatives and service providers, have tested in practice the application of anti-trafficking legislation and policies, and have joined academics and legal theoreticians in discussing the concept trafficking in human beings (Ditmore–Wijers, 2003: 79; Ekberg, 2004; Raymond, 2002: 495; Hancilova–Massey, 2009; Anderson–Hancilova, 2011). As a result, a picture has emerged reflecting significant diversity of forms and patterns of trafficking and the challenges of responding in law, policy and practice.

More than a decade of monitoring the implementation of national anti-trafficking legal provisions clearly shows that practical application of the concept of trafficking was and continues to be strongly focused on law enforcement and criminal law (see, for example, Jernow, 2009), shaped by an anti-immigration agenda and by rejection of prostitution/sex work as work (discussed in more detail further below). The policy responses over this period have tended to be repressive and reactive, inconsistent, and overall often failing to safeguard human rights of trafficked persons (Hancilova–Massey, 2009; GAATW 2011 Supply Demand). Overall, the number of prosecutions for trafficking in human beings remains “extremely low” (UNODC, 2012c: 2; similarly Eurojust, 2012: 8). This can be explained in part by the relative novelty of the legal provisions. Importantly, however, in regard to state failure to prosecute, states have been very reluctant to broaden the group of “deserving” victims beyond a limited number of persons, often foreigners, who were subjected to severe exploitation, often in the commercial sex industry (see for example UNODC, 2012a: 12, Hancilova–Kutalkova, unpublished manuscript). In addition, practitioners (and experts alike) are challenged by the underlying lack of clarity of many of the concepts used to “define” trafficking in human beings (for example van Liempt, 2006; Anderson–O’Connell Davidson, 2006; also Raymond, 2002: 495; UNODC, 2012a: 12, UNODC, 2010: para 31 /b/).

This chapter applies the method of critical discourse analysis to “trafficking in human beings”. Critical discourse analysis sees the use of discourse (language) as a form of social practice. In particular, I focus “on the role of discourse in the production and reproduction of power abuse or domination” (Van Dijk, 2001: 96). In this sense I analyze the concept of trafficking in human beings and the definition contained in the UN Trafficking Protocol as reflecting four key discourses: (1) discourse about the nature of prostitution (i.e. whether all forms of prostitution should be considered as inherently harmful and exploitative or whether some forms can be considered as work), (2) discourse about irregular migration, (3) discourse about organized crime, and (4) discourse about forced labour and labour exploitation. The following sub-sections outline these key discourses and the political expectations connected to them.

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### 3. SEXUAL EXPLOITATION IN PROSTITUTION, CONSENSUAL SEX WORK, AND TRAFFICKING<sup>4</sup>

Perhaps the most salient discourse about trafficking in human beings is that of innocent women being lured into prostitution (see also Askola, 2007: 206). This understanding has its roots in discussions of the so called “white slave trade” (the coerced movement of women for the purpose of engagement in prostitution) (Terrell, 1907: 22 qtd. in Scully, 2001: 75) around the turn of the 19th and 20th century, when a broad coalition against the white slave trade successfully lobbied for white slavery to be recognized as a concept (imprecise as it was) in international law.<sup>5</sup>

The issues of prostitution and trafficking had returned to the political agenda of most post-industrial democracies by the end of the 1970s, reflecting rising international tourism and migration, growing affluence and changes in sexual mores in the West. The process was accelerated by the emergence of HIV and AIDS, which aggravated concerns about the health hazards of sex (Outshoorn, 2004: 8). In the 1980s abolitionism acquired a new fervour when the theoretical work of radical feminists such as Kathleen Barry, Carole Pateman and Andrea Dworkin redefined prostitution as the epitome of the sexual domination of women by men, and as a form of male sexual violence par excellence. In this view, prostitution and trafficking in human beings are the same, because prostitution is always a violation of human rights, equivalent to slavery and the essence of women’s oppression. It follows then that all women who engage in prostitution are victims of a crime (Havelkova, 2009).

Soon a rival feminist discourse emerged, rejecting the denial of agency (i.e., the right to sexual self-determination) of women who choose to earn their living through prostitution. In other words, this discourse objects to the attempts of radical feminists to reduce all women in prostitution to passive, agency-less victims, and the sweeping claims that all prostitution, across all historical periods and societies, is a form of violence (Weitzer, 2005: 212). The “sex-work” feminist discourse stressed that persons (usually women) who engage in prostitution can do so on their own accord and that “prostitution can be a profession” (Outshoorn, 2001: 474; cf. Bertone, 2004).<sup>6</sup>

The two schools of thought have influenced the debate of trafficking in human beings.<sup>7</sup> Both discourses claim that they are informed by – and advancing the human rights of – persons in prostitution, but they cannot agree on the definition of these human rights.<sup>8</sup> Supporters of abolitionism maintain that women’s human rights are best protected when prostitution, which they consider to be a deeply discriminatory institution, is abolished. To this end, they support either criminalization of prostitution, or criminalization of demand for sexual services. They reject the notion of prostitution as a form of labour, and believe that persons engaged in prostitution should exit this milieu. The abolitionist regulation models are notably silent on men providing sexual services, and they reject the argument that a woman may chose on her own accord to enter or to

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remain engaged in prostitution. In this understanding, any (migrant) woman involved in prostitution is a victim of trafficking, and measures to address trafficking and prostitution are one and the same. As Fitzgerald (2008) points out, there is a risk that this radical feminist perspective is aligned closely to a conservative anti-immigration agenda that restricts mobility and agency.<sup>9</sup>

The advocates of sex work call for a more nuanced understanding of the sex market. According to this view, prostitution as a social institution<sup>10</sup> is often discriminating against persons providing sexual services, yet persons who provide commercial sexual services can make an informed decision to do so. Sex work should be considered a form of legitimate gainful activity and enjoy the same protection as other forms of labour. The state should not absolve itself from its obligation to safeguard the rights of persons providing commercial sexual services, including their labour rights. It follows that forced (coerced) prostitution and other crimes that may be linked to it (such as deprivation of liberty, organizing of prostitution, kidnapping, blackmail etc.) should be prosecuted, just like other forms of forced labour.<sup>11</sup>

Today, neither international nor EU legislation takes a clear position on the treatment of consensual adult sex work. This issue is left to the discretion of individual countries.<sup>12</sup> At the same time, there is a broad international consensus that children should not be involved in prostitution regardless of their consent. The discussion about regulation of commercial sex business continues, not least in the form of discussions on tackling demand for commercial sexual services.

## 4. THE FIGHT AGAINST “ILLEGAL” MIGRATION

The heightened attention to trafficking in human beings and smuggling as forms of organized crime took place at a time of sharp growth in immigration to the European Union. Receiving states have in the past twenty or so years increasingly portrayed migrants and migration as a security threat and “an obstacle to the governance and maintenance of the liberal world system” (Ibrahim, 2005: 172; also Guild, 2001), and “unauthorized border crossing [...] has become a central issue in public debate in Europe” (Khosravi, 2010: 95). As a response to the “threats of migration”, receiving countries have tightened legal migration channels, which are now de facto reserved for those who are highly skilled or economically and otherwise privileged. Understandably, some people seeking to migrate to Europe who did not qualify for the increasingly circumscribed legal migration channels, migrated and worked in the European Union in violation of the regulations. Some of these migrants have used the services of smugglers.

In a way, the discourse of trafficking in human beings was meant to allow for differentiation between “innocent victims” coerced by traffickers, and irregular migrants, who

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used the services of smugglers to reach the territory of a foreign country, and in some cases were residing and working in states without the legal required authorization.

In the context of the negotiations on the supplementary Protocols to the UN Convention against Transnational Organized Crime, namely the Protocol against the Smuggling of Migrants by Land, Air and Sea, smuggling was for the first time defined as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident” (Article 3). This development testifies to a major shift in the international perception of smuggling: peculiar as it may appear from today’s perspective, that in the not so distant past (i.e., until the early 1990s), it was possible in Germany for smugglers to sue smuggled persons for due fees related to bringing them into West Germany (based on Junkert–Kreienbrink, 2009: fn 38).

According to Article 5 of the Protocol against the Smuggling of Migrants by Land, Air and Sea, migrants shall not become liable to criminal prosecution for the fact of having been smuggled. However, as explained in Article 6(4) of the Protocol, they can be prosecuted for having smuggled others or for the commission of any other offences against domestic law such as illegal crossing of borders or stay on the territory of the state. In contrast, trafficked persons themselves are supposed to be considered initially victims of crime, and are supposed to be allowed to remain temporarily in order to support the prosecution of this crime (Council Directive 2004/81/EC of 29 April 2004; also Hancilova–Massey, 2009: 32–33).

However, conceptually as well as in practice, there has never been a neat line between trafficking and smuggling. So for example, it is possible that a would-be migrant approaches a smuggler to assist with reaching the host country and later ends up being exploited by the same person or his or her affiliates (Buckland, 2009; van Liempt, 2006; Anderson–O’Connell Davidson, 2006).

## 5. THE FIGHT AGAINST ORGANIZED CRIME

Regarding the involvement of organized crime<sup>13</sup> in trafficking in human beings, available information is limited and decidedly mixed. Blanka Hancilova and Camille Massey (2009: 28–29) report that some experts point to the presence of large crime syndicates with hierarchical structures and division of responsibilities, while others maintain that trafficking in human beings is dominated by smaller actors, who lack the hierarchical structure and complexity characteristic of organized crime groups (see also Picarelli, 2009).

In the official rhetoric of state officials and representatives of international organizations on trafficking in human beings, organized crime, and especially transnational organized crime, continues to play an important role (see for example, Hague, 2012, online; Giammarinaro, 2011: 3). This often serves to justify the prevalence of law-enforcement

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strategies and caters to the sentiments of parts of the electorate who fear organized crime. This way, stressing organized crime helps mobilize political support for anti-trafficking measures, especially law enforcement and the tightening of legal migration channels, as a means of protection from organized crime syndicates from abroad.

According to Europol (2011: 11), “the most frequently reported criminal groups involved in THB in the EU are, in descending order, ethnic Roma, Nigerian, Romanian, Albanian speaking, Russian, Chinese, Hungarian, Bulgarian and Turkish organised crime groups. Bulgarian and Romanian (mostly of Roma ethnicity), Nigerian and Chinese groups are probably the most threatening to society as a whole.”

It appears however that among practitioners such as law enforcement officers and service providers, the insight that trafficking can take multiple forms and that the involvement of transnational organized crime is not a necessary prerequisite, has over time taken a more firm hold (Hancilova–Massey, 2009).

## 6. FORCED LABOUR, SLAVERY AND EXPLOITATION

It is now clearly recognized that men and boys can also be trafficked for the purpose of sexual exploitation, and that women and girls, as well as men and boys, can be exploited in a variety of other sectors beyond the commercial sex industry (Burcikova, 2006; Hancilova, 2008; ILO, 2001; ILO, 2005; ILO, 2009a; de Jonge–Smit, 2006; Surtees, 2008). In a recent study, in Africa, South and East Asia and the Pacific, more persons were identified as having been trafficked for the purpose of labour exploitation outside of the commercial sex industry than were trafficked for the purpose of exploitation in the commercial sex industry (UNODC, 2012d).

The widening of the concept of trafficking in human beings to include forced labour or services, slavery or practices similar to slavery and servitude,<sup>14</sup> was welcomed by those concerned with the wider ramifications of exploitation and forced labour (for example the ILO). Others, notably organizations supporting the abolishment of prostitution, opposed the inclusion, because it would in their opinion wrongly divert attention away from sexual exploitation of women and children, which they consider to be qualitatively different and far more objectionable than exploitation in other sectors of the economy, or exploitation of men.

Forced labour, broadly defined as a situation in which persons either enter work or service against their will and/or cannot leave without punishment or the threat of punishment, has been codified already in the Forced Labour Convention No. 29 of the ILO, adopted in 1930. However, this and other international instruments did not provide an actionable definition of forced labour and the related concepts. Worldwide courts struggle to clarify “involuntariness”, “force”, “coercion”, “consent”, “menace of penalty” and other concepts that are central to the definition of forced labour (ILO, 2009b; Elster, 1985;

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Burcikova, 2006). The ILO is assessing the need for further standard-setting to complement the ILO's Forced Labour Convention, 1930 (No. 29) and Abolition of Forced Labour Convention, 1957 (No. 105), by focusing in particular on prevention, victim protection, including compensation and trafficking for labour exploitation. (ILO, 2013)

In the EU context, labour exploitation "is not a recent development. However, because it is largely a hidden crime which has traditionally not been a priority for law enforcement action, in general terms it has remained undetected" (Europol, 2011: 7).

The US courts draw distinction between physical and legal coercion, which are believed to be potent enough to produce "involuntary servitude", and economic threats, which are not believed to be potent enough to produce "involuntary servitude" (Steinfeld, 2009). In a similar vein, the ILO Committee of Experts has "rejected the proposition that economic constraints that pressure a worker to accept low or underpaid work could, taken alone, come within the scope of the Convention" (ILO, 2009b: 43). Yet, in other statements, the ILO Committee of Experts echoed the reasoning of the Supreme Court of India, which concluded in 1982 that work performed for less than the minimum wage is forced labour (ILO, 2009b: 43–44).

This lack of agreement testifies to the complexities and unsettled questions with respect to the concepts of exploitation and forced labour. While it seems relatively easy to argue why a society should intervene in cases of exploitation where there is clear harm involved, it is certainly more difficult to explain why society might be justified in prohibiting voluntarily consented, "mutually advantageous" exploitation (Wertheimer, 2009). Let us consider the following case: a migrant consents to employment in conditions that are worse than the legally required minimum. This situation is often preferable for him or her given the set of choices available (no employment/income at all), and this situation may also be preferable to his or her employer, given the cost saving associated and the relatively low likelihood of being punished. At the same time, it could be argued that the host country society is the one that suffers, as there is no level field for employers, and minimum labour standards become eroded.

The responses of the EU states to this situation have been diverse, and the jurisdiction currently limited yet developing. In the Netherlands, the jurisprudence suggest that the above mentioned case of a migrant accepting employment in substandard conditions may amount to "misuse of authority arising from the actual state of affairs" and "abuse of position of vulnerability", and the employer would be liable to charge of trafficking (Krimpen, 2011: 498–499).

Some EU states (Belgium, France) when criminalizing trafficking have based the concept of exploitation on the notion of conditions considered "incompatible with human dignity" and not on coercion itself. In practice then these states apply a criterion of the minimum labour standards, and employment that is in breach of the minimum labour standards may potentially be considered as trafficking. Belgium lists as one of the characteristics of trafficking "the employment of a person in conditions incompatible with human dignity or allowing them thus to be employed"; it has also omitted the means

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of trafficking (*modi operandi*) from the basic definition of trafficking in human beings and these are listed as aggravating circumstances (Code pénal, Livre II, Titre VIII, chapitre IIIter: “de la traite des êtres humains”, 433. Quinquies, translation as in ILO, 2009b: 57). The legislator did not define which conditions are to be considered incompatible with human dignity. In a landmark case (Correctionele rechtbank van Brugge, 14e Kamer, 25 April 2006), the district court of Bruges considered that a group of Lithuanian workers who had worked in conditions that did not comply with the standards set forth in the “Act of 4 August 1996 concerning the wellbeing of employee, and the payment of minimum wages”, had been subjected to conditions “incompatible with human dignity”. The court also considered that the factual circumstances of unemployment and low wages in Lithuania amounted to a “vulnerable position” (Coster van Voorhout, 2007: 52–53; ILO, 2009b).

On the other hand, Germany seems to limit the application of the concept of trafficking for labour exploitation to foreigners only. Currently, it is much harder for German nationals who were exploited in Germany and may have been victims of internal trafficking to claim abuse of vulnerability or helplessness (Rabe, 2012: 4). At the same time, the number of reported cases of internal trafficking is on the rise globally (UNODC, 2009b, 2012d) as well as in Germany: the UNODC, Global report (UNODC, 2009b: 59) indicates that 21% of German victims were detected for internal trafficking. It remains to be seen whether Germany will amend its legislation in order to provide the same degree of protection to its nationals and non-nationals.

There is a need to identify and manage the risks associated with inappropriate application of the trafficking concept. Some European examples show that there is a possibility that even relatively minor labour-standards violations will be considered trafficking and punished harshly. Where the threshold is set too low, the “misapplication could lead to an expansion of the concept of trafficking that detracts from its essential nature as an extremely serious crime and violation of human rights” (UNODC, 2012b: 3).

If the threshold is set too high, this would mean that the rights of victims to be recognized as such are compromised and that perpetrators can escape with relatively mild or no punishments. It remains to be seen where the national courts and the European Court of Human Rights will draw the line between substandard labour conditions and forced labour, and acts amounting to trafficking in human beings. So far the ECtHR has dealt with cases of forced labour, enslavement and sexual exploitation but not with cases of alleged labour exploitation where minimum labour standards alone were violated (ECtHR, 2012).

This issue of threshold is of central importance to the understanding and practical implementation of the definition of trafficking in human beings. Yet questions of how to define exploitation, and when exploitation should be criminalized, remain unsettled.



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## 7. NEW INSIGHTS AND DEVELOPMENTS

This section provides a brief overview of several issues that continue to be discussed among scholars and practitioners: (1) movement as a defining element of trafficking, (2) the concept of “abuse of position of vulnerability” and (3) the principle of non-criminalization and non-punishment. Finally, (4) it considers emerging and lesser-known forms of exploitation and trafficking.

### 7.1 MOVEMENT AS ONE OF THE DEFINING ELEMENTS OF TRAFFICKING

The question of whether or not movement of a person is considered part of the trafficking concept is relevant for multiple issues, not least: the criteria for the identification of persons as victims of trafficking; the distinction of trafficking from other crimes; the comparability of official statistics between countries; and the design of targeted prevention and response measures.

In the past ten years considerable confusion has arisen with respect to the requirement of “movement” of the presumed trafficked person.

According to Anne Gallagher (2011), “when the international community came together in 2000 to draft a treaty on trafficking, attention was squarely on the ‘movement’ aspect of the very narrow issue of cross-border sexual exploitation of women and girls”. The focus on movement as an element of trafficking is understandable: after all, the definition of trafficking was negotiated in the context of organized crime facilitating irregular migration and “states, in their desire to maintain border controls, have tended to concentrate on the transportation and movement elements of the definition of trafficking, and have attempted to combat trafficking by establishing more restrictive immigration and border control regimes” (EU Expert Group, 2004: 48).

At the same time, there was consensus that crossing of international borders is not a requirement for the crime of trafficking to have taken place (UNODC, 2012a: 12; CoE CETS No. 197, 2005, Article 2). The Council of Europe Convention on Action Against Trafficking in human beings (CoE CETS No. 197, 2005) reiterates the wording of the UN Trafficking Protocol definition, and explicitly states that it applies to human trafficking offences committed nationally, transnationally, and with or without the involvement of organized crime. Yet again, the element of movement was not explicitly discussed.

At that, international guidance on the aspect of intra-state movement remains unclear and practices vary widely. Movement continues to play a significant role in the prevalent understanding of trafficking. This is testified for example by the positions of several international organizations that appear to maintain that some sort of movement continues to be considered relevant to distinguish trafficking from forced labour and other exploitation (see for example, ILO 2007a: 12; ILO 2007b: 4; ILO, UNICEF, UN GIFT, 2009: 15–17; ICAT, 2012, 2.3 point 1).

On the other hand, the focus on movement was problematized early on. In 2004, the EU Expert Group considered the focus on movement “inherently problematic, as at

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the time of transportation, movement, or border crossing, it is unlikely that the purpose for which the movement is occurring, i.e. exploitation will be clear. Indeed often a person may move between a number of different people and in a number of different situations. People may enter a country legally, but subsequently become trafficked. It is only at the point of outcome, when the person reaches exploitation, that it can be clear that trafficking has taken place. Until such point, movement may be for other (legitimate or illegitimate) reasons” (EU Expert Group, 2004: 48). Furthermore, a person can be exploited while being moved.

The US Department of State took a clear position on this question internally around mid-2000s.<sup>15</sup> In 2007, the State Department’s Trafficking in human beings Report stated that for the purposes of determining whether trafficking has taken place, establishing movement of a person is “not necessary, as any person who is recruited, harbored, provided, or obtained through force, fraud, or coercion for the purpose of subjecting that person to involuntary servitude, forced labor, or commercial sex qualifies as a trafficking victim. To define trafficking in human beings on the basis of movement is to create an artificial and unfounded distinction between victims who are exploited without being moved and those who are moved prior to and during their exploitation” (Trafficking in human beings Report, 2007: 31).

It appears that today an increasingly broad group of actors have reconsidered the distinction between exploitation without movement and exploitation with the element of movement, and now maintain that trafficking can take place without movement.

This view is also supported by the recommendations of the 2010 UN Working Group on TIP: “In accordance with article 3, subparagraph (a), of the Protocol, States parties should pay close attention to the acts of trafficking (recruitment, transportation, transfer, harbouring or receipt of persons) and recognize that the presence of any of those acts could mean that the offence of trafficking in human beings had been committed, even in the absence of transit or transportation” (UNODC, 2010: 5). Similarly, the 2012 UNODC Global Report on Trafficking in human beings reads:

“The presence and relevance of domestic trafficking in certain countries challenges one common understanding of this phenomenon. Although the term ‘trafficking in human beings’ may suggest that the victim is moved to a different location, by definition, this does not necessarily need to happen. According to the definition of trafficking in human beings in the Trafficking in human beings Protocol, the victim may be ‘recruited’ or ‘harboured’ for the purpose of exploitation by means of coercion or other means that do not necessarily include movement. Furthermore, even when the definition of trafficking addresses the movement of the victim (‘transfer’, ‘transport’ and ‘receipt’) there is no specification that this movement has to be across borders” (UNODC, 2012d: 51)

At the same time, various UNODC documents are not always clear on this aspect, as demonstrated above.

Today, many state institutions, including law enforcement, seem to continue to focus on trafficking primarily in the context of international (irregular) migration or at least con-

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sider migration/movement an important aspect in assessing vulnerability to trafficking (see for example, UNODC, s.a.: 9–10).

## 7.2 ABUSE OF A POSITION OF VULNERABILITY<sup>16</sup>

One of the most challenging concepts used in the definition of trafficking in human beings has been the “abuse of position of vulnerability” (APOV), one of the means by which trafficking can be determined listed in the UN Trafficking Protocol. Only recently, UNODC published an issue paper on APOV (UNODC, 2012a), written by Anne T Gallagher. This is the first in-depth study on the topic.

APOV is accepted as an integral part of the definition of trafficking, yet it is not defined in international law. The intentions of the drafters of the Protocol with respect to APOV are unclear: “The drafting history of the Protocol confirms that ‘abuse of a position of vulnerability’ is to be understood as referring to ‘any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved’: a circular definition that has not helped to clarify confusion among practitioners. No further guidance is provided and it is unclear what ‘real and acceptable alternative’ actually means or how it is to be applied in practice.” The available unofficial guidance focuses on vulnerability in the context of identification of trafficked persons, and leaves aside “the more complex and fraught question of whether, from the point of view of criminal law, a particular characteristic of the victim or his / her situation was abused as a means of trafficking him or her. They provide little or no guidance on how the proposed indicators could or should be applied in the context of a criminal investigation or prosecution” (UNODC, 2012a: 6–7).

Anne Gallagher (UNODC, 2012a) makes an important distinction between several types of vulnerability: (1) pre-existing vulnerability that is intrinsic to the victim; and (2) vulnerabilities that are created by external circumstances, either by the exploiter/s personally or by external circumstances such as state policies (for example, irregular migration status).

Critically, according to UNODC (2012b, points 2.4 and 3.2), “a victim’s vulnerability may be an indicator of APOV, but it will not constitute a means of trafficking in human beings unless that situation of vulnerability has also been abused to the extent that the victim’s consent is negated. [...] where APOV is being alleged as the ‘means’, an offender should be shown to have abused the victim’s vulnerability in order to [emphasis in the original] recruit, transport, transfer, harbor, or receive that person.” However, few practitioners appeared to make a distinction between the types of vulnerability that are pre-existing to the victim and vulnerabilities that could be created by the exploiter in order to maximize control over the victim. At the same time, “few practitioners appeared to make a distinction [...] between vulnerability as susceptibility to trafficking, and abuse of a position of vulnerability as a means by which trafficking occurs or is made possible” (UNODC 2012a: 7–8).

As for the issue of evidence, “APOV, as it is set out in the Trafficking in human beings Protocol, appears to comprise two separate evidentiary requirements: (i) proof of the ex-

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istence of a position of vulnerability on the part of the victim; and (ii) proof of abuse of (or intention to abuse) that vulnerability as the means by which a particular act (recruitment, harbouring, etc.) was undertaken.” Anne Gallagher found that “even among those countries that have included APOV within their definition of trafficking, the country surveys revealed that the focus of inquiry is generally on establishing the fact of vulnerability, rather than on proving its abuse. In effect, this means that the mere existence of vulnerability may be sufficient to satisfy the means element and thereby help support a conviction. Some countries have established that abuse of, or intention to abuse vulnerability, may be inferred from a defendant’s knowledge of the (proven) vulnerability. Both approaches raise concerns, particularly in light of the more general risk identified throughout the study that APOV may open the door to incorrect prosecution. In countries where the concept of APOV does not exist in law, practitioners noted the likelihood of substantial evidentiary challenges to establishing APOV in a prosecution. Some were firmly of the opinion that the concept is too vague to be effectively justiciable. A number of practitioners pointed out that while all trafficking prosecutions rely heavily on victim cooperation, such cooperation would be particularly important, (and perhaps even more difficult to secure), in cases alleging abuse of vulnerability” (UNODC, 2012a: 9).

With respect to the relationship of APOV with other “means” to establish whether trafficking has taken place, UNODC noted that “there appear to have been very few cases prosecuted on the basis of APOV being the sole means of trafficking. Those examples that are available fail to demonstrate that the success of the prosecution depended on the availability of that means. The survey noted a high level of fluidity between the various ‘means’ stipulated in national laws, due, at least in part, to the absence of definitions. The precise relationship between APOV and other means appears to depend on how the concept is reflected (or not) in the legal framework. In some cases, vulnerability and / or its abuse is used as a subsidiary means in that its function appears to be to bolster or substantiate other means. For instance, it may be established that a person has been deceived through the abuse of their position of vulnerability, where a less vulnerable person would not have been deceived. In other cases, establishing APOV is an important means by which an explicit element of the offence can be established” (UNODC, 2012a: 8).

Also, the relationship between abuse of a position of vulnerability and the exploitative purpose is “a complex and contested one. [...] A number of countries have integrated abuse of vulnerability into their understanding of exploitation. In such situations, the victim’s vulnerability and its abuse may be explored alongside other means, such as deceit, to ascertain the trafficker’s exploitative intent. Where trafficking in human beings is addressed across a spectrum of legislation, considerations of ‘abuse of a position of vulnerability’ indirectly arise as part of the narrative of the victim’s story. Some risks were identified in countries that appear to have established a low threshold for determining abuse of vulnerability and / or exploitation. These risks principally relate to cases being too readily identified as trafficking, and consequently, being incorrectly or too easily prosecuted as trafficking cases” (UNODC, 2012a: 8–9).

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Gallagher notes also that in the context of abuse of vulnerability, the issue of consent has arisen. In one country surveyed by UNODC for the report, “it is the victim’s vulnerability that is used to explain away and nullify the apparent consent. Alternatively, the presence of meaningful consent can change the nature of the crime at issue, from one of trafficking in human beings to other crimes. In other countries, the relationship between APOV and consent will sometimes be an issue in situations where the victim does not explicitly identify as a victim. Practitioners generally agree that the use of ‘means’ including APOV must be of a sufficiently specific and serious nature as to vitiate the consent of the victim” (UNODC, 2012a: 9).

### **7.3 NON-CRIMINALIZATION AND NON-PUNISHMENT OF TRAFFICKED PERSONS**

The principle of non-punishment of trafficked persons for criminal offences committed while, or as a consequence of, being trafficked is laid out in several international policy documents and reports (OSCE, 2003: Chapter III, point 1.8; UNHCHR, 2002: par 7; UN GA Resolution A/63-215, 2008: par 68). In 2010, the UN General Assembly (GA) urged “governments to take all appropriate measures to ensure that identified victims of trafficking in human beings are not penalized for having been trafficked and that they do not suffer from victimization as a result of actions taken by Government authorities” (UN GA Resolution A/64/293, 2010: par 30).

However, a binding endorsement for the principle of non-punishment is not codified in international law. The UN Protocol does not address the issue of non-punishment of victims for offences committed while, or as a consequence of, being trafficked. The Council of Europe Convention on Action against Trafficking in human beings (CoE CETS No. 197, 2005) requires the States merely to “provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so”. Similarly, the 2009 and 2010 recommendations of the UN Working Group on Trafficking in human beings asks state parties to “Consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts” (UNODC, 2009a: 3). Currently, however, as became particularly visible in the context of trafficking and exploitation of persons, including children, in drug cultivation, there seems to be rather strong opposition from some States to codifying this principle.

### **7.4 EMERGING FORMS OF EXPLOITATION AND TRAFFICKING INVOLVING PERSONS**

Among unresolved questions in regard to non-criminalization of trafficked persons is in which (economic) sectors can a person be exploited, and what forms can exploitation take? The UN Protocol definition of trafficking does not explicitly list all possible forms of exploitation. This issue is left to the discretion of states to determine and add new sectors and forms of exploitation.

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The available evidence shows that trafficking may take place in legitimate (including construction, factory production, agriculture, fishing) as well as illicit economic sectors (such as drug cultivation, petty crime, organized begging and, depending on the jurisdiction, commercial sexual services). These sectors are regulated to a varying degree. Among the less regulated sectors are often domestic services and child care, and commercial sexual services.

As mentioned above, defining exploitation represents one of the most vexing questions in today's debate about trafficking in human beings.<sup>17</sup> Also, exploitation does not have to be necessarily limited to exploitation of labour and services. For instance, trafficking in organs or according to some viewpoints, trafficking for the purpose of surrogate motherhood, could be classed as exploitation.

In addition, it seems that when forms and sectors of exploitation are somehow "new" or illicit, state representatives are at times ill-equipped or perhaps reluctant to consider some of the emerging forms of exploitation as being covered by criminal law and legal provisions on trafficking in human beings.

## **7.5 COERCED INVOLVEMENT IN PETTY CRIME, DRUG SMUGGLING AND DRUG CULTIVATION**

It appears that state-led responses to cases of forced involvement in criminality (including petty street crime such as shop lifting, bag snatching, ATM theft, pick-pocketing and forced begging) (ECPAT, 2010), cases of forced drug smuggling and drug cultivation (where persons, at times children or minors (i.e. children over 15 years of age), are coerced to smuggle drugs or grow them, in the case of cannabis), are guided primarily by the focus on apprehension and prosecution of the offenders, often regardless of the fact that they might have been coerced. In other words, the considerations related to potential coercion and lack of consent may be effectively sidelined. This response makes this type of crime one of the least risky and most profitable for traffickers.

On the other hand, there have been cases when courts have considered criminal exploitation proven, such as the Hague District Court, 26 June 2009 (quoted in Krimpen, 2011: 504–505).

## **7.6 TRAFFICKING IN HUMAN BEINGS FOR THE PURPOSE OF ORGAN REMOVAL**

The issue of organ trafficking, a form of human trafficking in which an individual is exploited for body organs, most commonly kidneys or livers, is not a new one. But it is only recently that information about the practice has become more available. Organ trafficking is often conflated with organ commercialism (sale of organs). It is also conflated with transplant tourism, travel for transplantation that involves "organ trafficking and/or transplant commercialism or if the resources (organs, professionals and transplant centres) devoted to providing transplants to patients from outside a country undermine the country's ability to provide transplant services for its own population" (The Declaration of

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Istanbul, quoted in Ambagtsheer et al, 2013: 5). All these are widely condemned, though some experts are highly critical of this and suggest that the harm experienced by some participants in these transactions is caused by the lack of regulation, rather than by the fact that there is something intrinsically wrong with the buying and selling of organs (Ambagtsheer et al, 2013: 6–7).

In 2011 the UNODC working group on trafficking in human beings considered this topic and urged state parties to support its efforts in “evidence-based data ... [collection and investigation]..., including the root causes, trends and modi operandi, with the aim of facilitating better understanding and awareness of the phenomenon, while recognizing the difference between trafficking in organs, tissues and cells” (UNODC, 2011: 2). The same document urges state parties to include awareness raising measures on organ trafficking into their trafficking in human beings approaches (UNODC, 2011: 2) and furthermore considered bringing the issue to the attention of the General Assembly (UNODC, 2011: 11). Apparently, the agenda on anti-trafficking in organs has become more nuanced (also looking into trafficking in cells and tissues) and gained high profile attention within the trafficking in human beings debates.

Today it is widely accepted that there are cases of transplant tourism and organ commercialism and it seems very likely that there are also cases of persons who were exploited for bodily organs. However, available information remains very limited (Ambagtsheer et al, 2013). Only relatively recently (2012) several large research projects were initiated in this area (e.g. the “Combating Trafficking in human beings for the Purpose of Organ Removal” project that aims at improving the non-legislative response to human trafficking for organ removal, coordinated by the Erasmus MC University Hospital in Rotterdam and funded by the EC DG Home Affairs Programme).

### **7.7 COERCED INVOLVEMENT IN BENEFIT AND OTHER TYPES OF FRAUD**

In recent years, cases of benefit fraud involving cashing children’s and elderly people’s benefits were discussed in the context of exploitation and trafficking. Also, cases were identified, including in the Czech Republic, when persons were coerced into signing for credit for consumption goods. The Czech courts did not uphold these charges.<sup>18</sup> In the Netherlands, two persons were convicted for trafficking in a case that involved deception of youngsters who were abused to subscribe for mobile phones and phone contracts and thus incur liabilities and debts (Krimpen, 2011: 506).

### **7.8 SHAM MARRIAGES (MARRIAGES OF CONVENIENCE)**

There are now also more inquiries into cases of trafficking for sham marriages, with the aim of legalizing the spouse’s and his or her relatives’ leave to remain in the host country.<sup>19</sup> In these cases, a middleman arranges against a payment for the sham marriage of EU national and a foreigner from outside the EU.

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## 7.9 FORCED MARRIAGES

The issue of forced marriage and child marriage<sup>20</sup> that used to be considered a minor issue until about mid-2000's, is today increasingly on the agenda of the Council of Europe and the EU. According to some experts, the observed rise in number of forced marriages cases is due to both demographic and administrative factors: girls born to parents with migrant background reach marriageable age and there are today more of them due to relatively liberal family reunification policies in many EU states during 1980s and relatively strong immigration. In the EU, forced marriages are most often identified in the intra-ethnic marriages within new minority communities, often but not exclusively, Muslim (CoE, 2005). The intersections with trafficking are relatively complex and the terrain legally and practically rather uncharted, even though interestingly, experts on trafficking in human beings identified the links rather early on (Wijers–Lap-Chew, 1996 quoted in Rude-Antoine, 2005: fn 4).

The Convention on the Rights of the Child includes children's rights to be protected from sexual exploitation (CRC, 1990: Article 34), to be protected from all forms of violence (CRC, 1990: Article 19), to be protected from kidnapping (CRC, 1990: Article 11), to live with their parents unless it is a harmful environment (CRC, 1990: Article 9) and to have their opinions respected (CRC, Articles 12, 13, 14). When a child is married to an adult spouse and the marriage consummated, at a minimum it could be argued that the child has been sexually exploited. Yet the situation gets more complicated when both wife and husband are under 18, or when both were coerced into the marriage (see for example: Daily Star, 2012). In addition, the issue of consent is complicated, as it is usually considered that children over 15 or 16 years of age (depending on jurisdiction) can consent to non-commercial sexual relations. In some documented cases, girls as well as boys (although this is much rarer) were flown to the home countries of their parents to be forcibly married.

It remains to be seen whether certain cases of forced marriage, for example those involving travel to the country of origin of the victim's parents and coercion to marry, will be charged under the trafficking statutes.

## 7.10 SURROGATE MOTHERHOOD

Another area in which issues of exploitation and coercion come to the forefront is that of surrogate motherhood. The Bureau of the Dutch National Rapporteur on Trafficking in human beings and Sexual Violence Against Children argues that, "under certain circumstances, surrogacy could constitute exploitation. An important indication of exploitation would be if the financial and health risks are entirely or largely borne by the surrogate mother" (BNRM, 2012: 21). Further research and conceptual clarifications seem necessary on this topic.



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## 8. CONCLUSIONS

The chapter has shown that in comparison to ten years ago, today a more wide variety of forms and patterns of trafficking and exploitation are recognized. While initially, trafficking in human beings was understood as a form of forced prostitution of women, today the concept is increasingly understood to include various forms of forced labour and labour exploitation. At the same time, the precise delineation between trafficking, forced labour and labour exploitation remains unclear and the national and international courts are facing substantial challenges in adjudicating cases related to these phenomena.

Furthermore, as discussed in detail above, the concept of trafficking is newly applied to situations such as coerced involvement in drug cultivation and various forms of abuse and exploitation. Meanwhile, more states and practitioners are involved in the practical implementation of anti-trafficking policies and the “current level of response in tackling this crime has never been higher (Europol, 2011: 14). Nonetheless, Europol (2011: 15) concludes that “based on current reporting, intelligence, trends and patterns, it is unlikely that there will be any immediate reduction in the levels of trafficking of human beings in Europe.”

More persons than in the past contribute to the discussions. Also, there is more jurisprudence available, including that of the European Court of Human Rights, resulting in a qualitatively improved discussion about trafficking. Worryingly, however, despite strong international political support for combating trafficking in human beings, the empirical evidence about the scope and patterns of the practice, as well as successes of responses, remains very scarce (Hancilova–Massey, 2009: 127; Rosenberg, 2009; Gallagher–Surtees; 2012, European Commission, 2008; ICAT, 2012: section 3). This critical lack of evidence may reflect to a degree the relative novelty of the concept and legislation on trafficking, the lack of support to victims and witness protection, and complex evidentiary requirements, as well as inefficient law enforcement, or simply a low prevalence of trafficking in human beings. Importantly, it reflects also the underlying lack of conceptual clarity (Hancilova–Massey, 2009: 24).

In this context, relations between policy makers, law enforcement bodies, service providers, trafficked persons and other stakeholders are often tense, reflecting differences in views of those “who support a [...] restrictive interpretation of the concept of trafficking, and those who advocate for its expansion [...] to include most, if not all forms of severe exploitation; [...]. The Protocol’s complex and fluid definition provides ammunition for both sides, and has contributed to ensuring that such tensions remain unresolved” (UNODC, 2012a: 5). Indeed, some experts consulted for this paper<sup>21</sup> observed that the views of many state officials and civil society representatives as to who qualifies as a trafficked person may be today further apart than in the past.

The chapter has demonstrated that while the concept of trafficking in human beings has evolved significantly over the past ten years, there are still numerous and crucial areas open to further conceptual developments. Progress and improvement of responses is

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also dearly needed in the practical implementation of measures to prevent and respond to trafficking in human beings. An environment that is prone to tensions and conflicts is likely to continue for the foreseeable future (see also Scanlan, 2007). While this can be at times irritating, it presents an opportunity to engage critically in the conceptual discussions, as well as to critique the practical implementation of the trafficking in human beings concept, and thus contribute to the advancement of human rights of all stakeholders.



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# COMPARATIVE ANALYSIS OF EUROPEAN CASE LAW IN THE AREA OF TRAFFICKING IN HUMAN BEINGS FOR THE PURPOSES OF LABOUR EXPLOITATION

*Michal Šmíd*

## Abstract

This chapter compares legal regulation and case law in the area of trafficking in human beings for the purpose of labour exploitation in nine European countries – the Czech Republic, the Netherlands, Germany, Spain, Slovakia, Belgium, Hungary, Italy and Romania. This paper analyses the issue of trafficking in human beings, from the general point of view, where it deals with the idea, whether the term trafficking in human beings is perceived traditionally as a three-side relationship, and also with the viewpoint of the shift within the interpretation of this relationship in the individual countries. The attention also focuses on the definitions and interpretation of relevant terms, which are connected to the issue of labour exploitation – forced labour, servitude, other forms of exploitation, etc. The chapter based on the analysis of the situation in the above mentioned countries will show, whether the Czech Republic has sufficient legal instruments for fighting the trafficking in human beings for the purposes of labour exploitation, and whether it is necessary to make some changes of either legal or non-legal nature.

## 1. INTRODUCTION

The issue of trafficking in human beings is closely connected to the globalisation that brings aside from higher economic, information and traffic connection also growing economic differences among individual countries. In 20th century the attention of the international community focused mainly on the issue of trafficking in human beings for the purposes of sexual exploitation of the victim, where the offenders forced the obedience of trafficked person by the means of violence. However, in the last decade this attention was focused also on the labour exploitation (Bellak in this book; Shelley, 2010). Under the promise of large salaries, free accommodation or lodging is taking place in the developed world the labour exploitation of persons, who come from the developing countries, or of persons, who suffer hardships. These persons are not receiving appropriate wage, they are subjected to the excessive deductions from their wage for making

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various administrative matters (e.g. for arranging the work permit and residence permit) and are generally subjected to bad working conditions (Belser, 2005). The offenders take in count during labour exploitation the desire of trafficked persons for better living and working conditions, and are fully exploiting the situation, in which the foreigners or the socially excluded citizens happen to be. Thus, in the first place the offenders exploit the subtle forms of exploitation; they resort to the use of violence or the threat of violence only in the extreme cases. Labour exploitation, is in the same way as sexual exploitation connected to the unlawful interference to human rights and dignity of trafficked persons (Ruggiero, 1997; Salt, 2000).

Since trafficking in human beings is a global phenomenon that goes beyond international borders (Friesendorf, 2007; Shelley, 2010), it was necessary to develop in Europe, as well as, international level and to adopt proper legal documentation, which will unify the process of individual countries in the fight against socially dangerous trafficking in human beings. These legal documents were subsequently projected into the national legal systems and put into practice. At the same time, it is clear that interpretation and practical application of the individual states illustrates the best way in its passed case law.

Above mentioned processes and practices were applied also in the Czech Republic for its membership in the European Union. Trafficking in human beings for the purposes of labour exploitation is a criminal offence in Czech republic since 2004, when at that time a valid criminal law was amended (Act. no. 140/1961 Coll.) The very first case law, in this area was passed by the court in 2010 that means seven years later. The reason for this delay was not the fact, that the Czech Republic is not infested by labour exploitation. Contrary to this, we possess conclusive data about the existence of this phenomenon (Ministry of the Interior, Security Policy Department. The report concerns the state of trafficking in human beings in the Czech Republic for year 2011, Police of Czech republic, UOOZ. The report is concerning the activity of the unit for detection of organized crime. From the findings of the Ministry of Interior it is clear that we have to look for the causes somewhere else. Law enforcement authorities are facing problems during the interpretation and application of facts in the case of the trafficking in human beings, mainly after the interpretation and application of the distress, dependency, forced labour and other forms of exploitation.

This chapter aside from the comparing the legal regulation concerning the trafficking in human beings for the purpose of labour exploitation in individual countries, focuses on the interpretation of certain important terms, that are interconnected with the issue of trafficking in human beings. Among these are forced labour, servitude and the position of vulnerability. The interpretation of these terms and the general approach of European courts towards the issue of trafficking in human beings will be in the scope of the analysis confronted with the activity of passing the case law in Czech courts. The aim of the analysis is to find out whether the Czech Republic has at its disposal the appropriate legal instruments for fighting against the trafficking in human beings for the purposes of labour exploitation and whether these legal instruments are sufficiently used by the practitioners.

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From the methodological viewpoint it is necessary to mention one limitation to the above stated, which is posed by the variable quality of individual passed case law. In some cases were for the purpose of this analysis available only case law passed by appellate courts or courts of extraordinary remedies, which don't comment on the judged case of trafficking in human beings in detail, and in these case law are not obvious all the factual circumstances of the cases.

## 2. THEORETICAL PART – LEGAL ASPECTS OF TRAFFICKING IN HUMAN BEINGS

It was as early as the beginning of the 20th century, when the legal documents were accepted by the international community for the purposes of a more efficient fight against the trafficking in human beings. The first international resolutions concerning this issue were dealing with the elimination of slavery and sexual exploitation of women (Gallagher, 2010: 54–95). At the beginning of the 21st century the focus of the international community concentrated much more on the issue of labour exploitation. This fact comes from the need to react on the new advancements and methods used by the traffickers.

There are several essential international (international agreements) and European documents (legal regulation of EU) that are dealing with the question of trafficking in human beings for the purposes of labour exploitation. Among these belong mainly, the following legal documents:

- 1) Forced labour convention – convention concerning forced or compulsory labour, 1930 (No. 29).
- 2) Protocol to prevent, suppress and punish trafficking in human beings, especially women and children supplementing the Resolution about international organized crime (2000), so called Palermo protocol.
- 3) Council Framework Decision on combating trafficking in human beings (2002/629/JHA)(2002).
- 4) Directive 2011/36/EU of the European parliament and of the council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Frame work Decision 2002/629/JHA (2011).
- 5) Convention of European council on actions against trafficking in human beings (2005).

Above mentioned documents set the term trafficking in human beings for the purposes of labour exploitation. For the purposes of this analysis, we understand the term labour exploitation as the unifying term for trafficking of human beings for the purposes of *slavery, servitude, forced labour and practices similar to slavery* in the same way as it is understood in the international and European regulations accepted during the 2000's.

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The Palermo protocol works with the following definition of trafficking in human beings for the purposes of labour exploitation. This definition specifies mentioned behaviour as “*recruitment, transportation, transfer, harbouring or receipt of persons, based on threat or use of force or other forms of coercion, of abduction, of fraud, of deception or of the abuse of power or of a position of vulnerability or of the giving or receiving payments or benefits to achieve the consent of the person having control over another person, with the purpose of exploitation.* Exploitation includes at least exploitation of the prostitution of others or other forms of sexual exploitation, *forced labour or services, slavery or practices similar to slavery, repression or organ removal.*”

In Europe, the Palermo protocol was followed by the Council Framework Decision 2002/629/JHA that by the criminal offence of trafficking in human beings for the purposes of labour exploitation or sexual exploitation understands following: “*the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:*

- a) use is made of coercion, force or threat, including abduction, or
- b) use is made of deceit or fraud, or
- c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real acceptable alternative but to submit to the abuse involved, or
- d) payments or benefits are given or received to achieve the consent of a person having control over another person

*for the purpose of exploitation of that person’s labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or forms of sexual exploitation including pornography.”*

Council Framework Decision was replaced in April 2011 by the Directive of European parliament and of the Council 2011/36/EU that should be implemented into legislative of the Member states until the April 6th, 2013. This Directive defines trafficking in human beings for the purposes of labour exploitation as: “recruitment, transporting, transfer, harbouring or receipt of persons, including exchange or transfer of control over that person 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 or vulnerability* or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. *Exploitation* shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, *forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities or the removal of organs.*”

The goal of above mentioned legal documents that were accepted at the international European level was to set minimal social standards for fight against trafficking in human beings – to define criminal act, criminal liability, and sanctions. In this viewpoint, this analysis is going to note whether the individual European countries exceeded the set frame of minimal standards or not, and the scope of this action. Within this analysis will

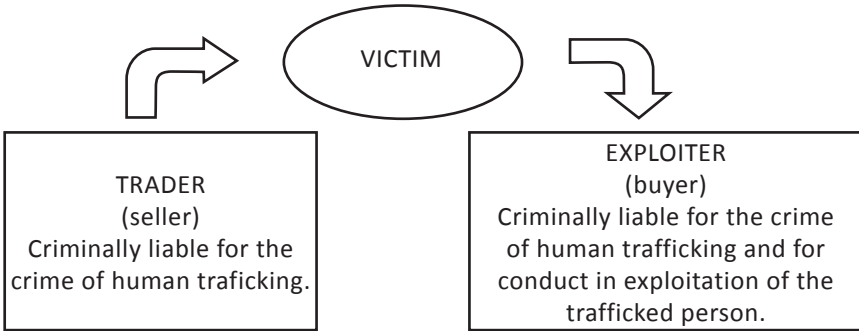
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also be monitored, whether the individual states implemented into their legislative the key points that are connected to the issue of trafficking in human beings for the purposes of labour exploitation – mainly *slavery, servitude, forced labour and practices similar to slavery*, and whether the states did not follow this terminology was this step troublesome in the practice in terms of application, and interpretation or if this step was advantageous.

The factual basis for trafficking in human beings consists of three main parts that are “actions” (sometimes the term transport is used), “means” (sometimes the term “coercion” is used) and “purpose”. Another rarity of this basis is that it *criminalizes only the trafficking in human beings itself*, that is happening for the purposes of exploitation of the trafficked person (uses the phrase “for the purposes”). The Act that lays in the exploitation itself is not being prosecuted (based on this actual basis).

The trafficking in human beings is understood as a process, in which is the person treated as goods. The process, in which is this person the means of the trade relation between “trader” (or simply “dealer”) and “buyer”, that is buying the trafficked person for the purpose of further exploitation (“the exploiter”). This relation is showed in the following scheme:

Scheme No. 1:



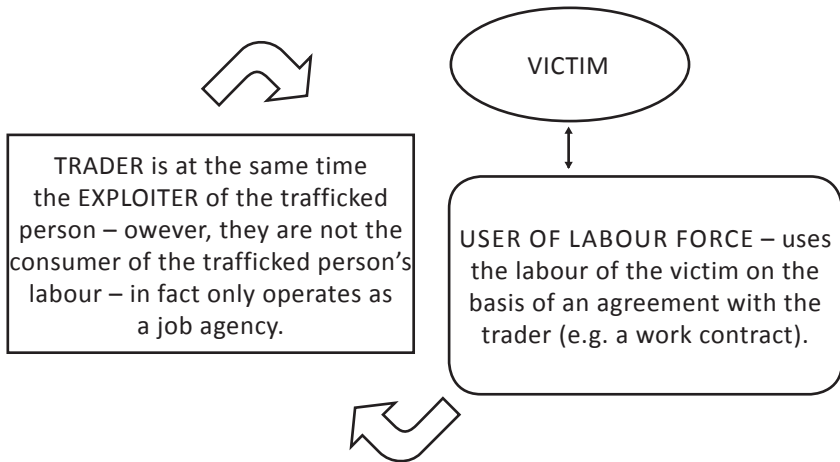
However this schema does not fully cover the modus operandi, which is being used by the offenders these days, mainly during the trafficking in human beings for the purposes of labour exploitation. From the findings of recent years it is clear that the offenders often play a part of *working agency* in the process of trafficking in human beings. The offenders, either under their name or under the name of private companies offer their employees (trafficked persons) to other companies that are the “users of their labour force”. The offenders are properly paid for the work done by these companies. However, the trafficked persons are being paid only a small part of the wage, where the offenders often deduct excessive amounts for arranging various administrative issues, other services, and



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they expose their employees to other exploitative working conditions. It is possible to draw this modus operandi simply as:

Scheme No. 2:



This presents an opportunity for a question, whether the term trafficking in human beings itself is viewed traditionally as a three-side relationship (as described above) or whether there was a shift in the understanding of this term.

Aside from the above mentioned international and European legal documents, in the issue of labour exploitation and trafficking in human beings are also involved the International catalogues of human rights, which are immediately applicable.

ECHR in their practice of the courts also mentioned the definition of terms slavery, servitude and forced labour. ECHR worked during the interpretation of the term slavery on the basis of understanding of the Convention about slavery from 1926, which defines slavery as “the state or the circumstances of a person, above which are carried out some or all parts of the ownership law”. As mentioned in *Kmec* (2012: 453), slavery thus requires that the state of the trafficked person needs to be reduced to the “object only” in the hands of other persons – see *Siliadin against France*, judgments, 26. 5. 2005, No. 73316/01 and *Rantsev against Cyprus and Russia* (*Kmec*, 2012: 453).

ECHR also mentioned in the judgments *Siliadin against France* the term “servitude”, when it stated that “aside from the duty to offer certain services to another person, the servitude also includes the obligation for a bondsman to reside with the person in hand and the inability to change their position”. ECHR also mentioned the difference between the servitude and forced labour, when it stated that “the servitude is characterised by not only the obligation to do a certain job, but also by the living conditions”.

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By applying so called *concept of positive liabilities of the state*, the ECHR concluded that article No. 4 of the CETS is violated also in cases that their legislative does not effectively prosecute the actions of a person, who is “exposing another person to the working and living conditions that are in contradiction to human dignity”. Thus, the legislative is not sufficient when it covers only the criminal act of abduction or threat, because in such a case, there are not respected all circumstances and conditions that the victim was exposed to (Siliadin against France, *C.N. against Great Britain, judgments, 13. 11. 2012, No. 4239/08*).

During the interpretation of the term “forced labour” itself, ECHR made reference to the Convention of International Labour Organisation about forced labour from 1930, that considers forced or obligatory labour as “every labour or service that is demanded under the threat of any punishment, and to which the person in hand did not come forward voluntarily.” The essential features of forced labour are thus its involuntariness and the threat of punishment. Another feature is obvious from the ECHR practice of courts, which is possible to understand as a material correction coming from the general principle of proportion, – the weight of burden. By using this correction, we can conclude that the forced labour is not happening in case that the carrying out of the labour is not obvious injustice, oppression or needless and unjustified hardship or maltreatment (Wagnerová–Šimíček–Langášek–Pospíšil a kol., 2012: 264). This correction was used by ECHR for example in case of *Van Der Mussele against Belgium* that was dealing with the pro bono providing of legal services to impecunious clients. However, ECHR does not follow this characteristic in their case law very strictly (Van der Mussele against Belgium, judgments, 23. 11. 1983, No. 8919/80).

It is necessary to mention above stated that the standard of the weight of burden was used by ECHR so far in cases, where the labour was supposed to be done for public interest. In already mentioned case *Siliadin against France*, when ECHR came to the conclusion that the plaintiff was during her stay and performance of the housework for the French family (the work was done based on private relation) put into the state of servitude, but the weight of burden was not further examined by ECHR. This standard was not used also in the case of *C.N. against Great Britain*, when the plaintiff, in fact was an employee of an agency, was taking care of older married couple for the period longer than 3 years without being paid by her employer. For both cases it is characteristic that the plaintiffs were in France or Great Britain illegally, and thus they did not have passports. This situation was later on used by their exploiters, who were keeping them under pressure, because of the imminent arrest by the police or harm.

During the interpretation of the term “forced labour” is often referred by experts to the indications of forced labour (Burcikova, 2006), that were published by the International Labour Organisation (ILO), who was the author of the Convention on forced labour in 1930. According to the above mentioned definition the essential indications of forced labour “the threat of punishment and involuntariness”.

“The threat of punishment” is characterised by following features:

- Physical or sexual violence or its threat

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- Restricting free movement
  - Debt slavery
  - Withholding the remuneration or refusal to pay the remuneration
  - Withholding of passports or other travel ID
  - Threatening of denunciation

“Involuntariness” is characterised by following features:

- Deception or false promises concerning the type and conditions of work
- Being in debt (it does not necessarily have to be debt slavery) caused by changing bills, exaggerated pricing, under-evaluation of produced goods or delivered service, over-evaluation of interests on payments etc.
- The psychological pressure, i.e. the order to work secured by the threat of punishment for not following the order
- Keeping in custody, imprisonment at the place of work
- Withholding or not paying the remuneration
- Withholding the ID or other valuables
- The sale of person to another person

It is visible at first sight that the indications of these two features are interconnected to a certain point, which is caused by the fact that the feature of “the threat of punishment” and “involuntariness” are connected to each other. It is impossible to divide these two features from each other. These indications are not referred to only by experts, but they are mentioned also in the case law of ECHR – *C.N. against Great Britain*.

### 3. METHODOLOGY

It can be deduced from the name of the paper itself; this analysis uses the methods of comparison. The subject of this comparison is criminal legislative of trafficking in human beings in individual states, which were studied, and its application. The goal of this analysis is not only to shortly mention the identical and different elements of the individual legislatives, but also to evaluate them and to get conclusions (Pokorny, 2010), which is in agreement with the content specification of legal comparatistics as a legal science. The practical material was collected in collaboration with relevant institutions of EU Member states. Certain states, such as Great Britain, were excluded from the analysis because of the clear incompatibility of the legal systems. The partner institutions were requested to send the case law from the area of trafficking in human beings for the purposes of labour exploitation. In these requests was specifically stated that the selected cases should be of character, where the offenders used subtle forms of force as well as cases, where the court mentioned the definitions of terms forced labour, position of vulnerability and force. We also requested the legislative from the given state.

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As a result of this process, we were able to collect more than 20 case law; some of them were excluded from this analysis, since they were concerned with the sexual exploitation. The selected case law were further discussed with the experts from the Netherlands, Belgium, Hungary, Spain and Germany as a part of a workshop that was held in May 2011 in Prague. During the next stage of the process were also collected additional case law from Belgium and Romania. The choice of the Czech cases was not limited only on the cases that qualified as the criminal act of trafficking in human beings, but we also focused our attention on other cases with the features of labour exploitation.

## 4. CASE STUDIES

### 4.1 RELEVANT LEGISLATION OF SELECTED COUNTRIES AND COMPARATIVE ANALYSIS OF INDIVIDUAL PASSED CASE LAW

#### 4.1.1 NETHERLANDS

##### 4.1.1.1 LEGISLATIVE AND DELIMITATION

The legislative of Netherlands concerning the criminal act of trafficking in human beings is included in article No. 273f of criminal law that follows:

1. A person who:

1° by the means of force, by violence or by another act or under the threat of violence or of another act, by coercion, embezzlement, deception or by abuse or superiority coming from factual circumstances, by abuse of the position of vulnerability and by giving or receiving the payments or benefits for the purpose of receiving the consent of a person, which has over another person control, or recruits, transports, transfers, harbours or receives *with the purpose of exploiting that person* or to remove that persons' organs;

(...)

4° forces or intimidates another person by using means described in 1° *to perform labour or services* or to behave under the circumstances described in 1°, that are known to him/her or it is possible to expect those circumstances to occur, in a way that makes another person to perform labour or services.

(...)

will be punished by detention for 8 years or will receive a fine in the 5th category.

2. *Exploitation* includes at least exploitation of another person for the purpose of prostitution, other forms of sexual exploitation, forced or compulsive labour or services, slavery and practices similar to slavery and servitude.

The legislative of the Netherlands is largely explicitly coincident with the European legislative about trafficking in human beings, as it is regulated by the above mentioned European regulations, when literally adopts all relevant terms. However, under the legislative of the Netherlands is characteristic that the facts of the case of trafficking in human

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beings directly covers both the purpose of the offender to exploit another person (1°), and the labour exploitation of another person itself (4°). The conclusion from this is that for the criminal act of trafficking in human beings can be in the Netherlands responsible in the eyes of court also a person, who uses workforce of the victim solely for himself/herself without *any means of trafficking in human beings*. This extensive interpretation thus exceeds the semantic meaning and traditional understanding of the criminal act of trafficking in human beings as a three-side relationship.

#### 4.1.1.2 INTRODUCING THE CASES AND THEIR LEGAL QUALIFICATION

We were able to obtain two very inspiring case law from Netherlands for the purposes of this analysis. It is the case Moonfish (2008) and the case Chinese Horeca (2009).

*The case Moonfish* (The judgments of district court of law Zwolle Record mark LJN BD0846)

##### Findings of fact

*Defendant was employing together with his Brothers a group of Indians in his factory*, which were illegally in the Netherlands and this fact was known by the defendant. *The defendant was behaving initiatively and proactively towards the Indians*. The Indians were not able to speak Dutch and they did not have any IDs. The social and health insurance was not paid for the employed persons. The Indians were housed in the house of the defendant, where was not available sufficient number of beds for them. The Indians were working 6 days a week more than 8 hours a day and they were paid for their work 800 EUR a month. 100 EUR was deduced from this amount for housing. Overtime worked was not reimbursed.

##### Legal qualification

For consideration, whether in this specific case was used exploitation or not, used the court aside from others also the standards for exploitation that were put together by the *office of Dutch National Rapporteur for the fight against trafficking in human beings*. The standards are as follows:

- 1) *Coercion*, including (the threat of) physical or sexual violence or notification of illegal stay or work, the abuse of power emerging from the current way of things or the exploitation of the position of vulnerability.
- 2) *Bad working conditions*, including the inappropriate working hours, undervalued wage, hazardous work without ensuring the proper occupational and health safety measures, and also the nature of performed labour and services.
- 3) *Multiple dependencies*, incl. the dependence of the labour performance for the purpose of debt redemption and the dependence on the same person, for which is the labour carried out; and further circumstances such as harbouring of personal ID.

According to the national correspondent the person exploited, when at least one of the three requirements is fulfilled and further if the person does not have freedom

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or if he/she has a justifiable concern that it is not possible to freely leave the given job, at the same time *the excess has to happen for the violation of basic human rights*. Dutch National Rapporteur thus does not give an explanation of the terms slavery, servitude, forced labour or practices similar to slavery – the terms that are being used in the Dutch legislative. Instead of it, it lays down certain criteria, when fulfilled according to the national correspondent *ends up generally as a labour exploitation*.

The Indians were according to the court in the position of vulnerability already by being illegally in the Netherlands – *the position of vulnerability, is thus understood by the court as an objective category*. Based on the above mentioned criteria, the court came to the conclusion that the exploitation of the Indian workers was not happening. The actions of the defendant were considered as inconsiderate and undesirable, however, not exploitative. *Bad working conditions of Indian workers were not considered as excessive, and thus according to the court, there was not a violation of basic human rights*.

The defendant was relieved of the charges for the criminal act of trafficking in human beings, however, he was found guilty of the criminal act of illegal employing and of tax frauds.

The court also took into account during its deliberation the fact that the Indians did get heavily indebted because of their migration to the Netherlands. The job performance however, did not have anything in common with the debt repayment, because the defendant was not the victims' creditor. The defendant also did not have the personal IDs of the employees, thus the *status of multiple dependencies* was not fulfilled.

This judgment is contributive from the viewpoint of reflections under which conditions will be or will not be the feature of the exploitation fulfilled. The verdict gives us the picture about the Dutch understanding and interpretation of the term trafficking in human beings – *the charged person was somebody, who actively seeks out the workers and who employed them*. For the Dutch legislative is the extensive interpretation of this term characteristic.

*The case Chinese Horeca* (the judgments of the highest court LJN: BI7099)

#### Findings of fact

The defendant (manager of Chinese restaurant) was employing Chinese citizens that were in the Netherlands illegally. The employment was arranged, because of the initiative of Chinese citizens, who themselves asked the defendant for a job. The working day of Chinese workers were 11 to 13 hours long, while the defendant was giving them only 5 vacant days a month. The workers were receiving a payment between 450 and 800 EUR a month and were sleeping in one room, *some of the Chinese workers were even given a reimbursement for their labour only food and housing*.

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### Legal qualification

The lower court sentenced the defendants for the criminal act of smuggling in persons, *however, the act of trafficking in human beings was not sentenced* and this judgment was confirmed by the appellate court. According to the court, in order for the features of the factual basis to be fulfilled as in article No. 273f, it is necessary for the defendant to act actively (to show some initiative), while he/she has at the same time purposefully exploit the position of vulnerability of the victim. The court decision was based also on the following deliberations:

- 1) The Chinese workers decided to come to the Netherlands on their own initiative.
- 2) The motive for their travel to the Netherlands was purely economic.
- 3) The Chinese workers approached the defendants themselves with the request for a job.
- 4) The Chinese workers were not indebted to the defendants.
- 5) All workers could leave on their own free will whenever they wanted.

After making a cassation complaint by the general prosecutor, the case was decided by the Supreme Court. The basic question that was being decided by the Supreme Court was whether it is necessary for fulfilling the factual basis of trafficking of humans *to actively, purposefully exploit the position* of vulnerability, the court was also concerned with the content definition of the term “exploitation”.

For the purposes of the analysis it was very beneficial, mainly the deliberations and arguments of the general prosecutor included in the cassation complaint, with whose the Supreme Court did identify.

The Supreme Court came to the conclusion that *during the exploitation of the position of vulnerability, the active purposeful exploitation by the offender was not necessary*. The opinion of the lower courts in order for the fulfilment of the factual basis for exploitation of the position of vulnerability to happen, the offender has to act actively and purposefully. It was not supported by the Supreme Court in the legislative, where the actual factual basis does not contain the feature of “actively” or “purposefully”. In addition to this, if the opinion of the lower courts was supported, it would limit the prohibition according to the article No. 3b of the Palermo protocol, which states that the agreement of the victim of the trafficking in human beings for the purpose of intended or current exploitation is not relevant, if there was used one of the coercive means. While applying the requirement of “activity and purposefulness” would the line of the term of coercive means be reduced and it would lead to the creation of the space for the legal labour exploitation.

It is possible to describe the deliberations of the general prosecutor as being very inspiring and thought-provoking. Those deliberations were concerned with the content specification and differentiation of the terms slavery, servitude and forced labour on one side and with *the practices similar to slavery* on the other side.

The general prosecutor in his representations *refused* the restrictive interpretation of the term exploitation that was held by at that time by the Dutch correspondent for

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trafficking in human beings – according to it, it is possible to consider bad working conditions as an exploitation (within the meaning of § 273f para. 2) only in cases that they bring the violation of basic human rights and freedoms such as human dignity, body integrity or personal freedom of that person. This argumentation was used by the court in above mentioned case Moonfish.

The restrictive interpretation of the term exploitation comes from the article No. 4 of the European convention on the protection of human rights and freedoms, according to which:

1. Nobody can be kept in slavery or servitude.
2. Nobody will be required to carry out forced or compulsory labour.

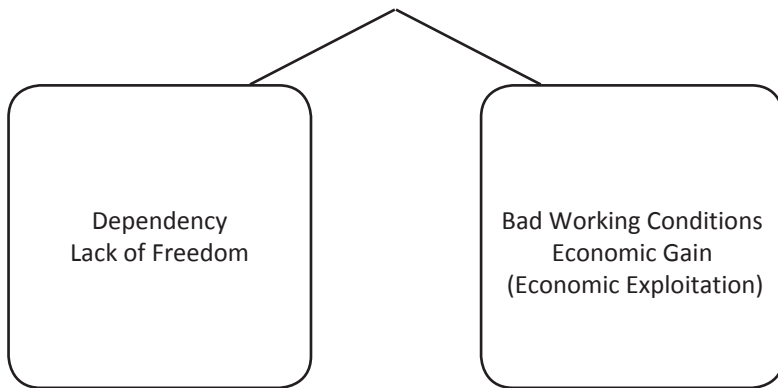
The prosecutor mentioned that the Dutch correspondent in its restrictive interpretation of § 273f omitted mainly the fact, that unlike in article No. 4 of the European convention on the protection of human rights and freedoms is § 273f concerned with the “practices similar to slavery”.

General prosecutor builds on the use of the word similarity (comparability) his further argumentation, when he states that similar (comparable) does not mean that the mentioned practice has to be equally serious as the violation of article No. 4 of CETS. It is the case of comparability only when there is an agreement in the important points. *The comparability thus anticipates at the same time the inequality and by this also the differences. This difference can be considered also the severity of the exploitation.*

The general prosecutor also mentions the decision of the European court for human rights in the case of Siliadin, in which according to his understanding the court defined the terms of *forced labour, slavery and servitude within the terms power, coercion and oppression*. The general prosecutor deduces from this that during the deliberation whether it is the case of forced labour, slavery or servitude or not, the standard of working conditions does not play any independent role. The person can be enslaved even when he/she is receiving the proper remuneration. Thus, the general prosecutor connects the term forced labour to the high level of oppression that the worker is subjected to.

In relation to the above mentioned, the extreme form of oppression is not the necessary the element of *practices similar to slavery*. Practices similar to slavery are unlike forced labour, slavery or servitude formed by *two-part term*, where the *first* part is the dependence of the worker and the level of oppression to which the labour is connected and the *second* part is the bad working conditions and the economic gain, which is received by the employer at the expense of the exploited persons (“economic exploitation”). Simply said, it is possible to talk about connected vessels – *the larger the oppression, the less important is the economic gain*. For the worker to be subjected to the practices similar to slavery it is not necessary for the oppression to reach the same intensity that is characteristic to forced labour, slavery or servitude.





According to the calculations the average wage of Chinese workers was between 1.48 and 3 EUR per hour, while the gross income of a worker with a minimal wage was 7.34 EUR per hour in 2006. According to the general prosecutor the economic gain of the defendant was significant, and nothing is going to change it even after adding the sum for board and lodging. It was just the economic gain of the defendant that was according to the general prosecutor supposed to be paid more attention to by the court for instance.

By his interpretation of slavery, servitude, forced labour and practices similar to slavery, the general prosecutor indirectly, but considerably *delimited against the indications of forced labour* that were prepared by ILO.

The general prosecutor understands by forced labour any labour output during which the worker is subjected to the measures that directly limit his physical freedom – closing the worker somewhere or watching over the worker, the measurements that effectively prevent the escape of the worker from the situation. The situation during which the exploiter abuses the position of vulnerability of the victim, when the escape of the worker is impossible not in actual fact but subjectively, is considered by the general prosecutor as one of the parts of the term practices similar to slavery.

*When compared to this interpretation, it is clear that the concept of forced labour is based on the indications of ILO, and is broader.* Based on these indications it is considered as a threat of punishment and at the same time also oppression considered in this situation, when the workers remuneration is being withheld or when the remuneration is not paid in full. On the contrary, this situation is according to the general persecutor considered as a part of the term practices similar to slavery.

The extensive interpretation of forced labour is further obvious from the fact that it is according to the indications of ILO possible to consider as a feature of oppression in this situation, when one person is sold to another. As it was already mentioned, the situation when the person is being reduced to the subject of ownership, it is according to the practice of the ECHR courts considered as a case of slavery. When reflecting on the specific

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case, whether there happened the act of labour exploitation or not, it is according to the general prosecutor further needed to apply the measures valid in the Netherlands as the frame of reference. The cassation complaint, which was made by the general prosecutor, was allowed by the Supreme Court and the judgments was revoked, at the same time, the case was returned to the court for a new deliberation. The new judgments of the court for this instance was not available during the time when this analysis was done.

At the end, it is necessary to mention the hypothesis of the general prosecutor that he applied to the interpretation of forced labour and practices similar to slavery. As it was already mentioned, the general prosecutor connects the term of forced labour to the high, extreme forms of oppression that the worker is subjected to from the offender (employer). His interpretation is based on the judgments of ECHR in case of Siliadin against France, in which in the view of the general prosecutor the terms slavery was defined, servitude, forced labour by ECHR as power, coercion and oppression. It remains a question whether this interpretation of the judgments in case of Siliadin against France is absolutely correct. As it was stated above, ECHR applies in its practice of the courts also the standard of the *weight of burden* (although not strictly) – the labour outputs have to be characterised by the obvious injustice, oppression or unnecessary unjustified hardness or maltreatment. *The requirement of high or extreme form of oppression does exceed this feature in many ways.* From the up to date practice of the ECHR courts it is possible to conclude that the conclusion about the fulfilment of the term forced labour was to be deduced by ECHR even in this situation, when it would be exploited the position of vulnerability, thus in the situation, when the person would be under strong physical pressure, which would not be connected to the extreme form of oppression. It is possible to conclude that ECHR was inspired by the indicators of forced labour that was worked out by ILO.

#### 4.1.2 GERMANY

##### 4.1.2.1 LEGISLATION AND DELIMITATION

The main part of the legislative of the issue of trafficking in human beings for the purpose of labour exploitation is included in the regulation § 233 and 233a of the criminal law (further on StGB). To the issue of labour exploitation is connected to the law about the fight against the black labour (Schwarzarbeitsbekämpfungsgesetz – further on abbreviated as „SchArbG“). Because of the term interconnection, we show also the legislative concerning the trafficking in human beings for the purposes of sexual exploitation (§ 232 StGB).

§ 232 StGB

trafficking in human beings for the purpose of sexual exploitation

(...)

(3) the prison judgments of a period between one year and 10 years will be the offender punished in case that

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1. The victim of the criminal act is a child (meaning the person younger than 14 years)
  2. The victim is severely physically tormented or the offender exposes the victim to the danger of death
  3. Commits such criminal act in connection with the employment or as a member of a group that was established for the purposes of this act

(4) based on the § 3 a person will be punished, who

1. will recruit another person while using violence or repulsive threat or ploy for the purposes of prostitution or for another kind of sexual act determined in the paragraph 1
2. will abduct another person while using violence, repulsive threat or ploy for the purposes of prostitution or for another kind of sexual act determined in the paragraph 1

(5) In less serious cases according to the paragraph 1 the offender will be punished, the prison judgments between three months to 5 years, in less serious cases according to the paragraphs 3 and 4 the offender will be punished, the prison judgments between 6 months to 5 years.

#### § 233StGB

Trafficking in human beings for the purpose of exploitation of workforce

(1) An offender who will exploit another person by using the means of the position of *vulnerability or powerlessness* that is connected to their stay in the foreign country, will put in the *position of slavery, servitude or debt slavery* or will put another at the beginning or during the performance of the labour at *his company or at the company of a third person* will expose him/her to such *working conditions that are in obvious discrepancy with the working conditions* of other employees that are doing the same or similar activity as above mentioned person, such an offender will be punished by a prison judgments between *6 months to 10 years*. The same way the person will be punished, who will expose another person younger than 21 years to slavery, servitude, debt slavery or to accepting or continuing the activity mentioned in the first point of this paragraph.

(2) The attempt is against the law.

(3) The regulation § 232 paragraph 3 to paragraph 5 is valid in the same way.

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## § 233a StGB

### The assistance in trafficking in human beings

(1) The person who is during the trafficking in human beings according to the § 232 or § 233 helping in the way that is recruiting, transporting, transferring, harbouring or receiving another person will be punished by the prison judgments between *3 months to 5 years*.

(2) The prison judgments between 6 months to 10 years the offender will be punished in case

1. will commit such a criminal offence to a child
2. The victim is severely physically tormented or the offender exposes the victim to the danger of death
3. Commits such criminal act in connection with the employment or as a member of a group that was established for the purposes of this act

(3) The attempt is against the law.

## § 10 SchArbG

The employment of foreigners without a work permit or without a residence permit and giving them unfair working conditions.

(1) The person who will act according to the § 404 para. 2 or 3 of the 3rd book of the social statute book and will employ the foreigners under unfair working conditions that are in *obvious discrepancy with the working conditions* of other employees that are doing the same or similar activity as above mentioned person, such an offender will be punished by a prison judgments for the period of less or equal to 3 years or by a fine.

(2) By the punishment of the prison judgments between 6 months to 5 years a person will be punished, who will commit a criminal act described in paragraph 1, in a very serious way. In a very serious way the act committed usually in these cases, when the offender is behaving in connection with his job or because of greed.

## § 10a SchArbG

Employment of the foreigners without a residence permit, whose are victims of trafficking in human beings

The punishment of a prison judgments for the period up to 3 years or by a fine, a person will be punished who in disagreement with § 4 paragraph 3 part 2 of the residence law will employ a foreigner and will abuse the position of vulnerability in which a foreigner is a victim of the criminal offence according to § 232 or 233 of the criminal statute book.

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Resolution § 233 StGB, although it bears the name of “trafficking in human beings”, criminalizes the activity when the employee is exploited by his employer in the form of labour exploitation and this is independent on the fact whether the employer is performing the labour directly at the company of this person or if the employee is sent to perform the labour at the company of third person. Resolution § 233 thus criminalizes the process itself of the labour exploitation, which is a *two side relationship*. The term trafficking in human beings for the purpose of exploitation of the workforce is thus somehow misleading, and this is because trafficking in human beings (or trafficking itself according to the above mentioned scheme No. 2) does not have to be happening at all. The behaviour that is traditionally the part of the factual basis of trafficking in human beings is described in resolution § 233a. German legislative does not differentiate between the intent of the offender to exploit another person and the realisation of this intent. It should be also noted that for the criminal offence according to § 233a is punished by *half of the judgments* according to § 233.

For the German legislative it is further characteristic that it does not work with the terms of forced labour or practices similar to slavery, the terms used in the international and European legal documents. Instead of these terms, the German legislative uses e.g. “working conditions that are in obvious discrepancy with the working conditions of other employees that are doing the same or similar activity as the above mentioned person”.

It seems that German lawmakers were unfortunately inspired during law-making by the factual basis of trafficking in human beings by the above mentioned law about the fight against the black labour and further by the law that delimitates the assignment of the employees (Arbeitsüberlassungsgesetz “AÜG”) that also contains the phrase “in the obvious discrepancy with the working conditions” – this is mentioned in the regulations § 15a AÜG and § 10 SchArbG. The lawmakers refer to these laws even in the causal report concerning the law that implemented the trafficking in human beings for the purpose of labour exploitation into the criminal statute book, but at the same time is mentioned in the causal report that in the resolution § 233 are discussed the practices similar to slavery.

However, the problem is in fact, that the subject of the factual bases mentioned in § 15a AÜG and in § 10 SchArbG is the protection of the German labour market, in detail the protection of the employees against the illegally worker from foreign countries, who are generally willing to perform the labour even in the most averse working conditions. On the other hand, the main object of the factual basis according to the § 233 StGB, that follows from the systematic categorisation of this factual basis, is the *protection of personal freedom and dignity*.

The content identity of the above mentioned terms is unacceptable, it would lead to the absurd conclusions and unjustified differences. In this context it is necessary to add that the German courts do not work with any *officially set line* (the difference between the remuneration paid to the victim and the remuneration paid to other employees) from which it would be possible to reason about the fulfilment of the term “in the obvious discrepancy with the working conditions”. Despite the fact that during the interpretation of the resolu-

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tion § 10 SchArbG it is often said that the feature “in the obvious discrepancy with the working conditions” is fulfilled in the case that the difference in the remuneration is one third.

The difficulty within the German legislative could be considered also in the term “bring towards/into”. During interpretation of this term is of a great importance in the German practice of the courts the decisions of the Federal court (BGH) from 13th of January 2010 – StR 507/09, StV 2010, 296. The court decided that for the fulfilment of the feature “bring towards/into” is necessary the active actions of the offender. In order to fulfil the mentioned feature it is not sufficient if the victim is willing to suffer the exploitation from his/hers own will, for example if he/she is to be found in a difficult financial situation, without any active approach of the offender. The active approach could be in the form of financial or other pressure. *This requirement of the active approach of the offender is thus in disagreement with the conclusions of Dutch Supreme court in the case of Chinese Horeca, in which the court came to the conclusion, that during the exploitation of the position of vulnerability it is not necessary for the active or purposeful behaviour of the offender.* In context, the experts propose the replacement of the phrase “bringing towards/into” with the phrase “will allow and will exploit” (Oberstaatsanwalt Andrea Thul-Epperlein *Stellungnahme zu den Schwierigkeiten bei der Anwendung des § 233 StGB und mögliche Lösungsansätze aus der Sicht der Praxis*).

The German legislative does not use directly the term “the position of vulnerability”, instead it uses the terms “distress” and “powerlessness”, when the term powerlessness is further specified as “the powerlessness connected to the stay in foreign country”. It is clear that the term “powerlessness” is understood objectively, for its fulfilment is not necessary to show whether “the person is subjectively considering himself/herself as the victim of exploitation or not”. Nevertheless, the experts criticize the factual basis of trafficking in human beings that it is overly oriented on the victim. Without the victims’ testimony, that is difficult to obtain in many cases because of the fear and the feeling of threat is difficult to obtain, the proof of fulfilment of all features of the factual basis is virtually impossible.

In relation to this book, are being voiced the opinions asking for the change in the phrasing of § 233 StGB or for the approval of a new factual basis, *that would not contain the terms “distress” and “powerlessness”* (Oberstaatsanwalt Andrea Thul-Epperlein. *Stellungnahme zu den Schwierigkeiten bei der Anwendung des § 233 StGB und mögliche Lösungsansätze aus der Sicht der Praxis*).

Regulation §233 StGB contains explicitly the term “debt slavery”, German lawmaker mentioned in a causal report, that “it is the relation of dependence, in which the creditor is exploiting in *long term* the workforce of the debtor with the goal of working off the factual or alleged debts”.

#### **4.1.2.2 INTRODUCING THE CASES AND THEIR LEGAL QUALIFICATION**

We are going to discuss further two cases with the working name of Farmer (2008) and Pension (2008). These cases are important mainly, because of the attention of the German courts on the height of the minimal wage.

#### Findings of fact

The defendant was a farmer from Bavaria that allured 100 workers from Romania (who did not understand German language) for the purpose of picking strawberries at his farm. He promised to pay them 5.50 EUR per hour and pay as you go system. No work contracts were signed after the arrival of the workers, the contracts were signed almost after two weeks passed and the defendant was reasonably assuming that there will be an inspection from the authorities.

In the contracts, that were written in German, was set the reward for 1,80 EUR a box of picked strawberries, although he was surely knowledgeable that the average worker is able to fill in an hour at maximum two boxes. The working hours were between 10 to 12 hours a day and the workers were living in 42 housing units, where they had available in total 12 sinks and 10 showers that were not separated by sex. The workers were not insured by the social and health insurance.

#### Legal qualification

When interpretation the term “the obvious discrepancy with the working conditions”, the court compared the size of (1) *the wage that was according to the contract and the number of picked boxes of strawberries to be paid* with (2) *the size of the wage calculated based on the hours worked* that is set in Bavaria in the general collective contract. According to this contract is the minimal wage per hour of the workers in agriculture set at 5.1 EUR. From the comparison of the wages that was done by the court in the case of the three workers, it became clear that the set wage was lower than the collectively set minimal wage (the difference was between 37 and 88%). This fact together with the provided housing conditions fulfils according to the court the term of obvious discrepancy in working conditions. *It is possible to say, that the German court used the way recommended by the Dutch general prosecutor in the case of Chinese Horeca, in which was criticized the method applied by the lower courts that did not considered the financial gain of the defendant.*

The feature “powerlessness, which is connected to the stay in foreign country” is according to German court fulfilled in case that the victim is not able or is seriously disabled in the possibility of refusal of the acceptance of the exploitative type of work or in the continuation to do so, which is based on the specific issues connected to the stay in the foreign country. The decisive criteria aside from others also the unsatisfactory or non-existent knowledge of the German language, the possibility to have cash money, the level of guarding by the offender and the extent of personal dependence on him, and also the possibility to leave Germany (judgments of the Federal court BGH NSTz – RR 2005, s. 366).

Together the farmer and his lawyer (who was giving him mainly legal advice) were charged and sentenced. The defenders were found guilty of the criminal act according to § 233 StGB trafficking in human beings for the purpose of labour exploitation and of the

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criminal act according to § 11 SchArbG – Employment of foreigners without work permit or the residence permit in larger extent (more than 5 persons). The main defendant (farmer) was sentenced to a *prison judgments* of 3 years and 3 months, and the second defendant was sentenced to a *prison judgments* of 2 years. The court took into deliberations the fact, that the Romanian workers were doing the exploitative type of work for a *very short period of time (10 days) and the fact that the main defendant was sentenced for a similar offence in the past.*

*The case Penzion* (judgments of the provincial court Traunstein Ns 220 Js 23280/07 jug and judgments of lower court Laufen 4 Ls 220 Js 23280/07)

#### Findings of fact

The offenders (mother and 19 years old son) allured under the promise of wage of 850 EUR per month (while working 8 hours a day) 4 Romanian girls one by one to work for them in their recreational settings. The girls did not have the knowledge of German language, were in fact working for 13 hours a day for a *period longer than 2 weeks* without the possibility of longer rest. The girls were sleeping in one room, where they did not have enough beds and the food that was supplied was not sufficient either. The offenders *did not sign a contract* with the girls and did not apply for social insurance. It is necessary to add, that according to German labour law, the work contracts arranged only verbally are valid.

#### Legal qualification

The court of in this instance stated that the offenders were exploiting the powerlessness of the Romanian girls that were connected to their stay in a foreign country. When qualifying the mentioned act as trafficking in human beings for the purposes of the labour exploitation the court calculated the average hour wage based on the promised amount of money (850 EUR per month per 8 hours a day makes 5.31 EUR per hour) and on the actual hours worked (13 hours a day). The average wage was then 3.20 EUR per hour.

The court stated specifically: “It is necessary to mention that the arranged wage of 850 EUR a month including housing and lodgings for free is not in disagreement with the usual working conditions, if it is based on the working hours of 8 hours a day. *However the working hours stated by the witnesses mean, that the average wage per hour was 3.20 EUR, which is clearly in obvious discrepancy with the working conditions that are usual in Germany.* In this context it is also possible to take into count the housing conditions, where there were 4 girls in one room without proper beds, how the situation is being described by the Romanian girls.”

*In this case, was not possible to use the settings concerning the minimal wage as in the previous case, since the minimal wage in Germany is set only for certain labour sectors.* The court did not comment on the line of the average wage, that if crossed could be stated as obvious discrepancy in working conditions. *For the purposes, of this analysis is important the fact that the calculation of the average wage per hour was done by the*



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court (the same way as in the previous case) contrary to the fact that the wage was not due and further contrary to the fact that the arranged wage was adequate (in contrast to the Farmer case). The court did not consider the possibility that there could be paid the wage corresponding to the average hourly wage according to the verbally arranged conditions, and thus it would be in agreement with the working conditions of other employees. It is important to add that from the facts described in the judgments it is not clear whether the Romanian girls were doing the work above mentioned or the arranged working hours by their own free will or if they were forced to do it.

It is also important to notice that during the deliberations whether the defendants committed a crime of trafficking in human beings, did the court *not limit the findings only on conditions related to the wage*, but it took in count the unsatisfactory living conditions even in the case that *the housing was for free*.

The actions of the defendants were qualified by the court as the criminal offence of trafficking in human beings for the purpose of labour exploitation in concurrence with the less serious criminal offences - employing of foreigners without work permit according to § 10 SchArbG and further the criminal offences withholding and embezzlement of the employees benefits, or in this case the benefits of the employer according to § 266 StGB.

The court sentenced the female defendant to a prison judgments of one year and 2 months, when it took into count the fact that the defendant was previously punished for the criminal offences concerning property. The female defendant was according to § 232 paragraph 5 of StGB under the consideration of a prison judgments between 6 months to 5 years. The allocate court changed the judgments and sentenced the female defendant to the prison judgments of 1 year and 3 months, that *was conditionally postponed* after taking into account the period that the female defendant spent in prison.

The male defendant was sentenced to a fine of 2400 EUR and the court took into count that he was under the influence of his mother. The decision of the court for this instance was upheld by the appellate court.

### 4.1.3 SPAIN

#### 4.1.3.1 LEGISLATION AND SCOPE OF LEGISLATION

A definition of the material elements of human trafficking was not explicitly incorporated into the Spanish Criminal Code until 23 December 2010. However, prior to this date cases involving human trafficking for the purpose of labour exploitation were judged as criminal activity in accordance with Articles 311 and 312 of the version of the Criminal Code in force at that time or as the crime of migrant smuggling.

Article 177 of the Criminal Code (provisions in force as of 23 December 2010)

A judgments of *five to eight years'* imprisonment for human trafficking shall be imposed against an individual who transports another person into Spanish territory or from

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Spanish territory or against an individual residing in Spain, who uses violence, the threat of violence, intimidation or fraud or who abuses their power or the vulnerability of the victim, whether a Spanish citizen or a foreigner, *and recruits, transports, transfers, receives, houses, or supports a person for the purpose of:*

1. performing forced labour or services, slavery, practices similar to slavery, servitude, or begging;
  2. sexual exploitation; or
  3. the removal of human organs;
- (...)

Article 312 (2) of the Criminal Code (provisions in force to 22 December 2010)  
Labour exploitation of foreign workers without a valid work permit

Anyone who hires or induces another individual to abandon their job using a fraudulent or false promise of employment or working conditions, or anyone who employs a foreigner without a valid work permit under conditions that are in conflict with valid legal provisions, a collective agreement or an employment contract shall be imprisoned for two to five years.

In addition, Article 311 (1) criminalises the labour exploitation of Spanish citizens and legally working employees. The Spanish legal provisions addressing the issues associated with human trafficking do not significantly digress from the definition of human trafficking used in the legislation at the European level.

#### **4.1.3.2 INTRODUCTION TO RELEVANT CASE LAW AND THEIR STATEMENT OF LAW**

Within the Spanish context, two court judgments are analysed in detail and are further designated as the Slave case (1998) and the Farm case (2005).

*The Slave case* (Judgment of the Supreme Criminal Court in Madrid, No. 995/2000)

##### Findings of Fact

In this case, the accused signed a contract for domestic services with an Algerian national, which effectively placed the worker in the position of a slave. The Algerian performed domestic tasks without fixed work hours and without any salary. He was provided solely with food. *In addition, he was subjected to other demeaning treatment by the accused, such as being addressed as “my slave” and having to address the accused as “my master”.* The Algerian was willing to bear this treatment for a period of three months, until the time his application for a residency permit was denied by the authorities.

##### Statement of law

This particular case is of limited value for the purpose of this analysis, as it occurred at a time when the Spanish Criminal Code did not yet include a definition of the material

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elements of the crime of human trafficking for the purpose of labour exploitation either the form of slavery or servitude. For this reason, a charge was lodged against the accused for *a crime against workers' rights*.

The court for this instance ruled that the case did not involve a crime against workers' rights and stated that *illegal immigrants do not have the right to work*. On the basis of the appeals, filed by the state prosecutor the case was subsequently heard by the Supreme Court. *The Supreme Court did not agree with the arguments of the lower court and stated that the lower court's interpretation would lead to a criminal law system that would intensify social inequality and also violate human dignity*. For this reason the judgment of the court was overturned and the accused was sentenced to two months of imprisonment and required to pay a fine of ESP 250,000 (*author's note: at the time the fine was imposed, this amount was equal to approximately EUR 1,500*).

*The Farm case* (judgment passed down by the Supreme Criminal Court in Madrid under judgment No. 321/2005)

#### Findings of Fact

The two accused acted as intermediaries and arranged farm labour for a few dozen Romanian nationals. *The Romanian nationals were not employees of the accused as they were employed directly by the companies on whose farms they worked*. The accused did however make arrangements whereby the companies sent the remuneration due to the workers to the bank accounts of the accused. The workers then received a payment of EUR 200 and the remainder of their wages was kept by the accused after deducting high amounts for accommodation, transport, and forged documents that they provided to the workers.

#### Statement of law

Within this particular judgment the Supreme Court, which denied the appeal of the convicted perpetrators to overturn the judgments, did not provide any more definitive information regarding the additional conditions of exploitation, i.e. the negotiated wages, the length of working hours, the conditions for accommodation and food, and compliance with occupational health and safety regulations. The Court also did not express an opinion about the definition of forced labour or any other relevant terms.

As the accused retained a high level of control over the workers they essentially functioned as work agencies, which provide employees to third parties, in spite of the fact that the workers were employed by the farmers for whom they performed the work.

The actions of the accused fall under the definition of three concurrent crimes – the falsification of official documents, the promotion of illegal migration, and human trafficking. The accused were sentenced to five years and nine months imprisonment and were required to pay a fine of EUR 3,240. *Specifically for the crime of human trafficking, the accused were sentenced to two years imprisonment and required to pay a fine of EUR 1,080*.

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It is worth mentioning, on the basis of the relevant text the findings of the Spanish courts should apply only to the intent of the perpetrators to exploit individuals, the perpetrators' actual exploitation of the workers was not separately classified by the court on the basis of separate findings.

#### 4.1.4 SLOVAKIA

##### 4.1.4.1 LEGISLATION AND SCOPE OF LEGISLATION

Slovakia's provisions addressing human trafficking are contained in Section 179 of the Criminal Code which reads as follows:

Anyone who uses fraudulent actions, deceit, the restriction of human freedom, violence, the threat of violence, the threat of other serious harm, or other forms of force; or anyone who accepts or pays money or provides other advantages for obtaining the agreement of another person on whom someone is dependent; or anyone who misuses his/her position to lure, transport, harbour, transfer, or receive another person, whether with that person's consent or not, *for the purpose of prostitution or any other form of sexual exploitation, including pornography, forced labour or the forced provision of services, slavery, practices similar to slavery, servitude, the removal of human organs, tissue or cells, or other forms of exploitation* shall be punished by imprisonment *for four to ten years*.

(2) The same punishment shall be imposed on anyone who lures, transports, harbours, transfers or receives a minor under the age of eighteen, whether with that person's consent or not, for the purpose of prostitution or any other form of sexual exploitation, including pornography, forced labour or the forced provision of services, slavery, practices similar to slavery, servitude, the removal of human organs, tissue or cells, or other forms of exploitation.

(...)

As is the case with the Spanish legal provisions, the Slovak legislation does not digress from the European definition of human trafficking. It is however worth mentioning that, in addition to the standard concepts of slavery, servitude, forced labour and other practices similar to slavery, the Slovak provisions also include the concept of "*other forms of exploitation*". It is possible to interpret this more general term to include other forms of exploitation, such as forcing an individual to commit a crime, as are newly addressed in Directive 2011/36/EU of the European Parliament and of the Council.

The commentary to the Slovakian Criminal Code specifies the following with regard to the crime of human trafficking: "The act is considered as having been completed at the moment the primary criminal offence is committed or at the moment at which a person is lured, transported, harboured, transferred, or received for the purposes exemplified within the objective aspects of the crime. On the basis of the descriptive contents of the act, it becomes apparent that various subjects are covered, which, in other cases, are protected independently. This non-traditional approach taken by the legislators is based on the aforementioned international documents, as the concept of human trafficking includes only the purpose and the perpetrator's intent to exploit persons in any of the

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specified manners. *The exploitation itself is a separate criminal act.*" (The commentary is included in the automated ASPI legal information system.)

This separate criminal act may consist of the following crimes according to the type of the specific labour exploitation in question:

#### Confinement (Section 182)

(1) Anyone who confines another person in an unauthorised manner shall be punished by imprisonment *for four to ten years*.

#### Limiting personal freedom (Section 183)

(1) Anyone who without authorisation prevents another person from exercising their personal freedom shall be punished by imprisonment *for six months to three years*.

#### Extortion (Section 189)

(1) Anyone who forces another person through violence, the threat of violence, or the threat of other serious harm to perform, forget or suffer any act shall be punished by imprisonment *for two to six years*.

(2) Imprisonment *for four to ten years* shall be the judgments for a perpetrator who commits any of the acts specified in paragraph 1 above:

- a) by means of a more severe course of action;
- b) against a protected person;
- c) for special motives; or
- d) *with a resulting greater volume of damage* (author's note: with a value of at least EUR 2,660).

#### Coercion (Section 192)

(1) Anyone who forces another person to perform, forget or suffer any act by taking advantage of the person's material needs, emergency non-material requirements, or difficulties resulting from an unfavourable personal position shall be punished by imprisonment *for up to three years*.

(2) Imprisonment *for one to five years* shall be the judgments for a perpetrator who commits any of the acts specified in paragraph 1 above:

1. by means of a more severe course of action;
2. against a protected person;
3. for special motives;

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4. with the intent to obtain for oneself or for another *greater material benefits* or other advantages (author's note: with a value of at least EUR 2,660); or
  5. by refusing an employee in an employment relationship or other comparable working relationship the right to occupational health protection, the right to holiday leave, or the right to any of the special working conditions guaranteed by law to women and minors.

#### Abuse of family members and persons entrusted into one's care (Section 208)

(1) Anyone who abuses a family member or any person entrusted into their care or for educational purposes, thus causing physical or mental anguish in any of the following manners:

- a) beating, kicking, punching, causing wounds and burns of various types, degrading treatment, contemptuous treatment, constant monitoring, threats, causing fear or stress, forceful isolation, emotional blackmail, or other behaviour that endangers an individual's physical or mental health or poses a threat to an individual's safety;
- b) the unjust withholding of food, rest or sleep or the denial of basic personal care, clothing, hygiene, medical care, housing, education, or training;
- c) *forcing an individual to beg or to repeatedly perform any activities that place a disproportionate physical or mental burden* on the individual because of the individual's age or health or that pose a threat to the individual's health;
- d) exposing an individual to harmful substances; or
- e) unduly restricting access to any property that an individual has a right to use, shall be punished by imprisonment *for three to eight years*.

#### Unauthorised employment (Section 251a)

(1) Anyone who illegally employs an individual staying in the Republic of Slovakia in conflict with binding legal regulation. In spite of the fact that this individual was punished for a similar offence during the past two years, shall be punished by imprisonment *for up to two years*.

(2) Imprisonment *for six months to three years* shall be the judgments for a perpetrator who commits any of the acts specified in Paragraph 1 above without regard to having been punished in the past for a similar crime if the crime is committed:

- a) against a protected person;
- b) by means of a more severe course of action;
- c) under particularly exploitative working conditions, including working conditions resulting from discrimination, if there is a marked disparity in comparison to

- 
- the working conditions of legally employed individuals, which has an impact on health and safety and is in conflict with human dignity; or
- d) against a person who is the victim of human trafficking.

At this point it is worth noting particularly the length of the case law for the individual crimes. As both currently valid Slovak as well as Czech criminal law provisions have evolved from the same roots (Act No. 140/1961 Coll., the Criminal Code), a further analysis of the Slovak material law provisions is included in *Chapter 6.2*.

#### **4.1.4.2 INTRODUCTION TO RELEVANT CASE LAW AND THEIR STATEMENT OF LAW**

The *Slum* case (2012), which is presented below, was one of the first cases in Slovakia in which an enforceable judgement was issued for human trafficking for the purpose of labour exploitation.

*The Slum Case* (judgment of the District Court in Prešov, No. 6T/52/2012)

##### Findings of Fact

The accused acted as intermediaries and offered jobs in Great Britain to the inhabitants of Roma housing estates in Slovakia, promising them wages ranging from EUR 1,000 to 1,300. To prove that these were not empty promises, they paid out EUR 50 to the workers' family members. The accused obtained travel documents for the workers and purchased bus tickets to Great Britain. Once the workers arrived in Great Britain, the accused arranged insurance for the workers, *registered them with job agencies*, and opened bank accounts for them. The contracts for these accounts and the associated payment cards were not however given to the workers. *The workers were accommodated in rented houses.*

*The workers worked as assistant labourers for eight to twelve hours a day. When the workers personally received their wages (GBP 180–300), they were forced to turn the money over to the accused. In some cases, the accused paid GBP 5–10 to the workers, however this amount was not sufficient to cover basic needs. If the workers complained or refused to go to work, the accused sometimes used force.* The workers were allowed to return to Slovakia only after their family members paid one of the accused EUR 200 per worker. It is important to keep in mind that the group of seven exploited workers were from the lowest social classes and thus were not able to communicate in English and were not aware of the laws in force in Great Britain.

##### Statement of law

The Court found the five accused guilty of human trafficking and the judgment specifically stated the following:

“With their common actions, including the use of fraudulent behaviour, deceit, the restriction of personal freedom, violence, and the threat of violence to obtain the con-

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sent of the workers, the accused, in spite of having obtained the workers' consent, lured, transported, and harboured other individuals for the purpose of forced labour, the provision of forced services, or practices similar to slavery. The accused committed this crime through the most severe form of behaviour – for a longer period of time and taking advantage disadvantageous personal situation, inexperience and dependency of a greater number of individuals.”

In this particular case the prosecutor and the Court *applied the instituted practice of an agreement on guilt and punishment* and therefore there was no principal hearing. For this reason, the Court's justification, which was available for the purpose of this analysis, was very brief and covered only the basic points. In its justification the Court did not in any way address the definition of the concepts of forced labour, practices similar to slavery, or any other factual aspects of human trafficking. In addition, the justification does not include any mention of the working and housing conditions of the victims.

In spite of the absence of a detailed justification, there is no doubt that the individual elements of human trafficking exist in this particular case, specifically:

- The workers were individuals from the lowest social classes, who were in social and financial distress;
- In some cases the worker's entire wage was taken away from him; and
- Some of the workers were *forced to perform labour with the use of violence*.

Applying the interpretations and arguments from the Chinese Horeca case in the Netherlands, we can most likely classify the conditions to which the workers were exposed under the term forced labour – the workers were forced to perform work with the use of violence and thus the level of force used and the resulting lack of freedom were high.

The share to which the individual accused individuals participated in the commission of the crime varied to a significant degree. For this reason, the Court passed down different case law, ranging from imprisonment for two years and eight months, a conditional deferral of a judgments for four years, up to imprisonment *for five years and nine months*.

Although the perpetrators acted *as both traders and, at the same time, as exploiters* they were *found guilty solely of human trafficking*, which, as is specified even in the commentary to the Slovak Criminal Code, applies only to the process of trading and not to the actual exploitation.

#### 4.1.5 BELGIUM

##### 4.1.5.1 LEGISLATION AND SCOPE OF LEGISLATION

The provisions associated with the issue of human trafficking are covered in Article 433 of the Belgian Criminal Code. As can be seen from the description provided below, the Belgian provisions are characterised by two important differences as compared to the legal provisions in other countries discussed previously.

Article 433 (5) of the Criminal Code



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Section 1: Any form of recruitment, transport, transfer, harbouring, and subsequent receiving of an individual, including and exchange or transfer into the control of another person *for the purpose of*

(...)

3. *employing or enabling the employment of an individual under conditions that are in conflict with human dignity,*

(...)

In addition, to the cases specified under point 5, whether an individual grants his/her consent with any intended or actual exploitation does not play a role.

Section 2: Any criminal activity as defined in Section 1 shall be punished by imprisonment *for one to five years* and a fine of EUR 500 to EUR 5,000.

Section 3: Any attempt to commit a crime as defined in Section 1 shall be punished by imprisonment for one to three years and a fine of EUR 100 to EUR 10,000.

#### Article 433 (6)

A crime as defined in Section 1 of Article 433 (5) shall be punished by imprisonment for five to ten years and a fine of EUR 750 to EUR 75,000 if it is committed by:

1. a person who holds power over an individual or a person who abuses their position of authority or specific advantages they hold on the basis of their position; or
2. an officer, a state official, or an individual authorised to perform public service within the competence of their position.

#### Article 433 (7)

A crime as defined in Section 1 of Article 433 (5) shall be punished by imprisonment *for ten to fifteen years* and a fine of EUR 1,000 to EUR 100,000 in the following situations:

1. If the crime is committed against a minor;
2. If the crime is committed *taking advantage of a particularly vulnerable situation*, in which an individual finds him/herself as a result of an administrative illegality or difficulty, a difficult social situation, pregnancy, illness, weakness, or physical or mental deficiency and this individual has no other actual or acceptable option other than to be subjected to abuse;
3. If the crime is committed with the direct or indirect *use of fraudulent methods, violence, threats, or any other form of coercion*;
4. If the victim's life is placed in danger whether intentionally or through negligence;
5. If the crime leads to an apparently incurable disease, a permanent physical or mental defect, the full loss of an organ or its functionality, or serious disfigurement;
6. If the relevant activity is a standard or on-going activity; or

- 
7. If the crime is committed through participation in the primary or secondary activities of an association, regardless of whether the perpetrator held a leading role or not.

(...)

As is apparent from the phrasing of factual requirements, the Belgian legislation does not use the terms forced labour, slavery, servitude, or practices similar to slavery in the way they are incorporated in international and European legal documents. Instead it uses the more general concept of *employment under conditions that are in conflict with human dignity*, which in all likelihood, includes all of the aforementioned forms of labour exploitation.

The Belgian legal provisions also differ because “*means of coercion*” need not be used in order to meet the definition specified for basic factual requirements. In this respect, the Belgian provisions exceed the minimum requirement for the common standards that have been incorporated at the European and international levels. Accordingly, even the basic punishment consists of imprisonment for one to five years. If the perpetrator of labour exploitation only takes advantage of a victim’s vulnerable situation, the factual requirements are met. *The formulation of the basic factual requirements in this manner overcomes any difficulties that may be encountered when proving that a perpetrator actually misused a victim’s vulnerable situation.* This also reduces the dependence of the investigating authorities on the testimony of the victims, which as mentioned in Chapter 6.1.2., may be difficult to obtain in many cases.

#### **4.1.5.2 INTRODUCTION TO RELEVANT CASE LAW AND THEIR STATEMENT OF LAW**

Four Belgian judicial judgments were selected for analysis: the Algerian case (2008), the Restaurant case (2007), the Fruit Pickers case (2007), and the Maid case (2011).

*The Algerian case* (judgment of the Criminal Court in Liege, Fourth Criminal Chamber No. 2007/SO/17)

##### Findings of Fact

The accused lured a disabled and socially disadvantaged youth (his arm was amputated below the elbow) from Algeria to Belgium with the promise that the accused will provide him with an education and arrange his adoption. After his arrival in Belgium, the accused employed the young man in his workshop but did not pay him any wages. Accommodation was provided in the accused’s attic and the meals that were provided were also inadequate. The accused exploited the young Algerian in this manner from 2003 to 2005.

##### Statement of law

In its justification the Court stated that the Algerian was lured to Belgium by the accused under false pretences and that the accused took advantage of the young man’s

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difficult situation as a socially disadvantaged person illegally residing in Belgium. The appellate court, whose judgment was available for the purpose of preparing this analysis, did not however provide a more detailed statement with regard to the working and living conditions.

The Court found the accused guilty of human trafficking and sentenced him to *two years imprisonment with a conditional deferral of judgments for three years* and also imposed a fine of EUR 2,750. In addition, the accused was ordered to pay compensation for damages and moral injury. As far as, the punishment is concerned, it needs to be mentioned that the sentencing for this case was not under the currently valid Article 433 (5) but in accordance with the provisions of Section 77 bis, which were in force at the time the crime was committed and which specified a lesser punishment.

*The Restaurant case* (judgment of the Criminal Court in Anvers, Fourteenth Social Affairs Chamber No. 933 P2007)

#### Findings of Fact

In this case the accused operated a Chinese restaurant and were a part of an organised group that brought Chinese workers to Belgium. The workers were not paid proper wages and received only symbolic amounts of compensation. They were provided with accommodation in inhumane conditions.

#### Statement of law

The accused were found guilty of human trafficking pursuant to section 433 subsection 1 of the Criminal Code. The appellate court sentenced them to *imprisonment for one year with a conditional deferral of judgments for three years* and also imposed a penalty of EUR 16,500. The Court did not provide a more detailed statement in its judgment regarding the amount of the retained compensation or the housing conditions.

*The Fruit Pickers case* (judgment of the Criminal Court in Tongres, Fourteenth Chamber No. 2164/07)

#### Findings of Fact

The accused *acted as an intermediary* and arranged work picking fruit for his countrymen (a group of ten people). In order to obtain employment for them in the fruit orchards he and the second accused forged the required documentation (passports, etc.). The work in the orchards lasted for a period of six months. The accused paid the workers only a fraction of the wages due to them for their work, even though the fruit growers provided him with the total wages.

#### Statement of law

The principal accused was found guilty of forging business and banking documents, the use of forged documents and other written materials, human trafficking, and the re-

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tention of stolen personal property. He was sentenced to imprisonment for *two years and ordered to pay a fine of EUR 5,500*. In its judgment the Court did not however express its opinion with regard to the conditions to which the victims were exposed.

*The Maid case* (judgment of the Criminal Court in Liege, Eight Criminal Chamber No. 1327/06)

#### Findings of Fact

The accused consisted of four Romanian citizens (a couple together with their son and his partner) who were residing in Belgium and who employed a Romanian woman as a household helper for a period of five months. The young woman (an orphan) was recruited in Romania by means of a magazine advertisement and subsequently transported by the accused's relatives to Belgium.

The victim agreed to perform household tasks in return for only room and board. Her living conditions were very poor. All of her personal documents were taken away from her, she did not receive any wages or pocket money, she slept in the living room on the sofa or on the floor, and she did not have any extra clothing. Her working hours were usually from 7:30 a.m. to 10:00 p.m., during which hours she vacuumed, cleaned, ironed, and took the family's children to school. She was repeatedly physically attacked and also sexually harassed numerous times.

Apparently, the perpetrators were committing a crime partially due to their ignorance as they were not aware of their illegal behaviour. They freely admitted the manner in which they had recruited the victim and the conditions under which she was employed (including an admission of the use of physical violence).

#### Statement of law

*The Court determined that the working conditions were degrading to human dignity primarily* because the young Romanian woman did not have her own room, she had practically no personal belongings, she did not receive any remuneration, and she did not receive any time off from work. She was also the victim of physical abuse.

The Court worked in cooperation with the social service authorities and the inspector from this office determined that the approximate gross wages that should be paid to the victim totalled EUR 16,084 (a net wage of EUR 13,981.82). This amount was then used to calculate the amount due for unpaid taxes. The applicable amount that was determined is not apparent from the Court's judgment and the Court only refers to the document prepared by the social service authorities that was included as an attachment to the judgment. This document was however not available for the purpose of preparing this analysis.

*When determining the victim's vulnerability*, the Court took primarily the following into consideration:

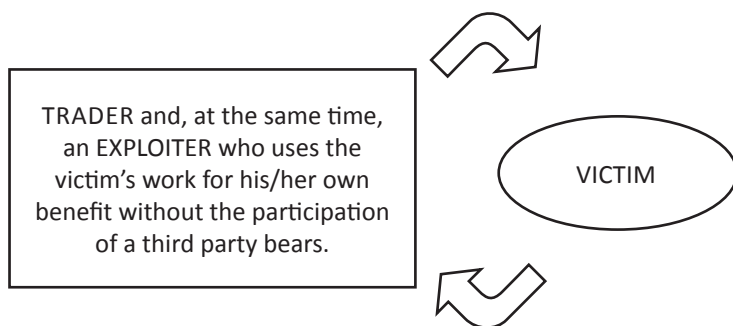
- The perpetrators were in a position of "authority" to the victim as her "employers";

- 
- During her interviews with the police, the victim appeared to be “extremely terrified” and it was obvious that she feared the consequences she might suffer at the hands of the perpetrators;
  - The victim’s difficult living conditions in Romania (as an orphan living in an institution); and
  - The fact that the young woman did not speak French and did not have a Belgian residence permit.

In addition to human trafficking, the perpetrators were also accused of the *illegal employment of foreigners* as the victim did not have residence permit in Belgium for more than three months. In addition, the perpetrators did *not register the young women with the social authorities as her employer*. All of the accused were sentenced to three years imprisonment and were ordered to pay fines, which amongst other things, included penalties for not complying with their obligation to pay social security and health insurance for their employed victim.

This case, together with the previously described Algerian and Restaurant cases, *provides evidence of the broad definition of human trafficking* in the same way as this concept is viewed in the Netherlands and Germany. The broad definition of human trafficking can be simply expressed as follows:

Scheme No. 3:



According to this conception, an employer who *directly uses the labour of an exploited victim* is criminally responsible for the act of human trafficking without the involvement of any third parties.

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## 4.1.6 BULGARIA

### 4.1.6.1 LEGISLATION AND SCOPE OF LEGISLATION

The Bulgarian legislative provisions regarding human trafficking can be found primarily in Sections 159a and 159b of that country's Criminal Code. These provisions state the following:

Section 159a of the Criminal Code:

(1) Anyone who hires, transports, harbours, or receives an individual or group of individuals *for the purpose of providing sexual services, forced labour, the removal of human organs, or confinement under severe conditions* regardless of the individual's consent shall be punished by imprisonment for two to eight years and a fine of BGN 3,000 to BGN 12,000 (author's note: approximately EUR 1,500 to EUR 6,000).

(2) Anyone who commits the criminal act defined in Paragraph 1 above:

1. against a minor younger than eighteen years of age;
2. with the use of coercion or deceit;
3. by means of kidnapping or through the illegal restriction of freedom;
4. by taking advantage of an individual's dependency;
5. by taking advantage of his/her position;
6. with the promise of collecting or receiving benefits shall be punished by imprisonment *for three to ten years* and a fine of BGN 10,000 to BGN 20,000 (author's note: approximately EUR 5,000 to EUR 10,000).

(3) Anyone who commits the criminal act defined in Paragraph 1 above against a pregnant woman with the aim of selling the woman's child shall be punished by imprisonment *for three to fifteen years* and a fine of BGN 20,000 to BGN 50,000 (author's note: approximately EUR 10,000 to EUR 25,000).

Section 159b of the Criminal Code

(1) Anyone who hires, transports, harbours, or receives an individual or group of individuals and transports them *across state borders* for the purposes specified in Section 159a (1) shall be punished by imprisonment *for three to twelve years* and a fine of BGN 10,000 to BGN 20,000 (author's note: approximately EUR 5,000 to EUR 10,000).

(2) Anyone who commits the criminal act specified in Paragraph 1 in the manner specified in Section 159a (2) or Section 159a (3) shall be punished by imprisonment *for five to twelve years* and a fine of BGN 20,000 to BGN 50,000 (author's note: approximately EUR 10,000 to EUR 25,000)

(...)

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In a manner comparable to that found in the relevant Belgian legislation, according to the Bulgarian legal provisions, “*means of coercion*” need not be used in order to meet the basic factual definition of human trafficking for the purpose of labour exploitation, which as has been mentioned above, makes the process of proving a crime easier for the authorities involved in criminal proceedings. As compared to the Belgian provisions however, the Bulgarian provisions in this case impose a longer judgments of *two to eight years*.

Another unique aspect of the Bulgarian provisions is that the Bulgarian legislators distinguish between cases at the national level from cases when there is an international aspect to human trafficking where in the case of the latter, the case law are more severe.

The Bulgarian legal provisions also differ in the fact that these provisions do not use the terms “*slavery*”, “*servitude*”, and “*practices similar to slavery*”. Instead they use the concept of “*confinement under severe conditions*”, which can almost certainly be considered to be as a synonym for slavery or servitude.

#### **4.1.6.2 INTRODUCTION TO RELEVANT CASE LAW AND THEIR STATEMENT OF LAW**

This section takes a look at the Blueberries case (2010), in which the perpetrator lured three of his Bulgarian countrymen to Sweden to pick blueberries.

*The Blueberries case* (judgment of the District Court, No. 30186/2010)

##### Findings of Fact

The Bulgarian accused recruited and transported three individuals to work in Sweden with the promise of free room and board. Upon their arrival in Sweden, the three individuals were employed picking blueberries in the local mountains. The accused subsequently sold the blueberries in the fruit collection centers located in the nearby town of Geble. The workers were not provided with any accommodation and they had to sleep outside. Meals were served three times a day; however these meals usually consisted only of bread and luncheon meats. The workers picked blueberries *for twelve days*, at which time they decided to escape from the accused for reasons including the lack of sufficient food.

##### Statement of law

The Court found the accused guilty of human trafficking, when it stated that the perpetrator *misled the victims by not providing them with the standard working and living conditions* he had promised. According to the Court, the perpetrator also took advantage of the *victims’ dependency*, which came into existence because they were *not provided with adequate food and proper accommodation and the workers were left without any finances*. These actions were undertaken by the perpetrator in order to use the individuals for forced labour. In a manner comparable to the Moonfish and Farmer cases, the Court determined the *dependency of the victims* on the basis of objective facts – a lack of finances and inadequate room and board.

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The Court reached the conclusion that the perpetrator used the individuals for forced labour in spite of the fact that the workers' physical freedom was not restricted in any way, which is evidenced by, amongst other things, the fact that the workers escaped from the perpetrator without any problems. Based on the information provided above, it is possible to conclude that, although there are no indications within the judgment itself, at the time the Court was making its decision it used the indicators for forced labour as defined by the International Labour Organisation, which, as already mentioned previously, uses a broader interpretation of the term "forced labour" as compared to the definition used by the prosecutor in the Chinese Horeca case in the Netherlands.

Although the accused was facing with a possible prison judgments of five to twelve years, the Court took into consideration the accused's personal situation, specifically he was unemployed with five children to support, and sentenced him to *two years imprisonment with a conditional deferral of judgments for three years*.

In this case the perpetrator of the human trafficking was the actual employer of the workers and he used their labour directly. *It is therefore possible to conclude that the Bulgarian judiciary also applies the broader interpretation of human trafficking in a way that is comparable to the way it is applied in the Netherlands, Germany, and Belgium.*

#### 4.1.7 ITALY

##### 4.1.7.1 LEGISLATION AND DEFINITION

The issue of human trafficking is provided for in Articles 600 to 604 of the Italian Penal Code.

#### Art. 600 of the Penal Code

Placing or holding a person in conditions of slavery or servitude

Whoever *exerts on any other person* powers and rights corresponding to *ownership*, or whoever *places or holds any other person in a condition of continuing enslavement*, sexually exploiting such person, imposing forced *labour* or forcing said person into begging, or *exploiting* him in any other way, shall be punished with imprisonment for a period of *eight to twenty years*.

*Placement or holding a person in a condition of enslavement* occurs, when use is made of violence, threat, deceit, or abuse of power, or when anyone takes advantage of a situation of physical or mental inferiority or poverty, or when money is promised, payments are made or other kinds of benefits are granted to those who are responsible for the person in question.

The aforesaid penalty becomes harsher, increasing by one third to one half, if the offence is perpetrated against minors under the age of 18 or for prostitution or organ removal purposes.



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## Art. 601 of the Penal Code

### Trafficking in human beings

Whoever *carries out trafficking in human beings* who are in the conditions referred to in article 600, or whoever, with a view to perpetrating the crimes referred to in the first paragraph of said article, leads any person to *enter, stay in, or leave the national territory*, or migrate to said territory, through deceit or by making use of violence, threat, or abuse of power, or by taking advantage of a situation of physical or mental inferiority or poverty, or by promising money or making payments or granting other kinds of benefits to those who are responsible for the person in question, shall be punished with imprisonment for a period of *eight to twenty years*. The aforesaid penalty becomes harsher, increasing by one third to one half, if the offence is perpetrated against minors under the age of 18 or for prostitution or organ removal purposes.

In all the above cases, the punishment shall be imposed on whoever makes it possible, with a view to perpetrating the crimes referred to in article 600, for any person who is in any of the conditions referred to in article 600 to enter, stay in, leave, or migrate to the national territory.

## Art. 602 of the Penal Code

### Sale and purchase of slaves

Whoever, in *cases other than the ones referred to in article 601*, purchases or sells or transfers any person who is in any of the conditions referred to in article 600, shall be punished with imprisonment for a period of *eight to twenty years*. The aforesaid penalty becomes harsher, increasing by one third to one half, if the offence is perpetrated against minors under the age of 18 or for prostitution or organ removal purposes.

## Art. 603 of the Penal Code

### Illicit intermediation and exploitation of workers

Unless, the act constitutes a more serious offence, whoever *carries out organised activities of labour intermediation* by recruiting labour or organising labour activities characterised by exploitation, *making use of violence, threat, or intimidation, abusing the situation in which the worker is, resulting from poverty or necessity*, shall be punished with imprisonment for a period of five to eight years and with a fine in the amount of EUR 1,000–2,000 per each worker recruited.

For the purposes of the first paragraph, the indicator of exploitation is deemed to be the existence of *at least one of the following circumstances*:

(1) systematic remuneration of workers in a manner that is clearly contrary to national collective bargaining agreements or in any case, disproportionate in respect of the quantity and quality of the work done,

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(2) systematic violation of regulations concerning working hours, weekly rest, maternity leave, and leave of absence,

(3) violation of regulations in the field of safety and hygiene in the workplace, such as to jeopardize the worker's health, safety or human dignity, or

(4) submission of the worker to such working conditions, methods of supervision, or lodging conditions as are deemed to be particularly degrading.

The aggravating circumstances increasing the aforesaid penalties by one third to one half are the following:

(1) the fact that the number of workers exceeds three,

(2) the fact that at least one worker is under the age permitted by law for the performance of work, or

(3) the fact that the workers have been exposed to situations of grave danger with regard to the nature and conditions of the work performed.

The Italian legislation expressly distinguishes between placement into slavery or enslavement and the process of human trafficking itself. It is worth mentioning that the Italian legislation uses the term "continuing enslavement", and it should therefore not be sufficient to carry out exploitation of workers on a short-term basis to establish enslavement. Hence, it is questionable to what extent the term "continuing enslavement" is consistent with the definition of forced labour under the ILO's Forced Labour Convention – "*all work or service which is exacted under the menace of any penalty and for which the said person has not offered him voluntarily*". The exhaustive enumeration of labour-related exploiting conditions, as specified in Article 603, can be identified as inspiring for other European legislations. Those conditions appear to be a reasonable compromise between the vague definitions of the term "exploitation", on the one hand, and a dangerously strict definition of that term, on the other hand. By contrast, the Italian legislation requires that "means" (signs of force) be proven even in cases where the victim of human trafficking is a *child*, which at first sight, does not appear to be fully consistent with European and international documents applicable to the issue of human trafficking.

#### **4.1.7.2 INTRODUCING THE CASES AND THEIR LEGAL QUALIFICATION**

This part introduces two judgments of the Supreme Court of Cassation – specifically the *Begging* (2006) and *Circus* (2008).

*The Begging case* (Judgment of the Supreme Court of Cassation – 3rd Criminal Department no. 2841)

##### Facts of the case

A group of people, members of nomadic Roma communities, *used physical violence to force their minor relatives to beg and sell figurines*. The begging took place in cities, specifically at traffic lights, where the children were driven by their relatives every morn-

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ing and afternoon. The money obtained by begging was given by the children to their relatives each night.

#### Legal qualification

The Court qualified the case as a crime under Article 600 – Placing or holding a person in conditions of slavery or servitude, holding that the perpetrators committed the crime against minors under the age of 18. The Judgment of the Supreme Court which was available during the preparation of the analysis, but did not contain the specification of the types and amounts of the penalties imposed.

The Court also held that the accused forced minors to beg and sells figurines by making use of violence, thereby abusing their power and taking advantage of the inferiority and poverty, where the term “*poverty*” was understood by the Court as any material or moral weakness or shortage that may have an impact on the will of an individual. The Supreme Court affirmed judgments of lower courts by its decision, rejecting, among other things, the perpetrators’ defence that the begging of minors belongs to the tradition of the Roma people.

*The Circus case* (Judgment of the Supreme Court of Cassation – 5th Criminal Department no. 46128)

#### Facts of the case

A Bulgarian family of four (parents with two daughters) were employed with a circus. Their working hours were 15–20 hours a day, and they received weekly wages in the amount of EUR 100 for that work. However, fees for travel to Italy and for labour intermediation were deducted from that amount and paid to their fellow countrymen. During performances, their minor daughter was forced to enter a transparent box containing snakes and tarantulas. The other members of the family were forced to dive into water with piranhas, to disassemble and reassemble circus structures, and to clean up and maintain the performance area.

#### Legal qualification

In this case, only an appeal from the resolution to terminate custody, which was granted by the Supreme Court of Cassation and the resolution was vacated, was available during the preparation of the analysis. The Supreme Court, therefore, did not decide on the merits, but ruled while examining the resolution to terminate custody that the case at issue was not a case of slavery, since the Bulgarian family had their documents and were free to leave the workplace, albeit for a short period of time.

### **4.1.8 ROMANIA**

#### **4.1.8.1 LEGISLATION AND DEFINITION**

The criminalisation of all forms of human trafficking was carried out in Romania by the special Act No. 678/2001 on preventing and combating trafficking in human beings.

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The relevant provisions were then transposed also to the Criminal Code, specifically to Articles 202 to 207.

Art. 202 of the Criminal Code

Slavery

*Placing or keeping a person in slavery, as well as trafficking in slaves, shall be punished by strict imprisonment from three to ten years and the prohibition of certain rights.*

Art. 203 of the Criminal Code

Subjection to forced or obligatory labour

The act of subjecting a person, in cases other than those specified by law, to any kind of labour against his will or to any kind obligatory labour, shall be punished by strict imprisonment from *one to three years*.

Art. 204 of the Criminal Code

Trafficking in adult persons

(1) The act of recruiting, conveying, transferring, lodging or taking over a person by threat or by other forms of coercion, by abduction, fraud or deceit, abuse of authority or *taking advantage of the person's inability to defend himself and to express his will* (condition of dependence) or by giving, accepting or receiving money or other benefits in order to obtain consent from the person having authority over another person in order to exploit that person, shall be punished *by strict imprisonment from three to twelve years* and the prohibition of certain rights.

(2) The penalty shall be severe detention from fifteen to twenty years and the prohibition of certain rights, if:

- (a) the act has been committed by two or more persons together,
  - (b) the victim suffered serious harm to health or corporal integrity, or
  - (c) the act produced significant material benefits.
- (...)

Art. 205 of the Criminal Code

Trafficking in minors

(1) The act of recruiting, conveying, transferring, lodging or taking over a person aged fifteen to eighteen *in order to exploit* that person, shall be punished by strict imprisonment from three to twelve years and the prohibition of certain rights.

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(2) The penalty shall be severe detention from fifteen to twenty years and the prohibition of certain rights, if:

- (a) the act has been committed against a person under the age of fifteen,
- (b) the act has been committed by threat, violence or other forms of coercion, by abduction, fraud or deceit, by abuse of authority or taking advantage of the minor's inability to defend himself or to express his will, or by giving, accepting or receiving money or other benefits to receive consent from the person having authority over the minor,
- (c) the act has been committed by two or more persons together,
- (d) the victim suffered serious harm to health or corporal integrity, or
- (e) the act produced significant material benefits.

(3) If the act resulted in the victim's death or suicide, the penalty shall be life detention or severe detention from fifteen to twenty-five years and the prohibition of certain rights.

Art. 206 of the Criminal Code

The victim's consent to trafficking in human beings

For offences in Art. 204 and Art. 205, the victim's consent is not a justifying cause.

Art. 207 of the Criminal Code

Defining the exploitation of a person

For the purposes of Art. 204 and Art. 205, a person's exploitation means:

- (a) the execution of labour or the performance of services, in a forced manner, while transgressing legal regulation concerning working conditions, remuneration, health and safety,
- (b) maintenance in slavery or other similar means of deprivation of freedom or servitude,
- (c) obligation to practice prostitution, to pornographic performance in order to produce or disseminate pornographic material or other forms of sexual exploitation,
- (d) obligation to practice begging, or
- (e) extraction of organs.

The distinction between the crime of slavery under Article 202, which applies, in addition to slavery itself, also to trafficking in slaves, and the crime of trafficking in adult persons under Article 204 in conjunction with Article 207, is somewhat unclear. The primary difference between those two crimes is that the crime of trafficking in adult persons, as opposed to the crime of slavery, contains the factual element of force (by threat of by other forms of coercion, etc.). However, since slavery represents the most serious form of exploitation of workers, where a human being is reduced to a mere object of ownership,

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it is very difficult to imagine cases of trafficking in slaves where the use of at least one of the many signs of force could not be proven to the perpetrator. However, Article 204, in comparison with Article 202, imposes a higher penalty (from three to twelve years).

As the only one of all the analysed legislations, the Romanian legislation expressly defines the crime of forced or obligatory labour. It is, however, interesting that the term “forced labour” is not expressly used in Article 207(a), which provides for individual types of exploitation. Article 207(a) uses the term “the execution of labour or the performance of services, in a forced manner”, but the establishment of this, in contrast to Article 203, depends on whether or not the work performed is *simultaneously transgressing* legal regulation concerning working conditions, remuneration, health and safety. It also is interesting to compare this definition with the Dutch interpretation of forced labour in the Chinese Horeca case. According to the Dutch general prosecutor, it is sufficient to conclude that a worker has been subjected to forced labour if the worker has experienced a high (extreme) degree of lack of freedom.

#### 4.1.8.2 INTRODUCING THE CASES AND THEIR LEGAL QUALIFICATION

This part deals with three of Romanian judgments, specifically with the Boiciuc (2007), Spanish Anabasis (2008) and Citrus Fruits (2010).

##### *The Boiciuc case* (Judgment of the Regional Court in Alba no. 3118/107/2007)

##### Facts of the case

The accused, two men, successively lured tens of people to arrive to the Czech Republic by promising them work. The workers were told they would be paid monthly wages in the amount of USD 800–1,200 and provided with free lodging. Each worker was supposed to pay for his own transport (USD 150 or CZK 4,000).

After the arrival to the Czech Republic, no proper employment contract was entered into in writing with the workers. The workers carried out work at construction sites or in industrial halls, the working hours were 10–14 hours per day. They also worked on Saturdays. Every week, the workers received CZK 500 for their work. The lodging conditions were very poor – several workers complained about skin problems, and the lodging was not free either. The workers were allegedly subjected to unreasonable supervision both at work and in the lodging premises.

##### Legal qualification

The Court ruled in the judgment that the victims were *in the position of dependence*, since the workers were not paid appropriate wages. The workers were therefore not given the opportunity to leave the workplace or to leave for home.

For the crime of trafficking in human beings, the accused were sentenced to imprisonment for a period of five years and to prohibition of the exercise of certain rights for the term of the imprisonment and for two years thereafter.

Facts of the case

Within a period of two years, the three accused (a married couple and their son) lured at least eleven people to travel to Spain with a view to performing farm work. The workers were told they would be paid monthly wages in the amount of EUR 300–350 and provided with free lodging, food, and transportation. The workers included minors and a deaf-mute person.

After the arrival to Spain, the victims were deprived of their identification documents. The workers received no remuneration for their work, even though the accused allegedly received EUR 45–50 per person each day from the Spanish farmers. If no work was available for the victims to perform, *they were forced to beg, sometimes by physical violence*. During the period when they were begging, they were under continuous supervision from one of the perpetrators. Workers who complained about the working and lodging conditions were physically attacked and deprived of food. The accused supervised the workers also when they phoned their relatives in Romania, having prohibited the workers to speak about their working and lodging conditions. The accused also attempted to “sell” one of the female workers, but the sale failed in the end.

Legal qualification

The Regional Court held that the accused used deceit and fraud, and subsequently also violence, to perpetrate the crime. From the very beginning, their intention was to lead the victims into the position of dependence by luring them to travel to a foreign country, where they were deprived of identification documents and subjected to poor working conditions and where they did not receive any financial remuneration for the work performed. The victims were also subjected to continuous supervision by the perpetrators, they were threatened, and some of them were even physically attacked. According to the Court, the perpetrators thereby placed the workers in slavery. The Court used the term “*placing in slavery*” without arriving, in accordance with the ECHR case law, at the conclusion that the exploited workers were reduced to a mere object of ownership or any part thereof.

The accused were sentenced to imprisonment for a period of seven years. In addition, they were prohibited to exercise certain rights for the term of the imprisonment and for five years thereafter. Simultaneously with the penalty, the accused were imposed an obligation to pay damages to the victims in the amount of EUR 900 to 2,100.

*The Citrus Fruits case* (Judgment of the Bihor Regional Court no. 1262/35/P/2010)

Facts of the case

The two accused, members of an organised group, successively lured tens of people (thirty-three people) to travel to Spain with a view to picking citrus fruits. The accused promised some workers remuneration in the amount of EUR 30–50 per day, and remu-

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neration amounting to EUR 5 per hour to others. The accused required the workers to pay EUR 100 for the labour intermediation.

After the arrival to Spain, the workers were driven by other members of the organised group to various Spanish towns and cities. The lodging conditions were very poor. Some workers slept on the floor in garages, while others stayed in rooms without power and water supply.

The accused did not manage to provide enough work, and the workers therefore carried out work on an irregular basis. The working hours were 5 am to 7 pm. The workers received remuneration in the amount of EUR 5 per day, but some workers were paid remuneration in the amount of only EUR 5 a week.

#### Legal qualification

The Court held in the judgment that the accused used deceit, since the promised working and lodging conditions were very different from the actual conditions that were eventually provided to the workers in Spain. As a result, the Court arrived at the conclusion that the accused, as members of an organised group, recruited workers and organised their travel to Spain, where the workers, *under the supervision* of other members of the organised group, who attacked them verbally and threatened them, performed work contrary to the applicable legislation concerning working conditions, remuneration, health and safety.

The Court inferred the position of dependence from the fact that the workers were paid remuneration only in such an amount as to make it possible for them to survive.

For the crime of trafficking in human beings, the accused were sentenced to imprisonment for a period of four years and simultaneously to prohibition of the exercise of certain rights for the term of the imprisonment and for two years thereafter. In addition, the Court imposed an obligation on the accused to pay actual and moral damages to the victims, with the amount based on the duration of the victims' stay in Spain, but the amount thereof must exceed the minimum threshold of EUR 1,100.

## 4.2 THE LEGAL SITUATION IN THE CZECH REPUBLIC

Criminal Act No. 141/1961 Coll., (hereinafter referred to as "*the old Criminal Act*") contained the regulation of the facts related to human trafficking which however was limited only to the *trafficking of women* for the purpose of *sexual intercourse* at the time of its adoption, which meant that in order for the merits of the case to be fulfilled, the woman had to be enticed, hired or transported *abroad*. The wording of the said provision was as follows:

(1) Whoever entices, hires or transports a woman abroad with the intent of using her for sexual intercourse with another person shall be punished by a prison judgments of one to five years.



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The amendment of the provision was not implemented until 2002. The amendment stopped distinguishing between the sexes of the trafficked person; however it was still limited to a single purpose of the trafficking – i.e. sexual intercourse. Additionally, it failed to eliminate the cross-border element even though, based on the amendment, a woman could also be enticed, hired or transported from a foreign country, which expanded the scope of the facts. The wording of the amended provision was as follows:

(1) Whoever entices, hires, or transports a woman abroad or from abroad with the intent of using them for sexual intercourse shall be punished by a prison judgments of one to five years.

Criminalisation of human trafficking for the purpose of exploitation was only updated by the amendment of Criminal Act No. 537/2004 Coll., which pretty much reflected the legal provisions of the International Convention on International Organised Crime of 2000, i.e. the Palermo Protocol and in the Framework Decision of the Council No. 2002/629/JHA on Combating trafficking in human beings. *The actual facts were newly included in Section 232a*, while the working of its two fundamental facts was as follows:

(1) Whoever *forces, arranges, hires, entices, transports, harbours, detains or sets up (conduct)* a person younger than 18 years of age, *to be used for (for the purpose of)*

- a) sexual intercourse or other forms of sexual harassment or abuse,
- b) slavery or servitude, or
- c) forced labour or other forms of exploitation, shall be punished by a prison judgments of two to ten years.

(2) Anyone shall be similarly punished, who *uses violence, the threat of violence or deceit or through an abuse of their error, distress or dependence (means), forces, arranges, hires, entices, transports, harbours, detains or sets up (conduct), to be used for (for the purpose of)*

- a) sexual intercourse or other forms of sexual harassment or abuse,
- b) slavery or servitude, or
- c) forced labour or other forms of exploitation.

Upon the adoption of the amendment of the Act, human trafficking in the Czech Republic stopped being limited only to forms of sexual exploitation. Following the example of the above referred to international instruments, the amended facts distinguished between the conduct, means and purpose, when the criminal liability of the offender required the fulfilment of all these elements. Only in cases, when the trafficked person is younger than 18 years of age, i.e. a person not yet sufficiently mentally developed, the fulfilment of the facts did not require evidence of coercion – the means.

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In relation, with the adoption of the new Criminal Act No. 40/2009 Coll., (hereinafter referred to as *“the new Criminal Act”*), which came into full force and effect on 1 January 2010, the definition of these facts was amended further. The new Criminal Act deems a person who preys on human trafficking, or any other referred form of trafficking, guilty of committing the criminal act of human trafficking (exploitation is only one of the forms of auxiliary activities promoted to a completed criminal act and thus it is important to differentiate between people who prey on others and exploiters). In addition to the expansion of the list of different forms of trafficking, the statement *“to use them”* was changed by the new Criminal Act to *“to use them by another person”*. This change was to emphasize the significance of the trafficking itself (tripartite relationship) when the main objective was to distinguish between the criminal act of human trafficking and the criminal act of soliciting. The provisions regulating soliciting in the old Criminal Act overlapped with the provisions regulating human trafficking in terms of the content. This feature to a certain extent originated in the fact that the *criminal act of soliciting* also contained the features of trafficking (tripartite relationship) – the offender arranges (or utilised other forms of conduct) that such person has a sexual intercourse with another person for payment.

Definition of soliciting as referred to in the old Criminal Act:

#### Section 204 Soliciting

(1) *Whoever arranges by forces or entices another person to engage in prostitution* or whoever profits from prostitution practiced by another person shall be punished by a prison judgments of up to three years.

(2) If the offender *commits the act referred to in Subsection 1 while using violence, threat of violence or threat of other serious bodily harm or abusing the distress or dependence of another person*, they shall be punished by a prison judgments of one to five years.

(...)

Definition of soliciting as referred to in the new Criminal Act:

#### Section 189 Soliciting

(1) *Whoever arranges by forces or entices another person to engage in prostitution* or whoever profits from prostitution practiced by another person shall be punished by a prison judgments between six months to four years, prohibition of performing an activity or forfeiture of items or other assets.

(2) The offender shall be punished by a prison judgments of two to eight years if they commit the act referred to in Subsection 1

- a) with the intent to obtain considerable profit for themselves or somebody else, or
- b) as a member of an organised group.

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(...)

The legislative process during which the statement “*to use them by another person*” was amended may be evaluated as somewhat illogical, due to the fact that soliciting does not contain the feature “*engage in prostitution*” and the facts of human trafficking under the new Criminal Act uses the statement “*to use them by another person – for sexual intercourse*”. In a situation when the prostitution is defined as sexual intercourse with another person or persons for a payment (R 22/1995), the addition (amendment) of the statements “*to use them by another person*” did not lead to a difference between the two criminal acts in any case. Their true difference occurred due to the amendment of the facts of soliciting which under the new Criminal Act, as referred to in Subsection 2, no longer includes the statement “*while using violence, threat of violence or threat of other serious bodily harm or abusing the distress or dependence of another person*”. The Supreme Court has already commented on the said matter in its resolution No. 5 Tdo 160/2012 stating: “The fundamental difference between these facts is based particularly in the fact that in the case of the criminal offence of soliciting, the victim *voluntarily accepts the offer of the offenders* to engage in prostitution, which may be unrealistic or false (see terms “*entice*” or “*lure*”). *Nevertheless, this is often a free decision.* In contrast, in the case of the criminal offence of human trafficking, the offender acts *against the will of the victim* under Section 168 Subsection 2 and 3 of the Criminal Act.

The lack of clarity on the issue of human trafficking with the purpose of sexual exploitation also introduces the fact that the legislator distinguishes between “*use for sexual intercourse*” (Subsections 1 and 2) and “*use for prostitution*” (Subsection 3 – qualified facts with a criminal judgments of five to twenty years). Based on this distinction, it would be possible to conclude that the regulation under Subsection 1 and Subsection 2 relates to cases of the involuntary use of another person for the purpose of sexual intercourse, where *contrary to the provision under Subsection 3*, the sexual intercourse is provided for a payment. However, such definition of the criminal act of human trafficking significantly overlaps with the basis of the criminal act of rape under Section 185 of the Criminal Act, which was committed in the form of complicity.

The basic facts of the criminal act of human trafficking are regulated under the Criminal Act as follows:

(1) *Whoever arranges by forces ,hires, entices, transports, harbours, detains or sets up (conduct) a person younger than 18 years of age, to be used by another person for (for the purpose of)*

- a) sexual intercourse or other forms of sexual harassment or abuse, or for the production of pornographic works,
- b) tissue, cell or organ sampling and removal from the body,
- c) service in the armed forces,
- d) slavery or servitude, or

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e) *forced labour or other forms of exploitation*, or whoever profits from such conduct, shall be punished by a prison judgments of two to ten years.

(2) Anyone shall be similarly punished who *uses violence, threat of violence or deceit or through an abuse of their error, distress or dependence (means), forces, arranges, hires, entices, transports, harbours, detains or sets up (conduct), to be used by another person for (for the purpose of)*

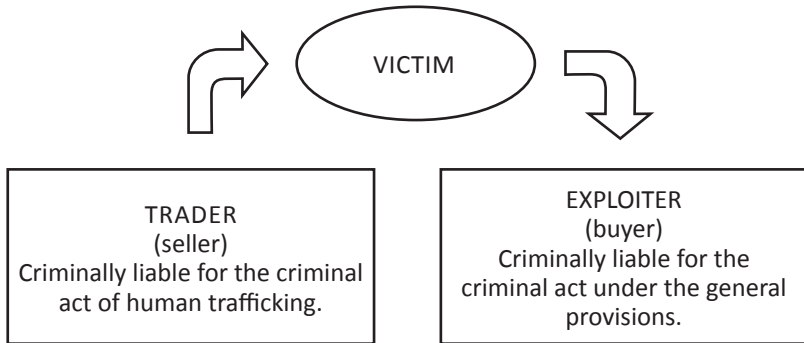
- a) sexual intercourse or other forms of sexual harassment or abuse, or for the production of pornographic works,
- b) for tissue, cell or organ sampling and removal from the body,
- c) service in the armed forces,
- d) slavery or servitude, or
- e) *forced labour or other forms of exploitation*, or whoever profits from such conduct.

The facts of human trafficking; deals with the terms *distress* and *dependency*. The *distress* is legally defined as a state that is temporary and caused by unfortunate circumstances that leads to a restriction in terms of the freedom of the decision-making of a person. These unfortunate circumstances may relate to personal, family, financial or other circumstances due to which the oppressed person finds themselves in difficulties and *distress*.

A *dependency* then means a state in which a person is unable to freely decide, given the fact that they are dependent upon the perpetrator in some respect. This does not have to be a dependency arising from the legal circumstances defined by law. A factual dependency is sufficient (Šámal a kol., 2010: 1522).

As it has already been mentioned in *Chapter 4*, the facts of human trafficking only relates to the intent of the offender to exploit a person and not the process of exploitation. The above referred to information is further confirmed by the justification memorandum to the Criminal Act under which: “the facts *only punishes human trafficking* for the purpose of their exploitation in the forms referred to therein and *not the exploitation itself that is punishable under the general provisions.*”

In a situation when the new Criminal Act contains the previously mentioned statement “*to use them by another person*”, *only the trafficker (seller) shall be criminally liable for the criminal act of human trafficking. The exploiter obviously cannot fulfil such statement.* This relationship may also be expressed in the following manner:



As it has already been introduced in *Chapter 6.1.4*, the act based on the exploitation itself is legally qualified as the following criminal acts:

Denial of personal liberty (Section 170)

(1) Whoever imprisons another person without authorisation or whoever denies the personal freedom of any person shall be punished by a prison judgments *of two to eight years*.

Restriction of personal liberty (Section 171)

(1) Whoever restricts another person from exercising their personal liberty without authorisation shall be punished by a prison judgments *of up to two years*.

Extortion (Section 175)

(1) Whoever coerces another person to act, ignore or tolerate something through violence, threat of violence or threat of other serious bodily harm shall be punished by a prison judgments *of six months to four years* or a monetary fine.

(2) An offender shall be punished by a prison judgments *of two to eight years*,

- a) if they committed an act referred to in Subsection 1 as a member of an organised group
- b) committed such act with at least other two persons,
- c) committed such act with a weapon,
- d) caused significant damage through the commission of such act,
- (...)

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Oppression (Section 177)

(1) Whoever *forces another person, by abusing their distress or dependence*, to act, ignore or tolerate something shall be punished by a prison judgments of up to one year or the prohibition of performing an activity.

(2) An offender shall be punished by a prison judgments *of six months to three years*,

a) if they cause significant damage by committing an act referred to in Subsection 1, or

b) they commit such act with the intent of obtaining a considerable profit for themselves or somebody else.

(...)

Torture of a person residing in a shared dwelling (Section 199)

(1) Whoever tortures a close person or another person residing in a shared dwelling shall be punished by a prison judgments of *six months to four years*.

(2) An offender shall be punished by a prison judgments *of two to eight years*,

a) if they commit an act referred to in Subsection 1 in a particularly brutal or painful way,

b) if they cause serious bodily harm by committing such act,

c) if they committed such act on at least two other persons, or

d) if they committed such act over an extended period of time.

(...)

Illegal employment of foreign nationals (Section 342)

(1) Whoever consistently, repeatedly, *under particularly exploitative working conditions or on a large scale employs or provides employment to a foreign national*, who illegally sojourns in the territory of the Czech Republic or does not have a valid work permit. If it is required under another Czech regulation, shall be punished by a prison judgments of *up to six months*, forfeiture of assets or other assets or prohibition to perform an activity.

(2) Whoever *employs or provides employment to a foreign national* who is a child and illegally sojourns in the territory of the Czech Republic or does not have a valid work permit under another regulation.

(...)

Based on the above referred to information, it is clear that the Czech criminal legislation introduces unjustified differences in the criminal sanctions of merchants (under the criminal offence of human trafficking – the basic judgments of two years to ten years) on the one hand and punishment of the exploiter on the other. Criminal regulation favours the exploiter, despite the fact that the conduct of the exploiter is often more serious than

the conduct of the merchant. This difference is relatively small in the case of the most serious forms of exploitation – slavery and servitude, when the exploiter may be prosecuted and subsequently convicted, for instance, for a criminal offence of deprivation of personal liberty (the basic judgments of *two to eight years*) or abuse of a person residing in a shared dwelling (basic judgments of *six months to four years*, if the person has been abused for a long time, the offender may be imposed a judgments of *two to eight years*). The knowledge of these differences is more pronounced in the case of less serious forms of labour exploitation – forced labour and other forms of exploitation. In these cases, the conduct of an offender may be qualified as a criminal act of extortion (basic judgments of *six months to four years*), oppression (the basic judgments of *up to one year*) or the illegal employment of foreign nationals (the basic judgments of *up to six months*). It should be particularly emphasized that the punishment for the criminal offence of oppression requires that the character of coercion is fulfilled (“whoever forces another person”). However, as it has already been mentioned, in many cases the exploited persons performs the work voluntarily when the perpetrator uses subtle forms of coercion. In these cases, the character of coercion may be very difficult to prove.

In regards to the above referred to information, the comparison of the criminal case law in the Criminal Acts of the Czech and Slovak Republics is very interesting mainly due to the common criminal traditions which the Czech and Slovak regulations draw from.

Table 1:

<i>Criminal act</i>	<i>Criminal case law according to the Criminal Act of the Czech Republic</i>	<i>Criminal case law according to the Criminal Act of the Slovak Republic</i>
Denial of personal liberty	Two to eight years	Four to ten years
Restriction of personal liberty	Two years	Six months to three years
Extortion	Six months to four years	Two to six years Four to ten years (for damage caused in excess of 66,500 CZK)
Oppression (Pressure)	One year	Three years One to five years For damage caused in excess of 66,500 CZK or denial of health and safety at work and vacation for recuperation)
Torture of persons	Six months to four years	Three years to eight years
Illegal employment	Six months	Two years Six months to three years (a person who is a victim of human trafficking)

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In light of the judgment of the ECHR in the case of *Siliadin vs. France* and in particular *C.N. vs. UK*, however quite reasonably a question arises whether the Czech regulation is not in conflict with the conclusions performed in these judgments by the ECHR. In the case of *C.N. vs. UK* However, the ECHR came to the conclusion that the actual and efficient protection against any kind of conduct falling under the provisions of Article 4 of the ECHR is not provided by the State in cases when the national law includes only the regulation of such criminal acts; such as abduction, extortion, assault with bodily harm, etc.

At the institutional level, forced labour is prohibited by Article 9 of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as “the Charter”) – “*No one shall be subjected to forced labour or services.*” Although, this prohibition only refers to the prohibition of forced labour, it does not mean that the Charter would not apply to the prohibition of slavery and servitude. As Mr. Langášek states, the prohibition of those forms of labour exploitation may be inferred from the Preamble to the Charter and the Constitution (a reference to the natural rights of a person, the commonly shared values of humanity, equality and freedom), from Article 1 (human dignity, freedom and equality), from Article 5 (capacity to have rights) or from Article 8 (personal liberty, the prohibition of debtor imprisonment and slavery) and other provisions (Article 7 – inviolability of a person and their privacy and the prohibition of degrading treatment, Article 10 – the right to retain human dignity and to protection against unauthorized intrusion into their private and family life, Article 14 – freedom of movement and residence), since it is clearly in deep contradiction with all these basic human rights (Wagnerová – Šimíček – Langášek – Pospíšil a kol., 2012: 262).

As it has already been mentioned, the criminalization of human trafficking for the purpose of labour exploitation occurred in the Czech Republic in 2004, through the incorporation of the provision of Section 232a into the then effective Criminal Act, which resulted in the implementation of the often referred to international and European legal instruments. During the implementation of these provisions, the legislator decided to adopt the terms of “slavery”, “servitude” and “forced labour” into the amendment of the Czech Criminal Act. In terms of the interpretation of these terms, the Czech criminal law based it on the above referred to existing judicature of the ECHR and the instruments of the International Labour Organization. However, the legislator specifically failed to implement the term “*practices similar to slavery*” in the amendment, i.e. a term that the international and European legal instruments include and which has also been specifically assumed by some other States, as was evident from the foreign regulations. Instead, the facts contain the term “other forms of exploitation”. It can be assumed that the intention of the legislator was to implement a general term that could act as a residual category for all other forms of exploitation. However, the justification report does not indicate what forms of exploitation can be included under this term. Given the international and European regulation, the term “other forms of exploitation” may include “practices similar to slavery” or “coercion to criminal activity”. It is worth noting that the term “other forms of



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exploitation” is also used by the Slovak legislation, however, contrary to the Czech legislation, it also includes the term “practices similar to slavery”.

According to Grivna, other forms of exploitation shall mean any other activity of the perpetrator during which they obtain an illegal profit from the activity of the victim (Šámal a kol., 2010: 1519). Despite the existence of this definition, the law enforcement authorities face difficulties in the interpretation and application of this term (e.g. Attorney General’s Office, Report on the Activities of Public Administrations 2011).

In 2006, the Security Policy Department of the Ministry of Interior commented in regards to the interpretation of the term “other forms of exploitation” according to which in terms of the *formal point of view the activities that a person commits to (even verbally) e.g. within the limits of civil and commercial law (various contracts relating to the performance of a certain job for a payment, etc.) do not fall within the scope of the term of forced labour*. The Security Policy Department based its formulation of such opinion on the findings of the Constitutional Court File Ref. Pl. US 37/1993 (disclosed under No. 86/1994 Coll.), in which the Constitutional Court stated that *the forced labour and services may not include jobs arising from the civil commitments under the Civil Code and other private legal regulation*.

However, it is necessary to refuse the opinion of the Security Policy Department and the findings of the Constitutional Court, in particular due to the fact that in 1993, the Constitutional Court based its opinion on the *concept of implementing the fundamental human rights into the entire system of law* and the *concept of positive obligations of the States*, and thus the concepts upheld by the European Court of Human Rights, which is now endorsed by the Constitutional Court of the Czech Republic as well. Based on the application of these concepts the addressee of the prohibition of forced labour may not only be limited to the State and public authorities. Forced labour may therefore also stem from private law relationships. Particularly cases in which a person undertakes to perform work under standard working conditions may be imagined. However, when the negotiated working conditions are subsequently violated by the employer, the conduct of the employer may ultimately lead to the performance of forced labour. In this context it is necessary to note that the Constitutional Court expressly waived the referred restrictive interpretation in its most recent judicature (findings of the Constitutional Court File Ref. Pl. US 1/12 of 27 November 2012), where it stated that in 1993 the Constitutional Court defined the term of forced labour and service too narrowly, *“without emphasizing that with regards to its purpose, which is to protect the freedom and dignity of an individual, the prohibition is also effective in relation to natural and legal persons. This means that the State has a positive obligation to criminalize such conduct that would enforce activities defined in Article 9 of the Charter or Article 4 of the Convention from anyone, and effectively combat it.”*

A major change in terms of the issue of labour exploitation was introduced by the amendment to the Criminal Act and implemented by Act No. 330/2011 Coll., which transposes Article 9 Subsection 1 of Directive 2009/52/EC of the European Parliament and

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of the Council on 18 June 2009 providing for the minimum standards on sanctions and measures against employers of illegally staying third-country nationals. The Act amends the provisions of Section 342 of the Criminal Act – *the criminal offence of the illegal employment of foreign nationals* (See above).

The fact of the illegal employment of foreign nationals now includes the term of employment under “*particularly exploitative working conditions*”. In regards to this term, the implemented directive states that it is also about the working conditions *which are contrary to human dignity*. The criminal offence of the illegal employment of foreign nationals is however regulated in Chapter X – criminal offences against public law and order, the primary object is the interest to prevent illegal immigration and the protection of the labour market. This naturally gives rise to a question, how to interpret the term “*particularly exploitative working conditions*”?

The given regulation may also be criticized for the lack of the element of trading and for overlapping with the criminal offence of human trafficking. The element of trading is contained in the statement “*employs or arranges employment*”. Although the requirement of the directive; was the sanctioning of employment agencies, not only those who employ workers but who are subsequently provided for the use by other natural or legal persons. The term “*arranges employment*” *however has a broader definition in the Czech system of law*” (Act No. 435/2004 Coll., on Employment) – the provider is also a person who only offers the work to other natural or legal persons and does not actually employ the workers themselves.

The dual approach of the legislator towards the *employment of Czech nationals and lawfully residing and working foreign nationals under particularly exploitative working conditions* is also very controversial. Although it is not at all clear how to interpret the term of particularly exploitative conditions, it may be reasonably assumed that this feature may be deemed fulfilled when a person is being paid a completely inadequate remuneration for the work done or the provisions on working times, rest times and health and safety at work are fundamentally violated. If the *element of human trafficking* is not fulfilled and the persons perform the work voluntarily, *the employer would not be criminally liable for such conduct*.

### **4.3 ANALYSIS OF THE JUDGMENTS OF CZECH COURTS AND THEIR COMPARISON WITH THE JUDGMENTS OF THE EUROPEAN COURTS**

In the next part we shall gradually deal with nine Czech cases, i.e. the case of Grail Movement (2008), Dairy plant (2008), Banda (2009), Stromkari (2009), Flora (2010), Rab (2011), Klacek (2012) Spargel (2012) and Kanci (2012). As stated in Chapter 5, the selection of cases from the Czech Republic was not limited only to cases, which were classed by the law enforcement authorities as criminal offences of human trafficking in the criminal proceedings. The interest was also in other cases that factually show signs of the criminal offence of human trafficking for the purpose of labour exploitation.

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## *The case of the Grail Movement*

### Background

The defendant *physically and mentally tortured* three women who resided at his place based on the “Agreement on a common household”. The three women gradually became completely dependent on the defendant. Their dependence was mainly based on their membership in the Grail Movement, which the accused person was the leader of. *The women were forced into heavy physical labour for 365 days a year, working on the half-built house of the accused, while also working on other properties used by the accused (garden, field, and orchard).* When the work was performed in the field, garden or in the orchard, the women resided in cabins, so that they could not interact with each other. The women were subjected to completely *unsanitary conditions*, without electricity, water and sanitary facilities even during the winter months. If they disobeyed his instructions they were physically punished (even by starvation for several days). They did not *receive any wages* for the work done and the food provisions were completely inadequate. This was the case of severe restriction or even deprivation of personal liberty, when the women were not permitted to *leave the house or other locations where they sojourned* without the express consent of the accused. The accused also prevented the women from any kind of communication with their relatives. The accused also forced one of the women to *transfer the deed for her family house worth CZK 1.3 million to him and his wife.*

### Legal Qualification

The supervising public prosecutor found the accused guilty of the commission of the criminal offence of torture of persons residing in a shared apartment or house in concurrence with the criminal offence of *human trafficking*. Based on the indictment, the accused coerced and detained another person through the use of violence, while abusing their distress and dependence, using them *for forced labour and other forms of exploitation*. However, the hearing of the matter was not completed under *the main trial due to the death of the accused.*

In addition to the gravity of the act, for which the accused was indicted, the case of the Grail Movement is rare in the fact that it *is the only case in the Czech Republic, when the police authority and the public prosecutor approached it in terms of the extensive concept of human trafficking*. In this case, the accused used the labour of the exploited women for himself, which means that it was a *bilateral relationship*. It is necessary to note that it happened under the application of the old Criminal Act, when the facts of human trafficking did not include the element “to use them by another person”.

When interpreting the term “*forced labour*”, the public prosecutor referred to the standard definition of the International Labour Organisation (“all work or service which is exacted from any person under the threat of any punishment and which the person does not perform voluntarily”). The term “*other forms of exploitation*” was equally interpreted

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by the public prosecutor in the standard manner as “any activity of the offender who preys on the activities of the person who is being trafficked, and thus obtains an illegal property benefit from their activity”.

Given the above described act, which the accused allegedly committed, it may however be *argued* with the legal qualification of the public prosecutor. The conduct under which the exploited women worked 365 days a year, while performing physically demanding work, exposed to physical punishment and mental torture, deprived of their liberties, literally cut off from the outside world and contact with their loved ones over a period of several years, may not be assessed only as exploitation in the form of forced labour or other forms of exploitation. *Such conduct absolutely and without a doubt shows features of servitude, which can realistically be contemplated as slavery as well.*

As it has already been stated in the case of Chinese Horeca, the essential features of slavery, servitude and forced labour is the lack of freedom, coercion and power of the exploiter over the exploited person. The terms of slavery, servitude and forced labour do not differ in terms of these features. What makes them different is their intensity. The ECHR has already stated in the above referred case of Siliadin vs. France that the conceptual features of *servitude* include the prevention of education, social integration and personal development. According to ECHR, the main feature of *modern day slavery* is then subjugation of a person through distress and control of over life, property, freedom of movement and decision-making.

*The case of Dairy plant* (Judgment of the Prague Municipal Court, File Ref. 46 T 13/2008)

#### Background

A group of Ukrainian citizens who provided employment for Ukrainian and Bulgarian workers in food and agriculture industries had to face the accusation of the criminal offence of human trafficking. The accused *acted effectively as an employment agency* that provides its employees to other companies. According to the indictment, the workers were supposed to be paid a salary of 50 CZK *per hour*, despite the fact that the accused received 150 CZK / *per hour* from the companies for whom they provided the workers. Furthermore the workers had their travel documents retained and a further CZK 10,000 was supposed to be deducted from their pay check for providing the necessary documents and CZK 1,200 for their medical insurance. All workers were supposed to be provided only with a deposit after the payment of the first salary, while *some workers were allegedly forced to work through the use of violence.*

#### Legal Qualification

*After providing evidence the court stated that the given act could not be sustained and acquitted the Ukrainian citizens of all charges.* According to the court the *activity of the accused was not apparently okay*, since the accused did not keep proper accounting,

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personnel did not have their employment agreements properly signed, no medical and social insurance was paid for the employees and no income taxes were being deducted. According to the justification of the court however, these circumstances were not the merits of the criminal proceedings and thus they were entirely irrelevant for the purpose of the court proceedings. Inconsistencies and contradictions regarding the payment of wages, which were revealed during the main trial, were passed over into civil law.

Furthermore, the court stated in the justification of the judgment that all employees arrived in the territory of the Czech Republic voluntarily and *nobody forced them to perform the work and nobody prevented them from freedom of movement*. Therefore the maltreatment of the employees was not proved in the main trial. In this respect the court disparaged the fact that the personal documents of all workers were detained until the repayment of their debt when it stated that although the situation was unpleasant, it was not irresolvable since the employees had an option to leave work and procure new documents themselves.

It may be concluded that in this case the court fully expressed difficulties in the interpretation of the term “other forms of exploitation”, which culminated in the fact that although the act was classified as human trafficking for the purpose of other forms of exploitation according to the indictment, the court failed to comment on the term in its justification. Instead, the court interpreted the terms of forced labour stating that “*under the term of forced labour should mean labour violating human dignity or extremely hard work performed in inappropriate conditions without the creation of conditions that are satisfactory or undoubtedly labour of inadequate extent not allowing the full recovery of the employees.*” According to the court, these conditions were not fulfilled in the given case.

In light of foreign judgments, the justification and approach of the court in terms of the heard act may be evaluated very negatively. In particular, the court should be criticized for the fact that it failed to assess the case comprehensively, but instead it qualified the conduct of the accused as a series of less serious violations of the law. In sharp contrast with this procedure, the approach of the Attorney General in the Dutch case of Chinese Horeca that interpreted the term “slavery-like practices” as a two-component term when it is necessary to examine both the lack of freedom and the dependence of the workers and the economic yield of the offender and the working conditions which the workers were exposed to.

In this case, it is necessary to also consider the facts based on which the public prosecutor concluded that the workers were subjected to “other forms of exploitation”. According to the indictment, this feature was also supposed to be fulfilled by the fact that the accused paid their employees a *net pay of 50 CZK per hour* despite the fact that they were paid an amount of *150 CZK per hour* by the companies which the workers worked for. Aside from the fact that the payment of such amount was not demonstrated in the main trial, only that the accused were paid by the companies a *gross wage of 85 CZK per hour (83 CZK per hour)* it is necessary to ask whether based on the given conduct it may even be suggested that workers were subjected to any other forms of exploitation?

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As it follows, particularly from the Dutch and German judgments that when considering the fact of whether the employees were subjected to economically exploitative conditions or not, *the foreign courts based their findings on the minimum wage established for the given industry*. Based on the conduct of the accused, who charged for the work of their employees an even higher amount than the amount subsequently paid out to the employees, would not be deemed as exploitative working conditions by, for instance, the German courts. The exploitative conditions could be considered only in situations where the wage that the employees were paid was in a significant disproportion with the minimum wage established for the given industry.

In this context, it is important to note that in terms of the companies (beneficiaries of the workforce) approached the employees of the accused in the same manner as the employees of an employment agency, even though *the accused did not have a permit to provide employment*. The amount paid by the beneficiary of the workforce for the provision of employees includes not only the actual cost of labour and expenses that the beneficiary of the workforce would otherwise expend if they decided to secure the performance of work by its own staff such as the recruitment costs, costs of processing personnel and payroll, any severance payments, etc.

Finally, it should be noted that the Czech system of law recognises the institution of *guaranteed wage*, which regulates the minimum wage according to the difficulty and complexity of the work. The amount of the guaranteed wage is regulated under *Government Regulation No. 567/2006 Coll., on Minimum wage and the lowest levels of guaranteed wages*, etc. Its amount is currently in the region of CZK 8,000–16,100 at 40 hours working week.

### *The case of Banda*

#### Background

In this case two mentally disabled women were physically and mentally abused. The accused man, partly with the help of his spouse, *forced the women into housework*, the submission of their disability pension, prostitution and also to get married to a man of Vietnamese origin, where the marriage was to serve for the legalization of his residence. The accused also appropriated money from credit agreements which the female victims were forced to conclude. The accused man also forced a visually impaired man to *beg*, he used to drive him to Prague and Vienna. The visually impaired man was then obligated to submit the begged amount to the accused.

#### Legal Qualification

The accused was found guilty of several counts of criminal offences. The court included the act of *forcing women into housework*, together with other physical and psychological maltreatment as a single act qualifying it as a criminal act of torture of a person residing in a shared house or apartment. *The coercion of the visually impaired man to*

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*beg was then classified as a crime of oppression. The accused was also convicted of the criminal offences of embezzlement, soliciting, and illegal detention of a debit card. The accused was imposed an aggregate punishment of a prison judgments of two or three years, suspended for a probationary period for a duration of four to five years.*

This case is somewhat *factually similar to the above referred case of the Grail Movement*. However unlike that case, the *conduct* of the accused was not qualified as a *criminal offense of human trafficking for the purpose of forced labour*, but only as a criminal offense of torture of persons residing in a shared household or the criminal offense of oppression. In this case the law enforcement authorities insisted on the narrower concept of human trafficking.

### *The case of Stromkari*

#### Background

During the period 2009–2011 two men provided employment to hundreds of workers from Vietnam, Slovakia and Romania, etc. through a number of enterprises that either formally or de facto operated as employment agencies. The workers primarily engaged in forestry work, which consisted of tree planting. The recruitment of workers was based on several stages. The use of several unfair methods was implemented.

For example, the Vietnamese workers were submitted written agreements entitled “Training agreement” in the Czech language. However, based on these agreements, the workers were not entitled to wages but were obligated to pay a fee of CZK 500 for the completion of training. On the other hand the Romanian workers were allegedly promised a wage of EUR 200 per week, with travel expenses, accommodation and tuition paid.

According to the information of the Ministry of the Interior, the workers were supposed to work every day from 9 for 12.5 hours, without the possibility of break. The performance of work was supposed to be carried out even in heavy snow and frost. Allegedly they were not given a break even under such conditions. The forestry workers were allegedly provided with entirely inadequate food, while the accommodation was allegedly at the standard level according to the findings of the Ministry of Interior. The workers did not receive adequate wages for the work done (lasting several months) – the majority of workers were supposed to be paid a deposit of CZK 500 to 1,000, while some workers were supposed to remain completely without any payment. Some workers were allegedly also threatened with violence. Medical and social insurance was not paid for the forestry workers either.

#### Legal Qualification

The conduct of the offender was initially under investigation or vetted by various police departments for being suspected of committing several counts of criminal offences – human trafficking, fraud, misrepresentation of data relating to accountancy, assets and the non-payment of taxes, social security and other mandatory payments. However, the

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prosecution of the suspects never occurred. At the time of the analysis the case was not, even after more than two years from the performance of the initial measures, completely concluded. According to the information from the Ministry of Interior, however, the law enforcement authorities did not find the fulfillment of the facts of human trafficking in the said conduct of the accused.

Due to the reported scope of up to several hundred of labour exploited forestry workers in the territory of the Czech Republic, it is an isolated case. Thanks to this, the case of Stromkari received unprecedented media attention, even from foreign media.

The Ministry of Interior did not have the specific materials available for the analysis. Even without this knowledge, we believe that the case would benefit from a comprehensive and uniform view of the law enforcement authorities regarding the criminal activity of the suspects. It may be concluded that even this case revealed difficulties in the interpretation of the term “other forms of exploitation” that are often actually interpreted as practices that in terms of their severity are comparable with forced labour. As it was and will be apparent (Judgment of the case of Dairy plant and RAB), the restrictions of personal liberty – physical prevention in personal movement and elements of extortion – are considered to be one of the conditions for forced labour. Then it is necessary to repeatedly refer to the interpretation of the term “slavery-like practices” as it was inferred by the Dutch Attorney General, who came to the conclusion that the measure of oppression and coercion does not have to achieve quite the same intensity in such practices, as it is in the case of forced labour, servitude or slavery.

### *The case of Flora*

#### Background

The given case is about an alleged labour exploitation of Romanian citizens, who were provided with a job in the Czech Republic – specifically for the production of Advent and floral decorations. The workers were promised wages of 750 EUR per month, which was, however dependent on the amount of work performed. The accommodation was provided free of charge. However, according to the police authority the labour standards were set so that it was impossible to meet them. The Romanian workers were dissatisfied with the fact that they were not paid any wages even after five weeks of work, which however according to the concluded work agreements and the Labour Code of the Czech Republic was not yet due. Their dissatisfaction eventually culminated in riots and the State-organized transport of the workers back to Romania.

#### Legal Qualification

The police authority commenced steps in the criminal proceedings on the grounds of suspicion of the commission of the criminal offence of human trafficking; however these steps were terminated by the supervising public prosecutor after a few days. It was found during the examination of the criminal offence that the workers were not forced



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into labour in any way, their personal documents were not detained and the personal liberty of the workers was not restricted either.

The public prosecutor stated during the termination of the steps: “just off the record and for comparison it is necessary to note that based on the testimony of one of the interviewed Romanian citizens it follows *that they had worked at the Social welfare office for the last six years until May last year where his monthly salary amounted to EUR 100. He terminated his employment due to the fact that his bonuses were taken from him.*” These words should not be overlooked by any means, despite the fact that they were noted by the public prosecutor only off the record and only for comparison. Based on the said words an opinion may be seen that could be simplified as follows: “*this is not about labour exploitation, if the worker has better living and working conditions than in their home state.*” However, such an approach must be strongly rejected on principle that it makes the overall view of the labour exploitation completely relative and ultimately such an approach could lead to impunity in enslaving people that would come from poor living conditions. Such a view is also contrary to what has already been stated in the case of the Chinese Horeca. *When deliberating whether the workers were subjected to exploitation or not, it is necessary to base it on the living conditions of the State in the territory of which the work was performed.* The examination of conditions in which the workers lived in their home country may however play a role in determining whether an abuse of distress of workers occurred or not.

In this context, the issue may also appear to be whether it is possible to conclude on the abuse of distress and dependency by the offender even in a situation when the victims of the criminal activity themselves do not feel that way, perhaps precisely because of the conditions that they were offered in the territory of the Czech Republic extending beyond their current living and working conditions in their home state. As it follows from the above referred definitions of the terms of distress and dependency, certainly nothing prevents such conclusion. The terms “distress” and “dependence” as well as the European term “vulnerable position” and the German term “impotence”, are certainly not tied only to the subjective belief of the person about whether they consider themselves to be the victim of criminal activity or not. As it is clear from the analyzed European judgments, the above referred terms are understood more or less as an objective category.

Based on the information that was available for this case at the time of analysis, it is impossible to be clearly attached to the opinion of whether the Romanian workers were subjected to labour exploitation or not. *An important issue associated with this case and which must be addressed is – whether the conclusion on the labour exploitation may be made even in this situation, when according to the employment agreement (or agreement on the performance of work), but also according to the Labour Code did not give rise to the entitlement of the workers to wages and thus the wages were not due?*

In the German cases Farmer and B&B, the offenders were convicted of human trafficking for the purpose of labour exploitation despite the fact that the employees were not entitled to wages to date. Such cases however differ from one another. In the case of

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Farmer, the workers entered into an agreement that already included *exploitative terms and conditions*. In such cases the conclusion is about the fact that the *exploitative conditions were easier to demonstrate*. In the second German case of B&B however no written employment agreements were concluded with the Romanian female workers and it was only verbally agreed that the workers would receive the remuneration of EUR 800 per month for 8 working hours a day. The Romanian girls however worked in excess of 13 hours a day without the possibility of a longer break. Equally the girls were not set up for social security and their accommodation conditions were substandard. Therefore, it may be concluded that labour exploitation may be considered even when the employees are not yet entitled to wages and the employment contracts included a standard wage.

*There can be no doubt that in terms of evidence, these cases are particularly difficult. Therefore, it is particularly important to properly investigate and evaluate all the circumstances of the case comprehensively in such cases, in particular to take into account the length of working time, space for leisure and recreation, accommodation and food conditions, retention of personal documents, compliance with regulations on health and safety at work, registration for employee social security, etc.* In this case, the procedure would be completely absurd if the law enforcement authorities waited for the maturity or non-payment of wages in the criminal proceedings and even after the finding of the above referred circumstances.

In conclusion, it is also necessary to note that the task wages that according to the knowledge of the police, was supposed to be set up so that the workers would not be able to achieve the promised amount of 750 EUR per month. As it has already been referred to above there is an institution of the so-called guaranteed wages in the Czech Republic. In this context it is necessary to state that the legal regulation of the guaranteed wages is applicable *irrespective of the type of employment* (i.e. even for the agreement for the performance of work), *and even regardless of whether the employees are remunerated based on their results. The amount of the task wage must be in compliance with the so-called guaranteed wage.*

*The case of RAB* (Judgment of the Prague Municipal Court, File Ref. 43 T 3/2011)

#### Background

In the case of RAB, a group of Ukraine citizens was accused of the commission of the criminal offence of human trafficking. According to the indictment, the accused allegedly enticed their fellow citizens to the Czech Republic for the purpose of employment provision. The workers were allegedly promised a wage from USD 1,000–3,000 per month, free accommodation and social security and medical insurance. An agreement on the provision of employment was concluded with the workers in the territory of the Ukraine for which the workers paid EUR 500–600. However, such amounts did not belong to the accused, but to their partners in the Ukraine. According to the indictment, the workers were forced to perform work other than agreed upon arrival in the Czech Republic – they were provid-

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ed work on construction sites. The workers were provided with free accommodation and no social security and health insurance was paid for them. Furthermore, *an amount of CZK 3,000 was deducted from their wages which on average came to USD 1,000 per month (in many case this amount was even higher, however that depended on the work performed). Equally their debt for their visa and work permit was deducted from their first pay check* – this amount differed in individual persons, which was on average USD 300. Their travel documents were detained until the time of the repayment of such debt.

#### Legal Qualification

During the main trial the court mainly dismissed the indictment of the accused under the witness testimonies, *as it was not demonstrated that the given criminal act was committed*. According to the court it was confirmed that the defendants deceived *the Ukraine citizens in regards to the promised jobs and salary conditions*. Equally it was not demonstrated that the accused promised the accommodation free of charge. All employees were also supposed to have social security and health insurance. In regards to the detention of the personal documents, the court did find it to be a measure that would restrict the free movement of the employees outside the hostel, while stating that the retention of passports is not illegal. *The fact that according to Czech law a Czech passport may not be used as collateral was not addressed by the court in its justification*. It was also demonstrated during the main trial that the wage was paid to the employees within the proper deadlines and given the type of work it also reached a fairly standard amount.

It may be noted in regards to the above referred that in the case of RAB, the significance of the witness testimony that are considered to be exploited by the law enforcement authorities when demonstrating the labour exploitation.

The court commented on the term *forced labour* in its judgment justification as follows: “any activity which a person performs against their will by the will of another person or persons. Then the person concerned does not have freedom of decision-making, which stems from concerns about the negative impact of the refusal to perform forced labour. It is clear that the forced labour also incorporates the *principle of extortion* for the performance of activities which the person concerned would normally not perform out of their free will.”

A special feature of this case is the fact that although the act was committed under the provisions of the old Criminal Act, the act was assessed according to the new Criminal Act, without the consideration of the court of whether the new amendment is actually more favourable for the accused or not.

*The case of Klacek* (judgment of Ceske Budejovice Regional Court No. 17 T 6/2010)

#### Background

The defendant actively sought out people from socially disadvantaged environments under the promise of regular wages of 80–150 CZK per hour and accommodation, for

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the performance of construction work. *The jobs were performed at various construction companies that would pay the defendant a proper wage for the work done and did not participate in the active exploitation of such persons.* In order to disguise the activity the offender, they used the identity of the existing companies on behalf of which the employment contracts were concluded.

The offender used a different person who was not identified in the final judgment for the signing of these contracts. With the exception of one company, which provided its identity to the offender for a bribe, none of the associated companies were aware of the abuse of their company details.

The construction work of the trafficked persons (total of 22 people) was performed from Monday to Saturday, 7am to 6pm with an hour break for lunch, but they often worked on Sundays from 7am to 1pm as well. *The offender did not conclude written employment agreements with the trafficked persons and did not pay for their social security and health insurance.* Instead of the promised wages of 150 CZK per hour he paid the persons a total of 150 CZK per day, *stating that he would pay them the remainder of the wages in the future. When the persons refused to work, they were threatened by the offender with physical violence, which in some cases actually occurred.* The personal documents were also taken from the workers. The offender committed the said conduct at least from the beginning of 2007 until April 2009 and allegedly achieved a net profit of over CZK 11 million through such conduct.

There were two other accused offenders who engaged the trafficked persons in other jobs. These accused persons performed the supervision of the trafficked persons at the instruction of the principal accused person, through their accommodation and employment activities; they were also responsible for the record-keeping of the employees and daily distribution of the daily payment of CZK 150.

#### Legal Qualification

With regards to the fact that the given act was committed during the validity of the old Criminal Act and the act was heard under the full force and effect of the new Criminal Act, the court also dealt with the issue of its assessment and the applicable legislation. Given the fact that the latter law shall only apply if it is more favourable for the offenders and since the new Criminal Act does not contain more favourable provisions, *the act was assessed pursuant to the provisions of the old Criminal Act.*

The court found the defendant guilty of the criminal offense under Section 232a Subsection 2 Paragraph c) and Subsection 4 Paragraph b) of the Criminal Act, when the wording of the law specifically stated “hired, transported and detained another person through the use of violence, threats of violence and deceit, abuse of distress and dependence to use them for other forms of exploitation and whoever committed such act with an intent to obtain benefit of a large scale.”

The court then qualified the hearing of the co-accused as participation in the form of assistance with the above referred criminal offence.

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According to the justification of the judgment, the accused abused the distressful circumstances which the socially poor persons found themselves in. In regards to the term distress, the court stated that *distress* must be understood as an adverse condition of a person caused by adverse facts, *which taken as a whole have resulted in restrictions of freedom of decision-making of such person in distress*. The victims found themselves in distress by the fact that they lacked any place to stay and had no steady source of income.

In addition to the distressful situation, the accused also used *deceit* by *misleading* the trafficked persons – persons coming from socially disadvantaged environments – regarding the income conditions that the accused intended to provide them with. The accused used such deceit not only to negotiate new employees, but also to retain the existing workforce when in the event of non-payment of wages he used the secondary insolvency as an excuse despite the fact that *all of his invoices for the performed work were paid*. The accused thus through these false assertions put the trafficked persons also *in a dependency*. The dependency in workers was also induced by removing the personal documents of the trafficked persons, which particularly restricted the movement of the foreign nationals from their place of work. The justification of the court in this part may be evaluated as very positive.

The court interpreted the term *other forms of exploitation* in a default manner as a method through which the perpetrator obtained profit.

Although the court stated in the judgment that there were also cases when the workers were forced to work even through the use of physical violence, it failed to address *whether such cases fulfilled the definition of forced labour*. If physical violence occurred, then given the precedence of the Chinese Horeca, it may be legitimately inferred that the degree of oppression and coercion reached high levels. In this context, it may be possible to assume that even though the court did not include it in the judgment, based its decision on the repeatedly cited findings of the Constitutional Court File Ref. Pl. US 37/1993, under which it is not forced labour if the worker performed work under the private law.

The court imposed the punishment by a prison judgments of ten years to the main perpetrator, which however was subsequently reduced under the *appellate proceedings to a prison judgments of eight years and six months*. The principal accused was also imposed the punishment of forfeiture of their personal vehicle Mercedes-Benz ML 320 CDI 4-Matic. However, this judgments was subsequently revoked by the Supreme Court under the appellate proceedings. According to the court it was not demonstrated that the car in question was purchased from the proceeds of criminal activity. Given the circumstances, the court failed to apply the provisions of the Criminal Act on the forfeiture of the replacement assets due to the completely incomprehensible reasons. *One of the co-accused was sentenced to a prison judgments of four years*, while the second co-defendant was sentenced to a prison judgments of three years, with the conditional suspension for the period of four years. During the consideration of the type and judgments of the punishment imposed to the co-accused, the court based its decision on the fact that the accused be given a more severe punishment, because he assisted in principal the accused in the crim-

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inal activity in a more *active form than the second co-accused*. Additionally, he received financial benefits from the principal accused for such activity.

The judgment of the Ceske Budejovice Regional Court came into the full force and effect on 15 May 2012 and thus it became the first ever conviction in human trafficking for the purpose of labour exploitation in the Czech Republic, which also became final.

Finally, it is necessary to note that although according to the justification memorandum to the Criminal Act, the facts of human trafficking affects only the intent of the offender to exploit another person, when the implementation of such intent, i.e. exploitation is punishable under the general provisions, the court qualified the act of the accused only as a criminal offence of human trafficking.

In reflection there is a need to ask a question why did not the prosecution and the conviction for the criminal offense of non-payment of taxes, social security and other mandatory payments did not occur when it was demonstrated that the accused, as the de facto employer of the victims, did not make these mandatory payments, though they certainly had the necessary funds to pay them in their possession.

*The case of Spargel* (Judgment of the Usti nad Labem Regional Court File Ref. 2T 12/2009)

#### Background

In this case from the Usti nad Labem Region, a group of three Ukrainian citizens who allegedly enticed at least twenty Romanian workers for the purpose of employment provision in the territory of the Czech Republic, whom they promised high earnings (CZK 12,000–18,000), free tuition, accommodation and transport, were accused. *The Romanian workers were provided with jobs in the meat processing plant and in agriculture – harvest of asparagus upon their arrival in the Czech Republic*. However, according to the indictment, contrary to the agreed employment conditions the employees were not provided with suitable accommodation and the workers were allegedly supposed to work in the asparagus fields for 12 hours a day and 18 hours a day in the meat processing plant without the provision of break at work. *The agreed wages were paid only in part – differing from person to person, however on average it was only few hundred crowns a week (usually CZK 200–500), however in some cases, the wages were not paid at all*. The Romanian workers were obligated to pay for the transport and food themselves. A portion of the employees had no written employment agreements concluded, while they concluded them with others (specifically agreement with the performance of work). However, these agreements were written in the Czech language, which the foreign employees naturally did not speak. The accused also detained the *personal documents of the workers*. If they refused to work and requested the return of their personal documents, the workers were threatened with violence, which actually occurred in two separate cases. *According to the indictment, the perpetrators committed the criminal offence of human trafficking for the purpose of forced labour and other forms of exploitation*. The offender allegedly commit-

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ted such criminal activities in the territory of the Czech Republic for the minimum period of five months.

It is noteworthy that *the accused or the co-accused* supervised the performance of the work of the Romanian workers in the asparagus fields. When compared with the work in the meat processing plant, where any instructions came from the employees of the meat processing plant, the role and activity of the owner of the asparagus field, i.e. user of the workforce of the Romanian citizens significantly lower.

#### Statement of law

The Court of First Instance found the accused guilty of human trafficking for the purpose of other forms of exploitation in accordance with Section 168 (2) (e) and Section 168 (3)(a) of the Criminal Code. The Court therefore did not agree with the statement of law proposed by the public prosecutor and in this respect *incorrectly argued that* this particular case cannot be considered to *involve the performance of forced labour* specifically for the reason that *the workers themselves initially volunteered their services*. This argument is extraordinarily limiting and it must be *refused*. Whilst considering if the workers were subjected to forced labour the decisive factor is whether the workers were forced to perform their work under any sort of threat or not. The timing of this force, i.e. whether it occurred at the very beginning or during the course of the work, *does not play a decisive role when determining if the description of forced labour has been met*. The Court did however very clearly state that the principal accused *did not meet the obligation* to inform the appropriate labour offices about the start of an European citizen's employment in accordance with Section 87 (1) of Act No. 435/2004 Coll., the Employment Act.

The sentencing judgement of the Regional Court was however *overturned by a Superior Court* on the basis of an appeal *and the entire case was returned to the Court of First Instance*. The Superior Court reproached the Court of First Instance primarily for the fact that within its justification it did not sufficiently address the evidence submitted on behalf of the accused and did not specify the considerations it followed when evaluating the evidence.

The Superior Court went on to emphasize the fact that the *economic exploitation of the victims is of key importance* in order to prove that the criteria for "other forms of exploitation" have been met. With regard to the above, the Superior Court bound the Court of First Instance to focus particularly on this aspect during all further proceedings in this case. Specifically, the Superior Court states that it is necessary to focus on and evaluate the following:

- the contracts (specifically *agreements for work*) between the accused companies of the accused as the contractors for the work as the first party and the meat processing plant and the owner of the asparagus fields as the commissioning parties for the work as the two respective second parties;
- the scope of the work that was performed;
- the invoicing and payments exchanged between the companies;

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- the accounting documentation of the relevant companies;
  - the costs outlaid by the accused; and
  - the wages (partial wages) that were paid to the workers.

The Superior Court did tend to agree with the opinion of the Court of First Instance that this particular case does not involve the performance of forced labour. *With regard to this point the Superior Court refers to the aforementioned finding of the Constitutional Court (No. Pl. ÚS 37/1993) according to which forced labour only occurs if the performance of the labour is forced by administrative means. In principle, it is not possible to consider labour performed on the basis of civil law relationships as forced labour.* As has already been mentioned in the preceding chapter, this interpretation is unjustifiably limiting and, at the same time, *it is in conflict with the positive commitment of the state to protect fundamental human rights in the way that this protection is interpreted by the European Court of Human Rights.*

During the retrial of this case, the Regional Court supplemented the evidence gathering process and focused on the specific points for which it was reproached in the Superior Court's judgment. For example, the Regional Court *requested a report from the Czech Statistical Office*, according to which the Court determined that, during the time in question, the *average gross monthly wages* (during standard legal working hours) were CZK 15,715 for sub-group 6111 (crop plant growers); CZK 15,499 for sub-group 9211 (unqualified agricultural assistant workers); and CZK 16,581 for sub-group 9321 (unqualified assistant construction and handling workers).

Within the justification for its decision the Regional Court further stated: "In accordance with Section 2 of Act no. 110/2006 Coll., on the subsistence minimum, the monthly subsistence minimum for an individual is CZK 3,410. For evaluating the case in question, it is the *subsistence minimum in the Czech Republic that is decisive* and not the subsistence minimum in Romania. *On the other hand, the living conditions of the damaged Romanians in their own country* (for example, the fact that they did not have electricity in their homes) *do not play a role in this case*, although the defence counsel brought up this fact and submitted a comparison with the boarding house in Vojkovice and with rental houses." As far as this opinion is concerned, it is necessary to add that *the specification of the subsistence minimum in the Czech Republic to which the Regional Court refers is not necessary.* The amount of the subsistence minimum is decisive when determining whether an individual is in distress and when determining the amount of state social benefits. *The subsistence minimum amount can therefore not be taken into consideration when determining whether an individual was the victim of labour exploitation or not.*

*In light of the German judicial decisions, the Regional Court can be reproached for the fact that, although it was entirely justified in requesting the report on average gross monthly wages from the Czech Statistical Office, it did not in any way use this information in the justification for its judgment.* For example, the Regional Court did not calculate the average gross wages that should have been paid to the workers for the working hours in



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question (in this particular case twelve and eighteen hours a day respectively). Taking into account the average wage levels specified in the report from the Czech Statistical Office and the number of hours worked, it is possible to estimate that the gross wages due to the workers would significantly exceed CZK 20,000. *This amount could then have been compared with the amount that the workers actually received (net monthly wages of CZK 800 to CZK 2,000), whilst also taking into account the food and board that was provided.*

On the other hand, it is possible to view very positively the Regional Court's justification with regard to the terms "*distress*" and "*dependency*" as they apply to the workers. The Court stated the following: "The damaged parties did not agree with the working conditions and requested the return of their personal documents as they wanted to leave. V. D., M. Z., A. K., G. L. N., B. M. O., and J. I. (i.e. the accused) *threatened* some of the victims and said that if they tried to escape or leave *they would not receive any food or that they would be beaten and that their personal documents would be burned*. The victim L. S. was threatened that *he would be shot* and the accused M. Z. physically attacked the victim Z. C.-Ion for wanting to go back home and the victim N. A.-C. for refusing to work because of a backache. The accused V. B. and V. D. *caught an unnamed group of Romanian citizens* who were working at the meat processing plant when they were trying to escape, returned them, and *beat them*. The accused intentionally introduced an *atmosphere of fear and uncertainty* amongst the victims. They took advantage of the victims' *material distress*, as the majority of the workers had come to work in the Czech Republic in order to earn an income to support their families. They also took advantage of the fact that the workers could not communicate in Czech and were not familiar with the Czech environment. As a result, the victims *became dependant on those who made the work arrangements for them* and many of them did not have any realistic or acceptable option other than to suffer the actions of the accused."

Even after the second hearing, the Court found the accused guilty of human trafficking pursuant to Section 232a (2)(c) and Section 232a (3)(a) of the old Criminal Code and sentenced them to imprisonment *for five years*. It is worth mentioning that, as compared to the first hearing, the Court judged the actions of the accused according to the old Criminal Code. The Court thus reached the conclusion that the provisions contained in the new Criminal Code would in no way be more beneficial for the accused and that there was therefore *no reason to judge their actions according the latter version of the legislation*.

In addition to their imprisonment, the punishment for the accused included *the seizure of property*, specifically the two pistols that were allegedly used to threaten the workers. With regard to this point, it needs to be asked why the proceeds from the accused's criminal activity was not also seized and retained. As was the situation in the Klacek case, the Court did not separately judge the perpetrators' intent to exploit other individuals and the actual realisation of this intent. Therefore, according to the court there was no concurrent commission of the crime of human trafficking with other crimes as defined in the general legislative provisions.

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In conclusion, it needs only to be added that criminal proceeding in this case were also heard in Romania. *The Romanian partners of the accused Ukrainian citizens* were also sentenced to imprisonment for human trafficking and for the organisation of a criminal group for periods ranging from five years and two months to six years. The Court also ordered the convicted parties to compensate the victims for moral injury.

*The case of Kanči* (Criminal proceeding orders issued by the District Court in Chomutov under No. 5T 33/2012 and No. 47T 74/2011)

#### Findings of Fact

In this case the owner of a construction company was accused that, minimally between March and October 2010, he forced *at least three socially weaker individuals to perform masonry work and to work as assistants at various construction projects* (there was no written contract with any of the individuals in question). During the summer, working hours were from 6:00 a.m. to 5:00 p.m. or 7:00 p.m. and during the autumn from 6:00 a.m. to 5:00 p.m. with only a half-hour to one-hour meal break. *The workers received a monthly wage ranging from CZK 2,000 to CZK 6,000 a month, from which an amount of CZK 2,000 was deducted for accommodation. The workers were housed in the accused's garage.* In addition, after their normal working hours, they *also worked in the accused's garden.* The perpetrator did not have the appropriate trade license to perform either masonry or other construction activities. The only trade licence he held was to perform ground works.

#### Legal qualification

Based on a judgment issued by the County Court, the accused was taken into custody, The judge explained the decision by pointing out that the accused was reasonably suspected of committing the criminal offence of trafficking in human beings as defined by Section 168 (2) letter e) of the Penal Code. The accused filed a complaint against the particular judgment.

*The accused was then released from custody based on the Regional Court's subsequent judgment.* The Regional Court in the proceedings regarding the filed complaint did not agree with the legal qualification of the lower court and stated that the specified conduct did not have all of the legal signs of the particular offence based on Section 168 (2) letter e) of the new Penal Code. A fundamental objection was argued against the alleged fulfilment of the definition of the abuse of a dire situation. The Regional Court stated: "It is true that the victims could consider their social situation to be a dire situation caused by unfavourable circumstances, *but this was not a situation that had the ability to deprive the victims of the freedom to make their own decisions.* The victims had the opportunity to use state social networks and the social networks of non-profit organisations and with their help to attempt to find employment and financially affordable housing. The victims were not at all limited in their ability to ask a relevant authority for assistance in their

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dire situation, for example for extraordinary immediate assistance. *The victims were not dependent on the accused, and they had the opportunity to make use of the options specified above or could have at any time decided to become homeless and share the fate of about 57,000 people living in the Czech Republic (data from the 2001 census)."*

*The Regional Court's explanation can be regarded as very unqualified, and it is necessary to completely reject it.* If we were to accept the Regional Court's argument, *the sign of a dire situation would become a completely empty concept.* The argument that a decision to become homeless is an entirely voluntary decision in every situation cannot be agreed with either. In relation to this, it is also necessary to point out that fulfilment of a sign of a dire situation is not necessary for a person to be deprived of the freedom to make voluntary decisions, because it is sufficient for the person's freedom to make decisions to be limited.

In the ongoing criminal proceedings, the offence committed by the accused was subsequently re-qualified as the criminal offence of oppression *based on Section 177 of the Penal Code.* According to information from the Interior Ministry, law enforcement authorities resorted to re-qualifying the offence committed by the accused because *in their opinion the sign of trafficking itself had not been fulfilled – there was not a trilateral relationship.* In relation to the above, it needs to be added that the exploited workers not only carried out work in the garden of the accused, but they also acted as employees of the accused, who ensured their work at various construction sites, and this work was carried out based on a contract for work between the accused and third parties. In the spirit of the Spargel case, it can be concluded subsequently that during the assessment of whether the party that ordered the work can be considered a user of exploited workers' labour, the activity and role of these persons are not entirely fundamental – whether or not they issued work instructions and organised work.

The accused based on a criminal order issued by the County Court was subsequently found guilty of the *criminal offence of oppression*, since a significant sign of this criminal offence is "abuse of a dire situation". The judge who issued the order did not agree with the opinion of the Regional Court and qualified the perpetrator's actions as abuse of a dire situation. For the purposes of analysis, it is only harmful that the issued criminal order legally came into force, and the offence therefore was not discussed in the main hearing. A criminal order is a type of decision that lacks an explanation.

In the criminal order by which the accused was found guilty of the offence of oppression, the judge stated: "At least from March 2010 to 25 October 2010 in Vilémov, Chomutov County, and in other locations in Chomutov County, the accused took advantage of the dire personal and financial situations of at least P. B., G. S., as of June 2010 also of J. S., and from June to the middle of August 2010 I. G., all of whom did not have *permanent housing and lacked any income, and he provided them with accommodation in a garage at his home in Vilémov, for which he demanded unreasonably high rent, and under the threat of them losing their accommodation and work, he forced these persons to carry out bricklaying and work at various construction sites in Chomutov County, for unreason-*

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ably long periods without needed breaks, for unreasonably low wages, from which he deducted payments for accommodation, and after their work period he also forced them to work in his garden.”

In the criminal order, the defendant was sentenced to three months in prison, with a conditional delay for a probationary period of eighteen months. This criminal order legally came into force, but a couple of months later it was overturned, since the perpetrator was subsequently found guilty in other proceedings of the criminal offence of unauthorised business activity. *For both of these two criminal offences, the perpetrator was sentenced to eleven months in prison with a conditional delay for a probationary period of two years.*

*From comparison of this particular case to cases such as Spargel or Klacek, it can be concluded that in both cases there were entirely unjustified differences in legal qualification and therefore naturally also unjustified differences during sentencing. However, it needs to be pointed out that the Kanči case is less serious than the Spargel and Klacek cases (differences in the number of victims and the use of violence), which the court took into consideration when imposing the case law.*

## 5. CONCLUSION: PROPOSALS FOR RESOLVING THE SITUATION IN THE CZECH REPUBLIC

In this part the chapter comes up with both legislative and non-legislative proposals that should help more efficiently fight human trafficking for the purpose of labour exploitation in the Czech Republic.

*1) Extensively interpret the physical elements of a crime of human trafficking or regulate a new crime of labour exploitation.*

As it is obvious from the analysis performed, Czech criminal law has introduced absolutely *unjustified differences between the penalty for a trader*, who has criminal liability for the crime of trafficking in human beings, and for an *exploiter*, who can be held liable pursuant to general provisions – e.g. for the crimes of deprivation of personal freedom, extortion or oppression. The differences consist in the extent of penalty specified for the crime of trafficking in human beings on the one hand and the extent of penalty specified for the latter crimes on the other hand. The differences are especially noticeable with the “less serious” forms of labour exploitation – forced labour and other forms of exploitation – as opposed to the “most serious” forms of labour exploitation – slavery and servitude.

However, it is also obvious from the Czech judgments analysed that *the unjustified differences have not manifested themselves in practice when penalizing traders and exploit-*

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ers, as no cases of human trafficking according to Scheme no. 4, i.e. cases when the trader is different from the exploiter, have been recorded in the Czech Republic.

*However, the insufficient Czech regulation of the exploitation process itself is fully manifested in those cases when law enforcement authorities fail to infer the three-side relationship – one of the basic conditions in Czech human trafficking legislation. Nonetheless, the analysed cases of Spargel and Kanči show that the borderline for concluding whether or not there is a three-side relationship in a specific case is very thin. The following options are available in the context of the European legislation examined.*

*Option 1 – Shift to an extensive interpretation as seen in the Dutch, Belgian or Bulgarian legislation (according to Scheme no. 3)*

Liability for the crime of trafficking in human beings will also be held by a person that is the direct user of an exploited person's labour, even if *the elements of trafficking – the three-side relationship – cannot be derived*. To enable the Czech Republic to embrace this interpretation, it is necessary to amend the element of "to make them used by another". Together with that amendment, it would be advisable to rephrase trafficking in human beings for the purposes of sexual exploitation. As already said above, differentiating between "use for sexual intercourse" (pursuant to s. 168 /1/ and /2/ of the Criminal Code) and "use for prostitution" (pursuant to s. 168 /3/ of the Criminal Code) brings along a number of ambiguities. *Just removing the words "by another" without any other amendment would deepen the ambiguities (overlapping with the crime of solicitation of sexual intercourse pursuant to s. 202 of the Criminal Code)*. It should be just noted that differentiating between "use for sexual intercourse" and "use for prostitution" is beyond the Czech Republic's obligations arising from European and international documents applying to sexual exploitation.

When applying the extensive interpretation, there is also the question whether it is meaningful to continue *differentiating between the perpetrator's intent to exploit and exploitation itself*, as suggested by e.g. the explanatory report on the Criminal Code. It results from the Czech judgments analysed that law enforcement authorities *do not differentiate between those two levels in any way* under the current approach to human trafficking as a three-side relationship. This approach certainly results from the modus operandi currently used by perpetrators (Scheme no. 2) under which the roles of trader and exploiter are merged in a single person and a third party (labour user) is involved in the trafficking process completely without their will. Differentiating between the perpetrator's intent to exploit and exploitation itself seems reasonable in those cases when the perpetrators use the procedure shown in Schemes no. 1 or 4, i.e. a procedure in which the trader and the exploiter are different persons. According to the judgments analysed, however, *such a procedure has not yet been used for human trafficking for the purposes of labour exploitation either in the Czech Republic or abroad*. Therefore, differentiating between the perpetrator's intent and exploitation itself seems to be more of an artificial legal construction that no longer fully corresponds to how the crime of trafficking in hu-

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man beings for the purposes of labour exploitation is committed. The procedure according to Scheme no. 1 or 4 has been used especially in cases of sexual exploitation, when the trader “sold” the sexually exploited person to a nightclub owner, consequently losing control over the trafficked person by the sale.

In conclusion, it should be pointed out that the extensive interpretation of trafficking in human beings was already used in the Czech Republic in 2008 in the *Grail Movement* case; however, this has been the only case of law enforcement authorities allowing such interpretation so far. Based on the ECHR cases of *Siliadin v France* and *C.N. v United Kingdom*, it is also reasonable to assume that the extensive interpretation of human trafficking is in full compliance with Article 4 of the European Convention on Human Rights. The judgments do not infer that states should explicitly define the crimes of slavery or forced labour in their legislation.

*Option 2 – Introducing a new physical elements of a crime a crime that will adequately penalize the process of exploitation itself.*

The new crime could be defined as follows:

Special Part of the Criminal Code – Title II

Labour exploitation

(1) A person that keeps another in slavery or servitude shall be punished by imprisonment for (*penalty – two to ten years – to be discussed*)

(2) A person that uses another for forced labour or other forms of exploitation (practices similar to slavery) shall be punished by imprisonment for (*penalty – six months to eight years – to be discussed*)

(3) Qualified facts of the crime (*to be discussed*)

*Even with this option, it is still worth considering* whether the element of “to make them used by another” should be amended as well while rephrasing sexual exploitation like with the previous option. As shown by Scheme no. 4, criminal liability for the crime of trafficking in human beings is only held by the seller. Then there is the question whether criminal liability for this crime should also be held by the “buyer” as a person involved in the “business relation”. If there is exploitation, the “buyer” would be additionally criminally liable for the crime of labour exploitation (see Scheme no. 1).

Another question that needs to be answered with this option is how to legally qualify conduct where the roles of trader and exploiter are merged in a single person and a third person partakes completely unknowingly in the trafficking process as the user of labour (Scheme no. 2). Should the perpetrators be liable for the crime of trafficking in human beings in concurrence with the crime of labour exploitation? Or should their acts be only

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regarded as the crime of labour exploitation with no trafficking in this case? E.g.: because the third party (labour user) is not aware of their participation in human trafficking.

When formulating answers to the above questions, however, we cannot forget what was said for the previous option – differentiating *between the perpetrator’s intent to exploit another and exploitation itself seems to be an artificial legal construct, based on the judgments analysed, which is no longer applicable* to how the crime of trafficking in human beings is committed today, especially for the purposes of labour exploitation. *For the above reasons, the author of the analysis favours Option 1.*

2) *It is possible to draw inspiration from the Dutch general prosecutor’s interpretation used in the Chinese Horeca case when interpreting the term “forced labour and other forms of exploitation”.*

In spite of the fact that there are definitions of forced labour, and other forms of exploitation, the Czech Republic encounters difficulties in the interpretation and application of the terms. This is caused, among other things, by the fact that law enforcement authorities, but also the expert public, often refer to a judgment of the Constitutional Court, ref. no. Pl. ÚS 37/1993 (published under no. 86/1994 Coll.), in which the Court came to the conclusion that *such labour and services that arise from civil obligations regulated by the Civil Code and other private-legal regulation cannot be in principle considered forced labour and services*. In the spirit of this judgment, activities falling into the term “other forms of exploitation” then cannot be construed as those activities that are as grave in their nature as forced labour that is associated with physical restriction of personal freedom.

Another shortcoming can be seen in the fact that Czech criminal legislation and jurisprudence do not work with the term *practices similar to slavery*, a term that is included in international and European documents dealing with human trafficking. As already said above, practices similar to slavery certainly fall within the Czech term “other forms of exploitation”.

For the above-mentioned reasons, the Czech Republic could be inspired by the interpretation of the terms “forced labour” and “practices similar to slavery” provided by the Dutch general prosecutor in the Chinese Horeca case. The general prosecutor associates the term “forced labour” (together with the terms “slavery” and “servitude”) with a high (extreme) form of oppression, with the exploited being effectively unable to escape from the situation. This condition can realistically be considered fulfilled in a situation when the perpetrator uses violence, threats of violence or other serious damage with the aim of forcing a person to perform work. The working conditions (e.g. the amount of wages) that the worker was subjected to do not have to be further examined then.

An extreme form of oppression is thus not an essential characteristic for the term “practices similar to slavery” to be fulfilled. Unlike forced labour (slavery or servitude), practices similar to slavery are a *bipolar* (two-part) term, with the *one* pole being the worker’s dependence and the level of oppression associated with the activity and the *oth-*

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er pole being bad working conditions and the economic gain that the employer receives at the expense of the exploited person (“economic exploitation”). The level of oppression experienced by the exploited worker thus does not result from physical restriction but from subtle forms of coercion applied to the worker by the perpetrator – withholding wages or abusing their vulnerability that might result e.g. from being in an foreign country or not speaking the language. When interpreting the term “practices similar to slavery”, the general prosecutor also talks about connected vessels – *the greater the oppression, the less important the economic gain is*.

The terms “forced labour” and “practices similar to slavery” are also not related to the fact whether or not exploitation results from relations governed by private law in any way.

The bipolar concept of “practices similar to slavery” *also helps define the borderline* between criminal penalties for labour exploitation on the one hand and a “mere” breach of labour regulations on the other hand. According to the general prosecutor’s interpretation, *a situation in which a worker is not paid their wage cannot be deemed to constitute labour exploitation unless the employee is subjected to bad working conditions at the same time (and vice versa)*. In addition, this interpretation helps law enforcement authorities understand the issues of labour exploitation *comprehensively*; this should prevent cases when the perpetrators’ actions are divided into several acts or qualifying the perpetrators’ actions as a series of less serious breaches of law that are irrelevant in terms of criminal law (see the Tree Workers and Dairy Shop cases).

It is certainly possible to derive *bad working conditions* from the working hours, compliance with mandatory breaks from work and rest periods, payment of health insurance and social security contributions for employees, compliance with occupational health and safety regulations; it is also necessary to take in account the nature and type of work performed, accommodation and meals.

When interpreting the term “forced labour”, we also should not forget that pursuant to the requirements of *Directive 2011/36/EU of the European Parliament and of the Council* of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, this term includes the term “*begging*”.

With his interpretation of slavery, servitude, forced labour and practices similar to slavery, the general prosecutor made an indirect but rather marked *distinction from forced labour indicators* defined by the ILO and *used by the ECHR, among others. The concept of forced labour as understood by the ILO is broader than the general prosecutor’s interpretation.*

The ILO’s interpretation of the term “forced labour” is based on the Forced Labour Convention, 1930, which defines forced or mandatory labour as “*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily*”. Thus the essential characteristics of forced labour are *involuntariness* and threat of *penalty*. According to the ILO indicators, the fact that employees’ wages are withheld or not paid in full is considered threat of penalty as well



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as involuntariness. By contrast, the general prosecutor considers this part of the term “practices similar to slavery”.

The extensive interpretation of forced labour is also obvious from the fact that a situation when one person is sold to be owned by another can be considered a characteristic of involuntariness according to the ILO indicators. As already said above, the judicial practice of the ECHR also deems the situation when a person is reduced to a subject of ownership to be slavery.

*3) When deriving the state of labour exploitation (other forms of exploitation), it seems reasonable for law enforcement authorities to work more with the amount of average/guaranteed/usual wages.*

It results from the European judgments analysed that especially German courts, when deriving the state of labour exploitation, work carefully with the amount of the minimum wage specified for the industry in question and the amount of wages that the exploited persons became entitled to according to the hours worked. They then compare the amount with the amount of money that the perpetrators actually paid or awarded to the exploited persons, taking account of the accommodation and food provided.

In the conditions of the Czech Republic, law enforcement authorities could make use of the institute of “*guaranteed wage*”, which adjusts the minimum wage depending on the difficulty and complexity of work. The amounts of guaranteed wages are specified in *Government Decree No. 567/2006 Coll., on the minimum wage and the lowest levels of guaranteed wages*. It would also be possible to base the *average wage* on, where it is possible to make use of collaboration with the Czech Statistical Office. However, the average wage will certainly differ among regions. Therefore, it is also conceivable to define the *usual wage*, i.e. the wage that is usual at a given place and time.

The approach of German courts can certainly be recommended to the Czech Republic, especially because of better *graspability* of the issues of labour exploitation. The adoption of this approach could also certainly lead to *improved quality of the reasoning* of Czech courts’ judgments.

*4) The perpetrator may abuse the victim’s distress or dependence, accomplishing the elements of the crime of trafficking in human beings, even though the actual person does not feel like a victim.*

As it is obvious from the judgments analysed, the terms “vulnerability” or “helplessness” are treated more or less as *objective categories* in the individual countries. When interpreting these terms, the following facts are especially relevant for courts: unfamiliarity with the language, lack of finances, insufficient food and accommodation, level of the perpetrator’s guarding the victim, etc.

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5) Provide an interpretation of the term “particularly exploitative working conditions”, which is contained in the regulation specifying the crime of unauthorised employment of foreigners pursuant to s. 342 of the Criminal Code.

The crime of unauthorised employment of foreigners newly contains the term “employment under *particularly exploitative working conditions*”. Concerning this term, the implemented directive says that it includes, among other things, such working conditions *that offend against human dignity*. However, the crime of unauthorised employment of foreigners is regulated in Title X – crimes against public order, its primary object is interest in the prevention of illegal migration and protection of the labour market. There is then the question how to interpret the term “particularly exploitative working conditions” and what is the relation between the term and the terms “forced labour” and “other forms of exploitation”.



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# STRATEGIC LITIGATION: FROM THEORY TO PRACTICE

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## Abstract

This chapter deals with the theoretical and practical aspects of strategic litigation. It discusses a wide range of theoretical concepts as well as the experience of stakeholders from advocacy, social work, law enforcement authorities and the clients of La Strada Czech Republic. It observes not only the theoretical background for litigation and legislative frameworks for strategic litigation but also practical applications of the method in the representation of trafficked and exploited persons. It offers a number of specific guidelines and recommendations for introducing strategic litigation in an organization's environment.

## 1. INTRODUCTION

The objective of this text is to present the method of strategic litigation at both theoretical and practical levels. Strategic litigation is a method that is inspirational for not only non-governmental organizations that work with marginalized and vulnerable groups. Our aim is to present the method in more detail and then describe its application in a non-governmental organization's practice. Trafficked and exploited persons are one of the groups at risk that in many areas and on a long-term basis hit the legislative, implementation and expertise limits of various components of the system that should provide them with access to justice. Problems are also encountered by the staff of La Strada Czech Republic, a non-governmental organization that provides social services to this diverse clients group. Similar difficulties are also faced by attorneys representing trafficked persons and, in many cases, by law enforcement authorities. A solution can be sought either at the individual level or in striving for a social change.

This chapter deals with the theoretical and practical aspects of strategic litigation. It should provide a better understanding of how the method works and what benefits and potential drawbacks it has, illustrated by an example of work at La Strada. It brings the views of stakeholders that are directly involved in the implementation of strategic litigation – the organization's clients, social workers and representatives of the injured. The chapter is intended especially for assisting staff. It summarizes the latest *information and findings in the theoretical area of strategic litigation*, drawing on *gathered experience*

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with how strategic litigation should be put into practice. In other words, the reader will find a description of the “procedural aspects” of strategic litigation here. Since there is a rather wide range of literature, concerning the application of advocacy/lobby in the field of human rights, we focused the presentation of the strategic litigation method especially in the area of practical collaboration within the “support” system for the clients, i.e. especially on the collaboration of attorneys and social workers. These are then put into the specific framework determined by the strategic level of the collaboration.

At the beginning, the chapter introduces the reader to the *methodology*, which documents how we arrived to our findings and experience. *Legal frameworks* are in principle a “playing field” where strategic litigation as a multidisciplinary concept in the border area of law, social work and politics takes place.

While criminal law may at first seem to provide exhaustive answers to both procedural issues and issues with the practical application of the definition of trafficking in human beings, it does not. Therefore the next part deals with select “content” *issues of strategic litigation both in the procedural and material area of criminal law*. The text summarizes the experience and recommendations for practice of representatives of the injured that worked on specific cases and representatives of law enforcement authorities. Important topics include representation of the injured, the representative’s cooperation with a specific person, issues with compensation and selected aspects of the application of the definition of the crime of human trafficking.

## 2. METHODOLOGY

The text deals with both theoretical and practical aspects of strategic litigation, covering several main topics – from theoretical concepts described in expert sources to stakeholders’ empirical experience with strategic litigation practice. The main goal of the article is to present the method of strategic litigation at both theoretical and practical levels and offer specific suggestions and recommendations for putting it into practice. We therefore use various research methods and techniques to reach the defined goal.

The conceptual frameworks of strategic litigation form a descriptive portion of the text, based on secondary sources of information (internet sources, own archives). These were mainly method application guides, plus PowerPoint presentations created for education purposes. The passage concerning legislation describes the legal environment in which strategic litigation takes place.

The review of strategic litigation in current practice also uses secondary analysis of information and qualitative interviewing.<sup>22</sup> The part concerning La Strada’s practice is based on information from the organization staff’s narratives (Ochrana, 2009). The perspective of social workers and the clients is based on the organization’s internal evaluation, individual interviews and focus groups. Internal evaluation from late 2011 assessed

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work with the organization's clients based on the study of secondary materials and a group interview with the team of social workers. In addition, individual interviews were conducted with the clients trafficked outside of the sex industry. The interviews were conducted based on the client's informed consent; some interviews were recorded, records of key points were made of others. The total number of interviews was eight.

Another method used was focus groups. Their objective was to gather information by means of group interaction arising from a debate over a topic defined by the researchers. According to Morgan (2001), the advantage of this method is its ability to obtain a large amount of information concerning the topic in question. The fact that the group is governed by research interest may also be a disadvantage – e.g. it may result in a lower level of spontaneity in comparison with participant observation. By contrast, its advantage is group interaction that helps generate information and allows comparing participants' experience (Miovský, 2006; Barbour, 2011). The first moderated focus group was attended by the current social workers that are responsible for collaboration with the clients and law offices, social service workers that work especially in a shelter flat, and organization employees that had covered the topic in previous years. The group was enriched by lawyers from the organization's analytical department at their own request. The goal was to gather illustrative data and opinions from practice and formulate recommendations for other organizations that would like to implement strategic litigation in the future. The methodology used was complemented by cooperative methods used for the introduction of quality standards in social services (Kostečka et al., 2008).

Participants of the second focus group, organized in late 2011, included representatives of the injured collaborating with La Strada, representatives of the Czech Police, public prosecutor's offices and social workers.<sup>23</sup> Several recommendations arose from this group, including a recommendation to hold another similar meeting that would be prepared with the participation of a member of the team of representatives of the injured. The preparatory group, consisting of the authors, a moderator and three attorneys, came up with the format of the second meeting under the working title of "research & educational meeting". The group meeting held in December 2012 was designed as three inter-related discussion panels introduced by two short papers from practice or theory and followed by moderated discussion on the topic in question. In addition to representatives of the injured, a social worker and the organization's lawyer, the discussion groups also consisted of speakers from the other panels (in practice, judges, a public prosecutor, an attorney and a legal theorist). The choice of discussants was governed by the criterion of practical experience with the topic, i.e. especially in the representation of the injured or as a law enforcement authority.<sup>24</sup> The discussion group was complemented by speakers from other panels, i.e. judges, a public prosecutor, etc. The advantage of this format was that it generated new topics that could be joined by representatives of the injured from the first meeting.<sup>25</sup>

The assessment of the focus groups showed that participants appreciated especially the multidisciplinary of the meetings. The meetings were a format that is not common in

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the criminal judiciary. In practice, public prosecutors and judges meet during education courses at the Judicial Academy, but there is lack of participation by attorneys. A similar situation is in the education of the police. There is also lack of meetings that would support the development of skills and expertise needed to play the role of a representative of the injured. In this regard, the focus groups pointed out the need for mutual meetings between various stakeholders. The original, more or less research-focused intent of the meetings was thus significantly complemented by an element of experience sharing (which is common with focus groups), but also enriched with an educational dimension. Therefore, there is the question whether similar meetings in the future should be focused more on education (allowing e.g. participation by more people) or on sharing experience within a more closed group, preparing e.g. a case study seminar, as proposed, that allows for deeper examination and sharing practical experience.

It should be noticed that the resulting interpretation of data reflects the authors' practical focus and experience. What cannot be left aside is our background in a non-governmental organization whose value framework has also affected the resulting text.<sup>26</sup> Our position is community involvement, without any ambition to compete with the academic discourse, focusing on specific goals and success of practice (Šmausová, 2008: 13). Emphasis on practical focus can be classified as action research (Hendl, 2005).

Our actual approach to data collection and evaluation is affected by interpretative approaches to research (Yanow, 2000; Schwartz-Shea, et al., 2012; Ochrana, 2009), mainly in the emphasis put on the understanding of social phenomena and concepts as understood by the stakeholders themselves, contextualization of reported findings and self-reflection as a human being that "examines" a situation while being part of it.

### 3. STRATEGIC LITIGATION CONCEPT

Strategic litigation is a targeted, extensive and comprehensive activity, which requires orientation in theoretical conclusions, so that those who plan and carry out these activities can select an appropriate variant that best corresponds to the needs of the particular situation. The knowledge of theoretical conclusions and frameworks is a condition for successful litigation. Experience acquired by the organisation and its workers involved in strategic litigation is also important.

#### 3.1 THEORY OF STRATEGIC LITIGATION

Strategic litigation, sometimes referred to as "test case" is based on a concept, which in a European context is prepared particularly by NGOs involved in defending the rights of marginalised groups. Strategic litigation is focused on by authors in the United States of America, who describe specific examples of legal cases (Koppelman, 2008; Jones, 2004); exceptionally examples of litigation at the European Court for Human Rights are described

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(Solvang, 2008).<sup>27</sup> In the Czech language, there is a publication entitled “Strategické vedení soudních sporů o rasové diskriminaci v Evropě – od principů k praxi: příručka k teorii a praxi strategického vedení soudních sporů se zvláštním zaměřením na rasovou směrnici ES” [“Strategic Litigation of Race Discrimination in Europe: From Principles to Practice; a Manual on the Theory and Practice of Strategic Litigation with Particular Reference to the EC Race Directive”] (Interights, 2006), according to which we use the term “strategic litigation” as the most general description of activities related to representation of clients and related political activities. For other terms describing similar activities, we always explain the reason for using different terminology.

Strategic litigation is applied particularly in *areas that call for social change* – such as regarding the rights of LGBT people, children’s rights, discrimination disputes, environmental causes, etc. It can be stated without exaggeration that the definition of strategic litigation depends on the organisation (Smith, 2003). Nevertheless, there are at least a few common characteristics – strategic litigation can be understood as *part of legal practice that is focused on bringing about social change through legal representation in selected cases. It does not only involve taking into consideration the benefits for those to whom it pertains, but it also is aimed at bringing about a greater impact on society or on the community. Strategic litigation tends to be part of more widespread advocacy campaigns waged in order to achieve goals that are considered to be in the public interest by civil society. This involves efforts in which NGOs and law firms or specialised legal organisations usually join forces* (Geary, 2009; Interights, 2006; ILGA – EUROPE, year not stated; Smith, 2003; Rekosh, 2003). As Geary points out, “strategic litigation is much more than simple presentation of a case before a court” (Geary, 2009: 6).

During strategic litigation, emphasis may be placed on various aspects of this activity. Some organisations when defining strategic litigation emphasise mainly the legal aspect. For example, Smith (2003) identifies which court decisions organisations aim to achieve the most often during strategic litigation. According to Smith, they are those that make it possible: a) to clear up so far untested legal issues, b) to confirm or call into question the existing interpretation of the law, or c) to knock down precedent (Smith, 2003). However, most authors emphasise not only legal clarification, but also support for the rule of law, and additionally they cite the important role of advocacy, increasing of awareness regarding the particular issues, education of various audiences including courts and the law community, documentation of injustice, strengthening of threatened groups and social or legal changes (Geary, 2009; Interights, 2006).

The primary objective of strategic litigation does not always have to be its successful outcome, and other goals or preliminary goals can include tabling an agenda or changing the considered approaches to the particular topic (Interights, 2006). Some cases waged strategically are even commenced with the expectation of an unsuccessful outcome in court, and those involved in such litigation often even create a strategy in advance for handling such outcome (Rekosh, 2003). So, how should efforts of success be evaluated? In cases of strategic litigation, that is always more difficult than during regular representa-



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tion. Success can be defined in several ways. For example: as achievement of a main goal, partial goals or a selected strategy. Interights states regarding evaluation of success that if the aim is social change, then it is necessary to assess the impact of the strategic dispute in comparison with other methods. This impact, although there are still few studies that measure the impact on NGOs' work generally, can be assessed for example based on the ability to obtain funding, successful implementation of standards, establishment of reputations, etc. (Interights, 2006).

*Strategic litigation* immediately requires asking of two basic questions: To what should efforts be devoted and where can an "ideal" case be found for such *topics*? The organisations initiating strategic litigation usually know the answers to both questions, because they are based on their declared aims and priorities. Interights (2006: 51) differentiates in relation to our topic the following spheres of specialisation of human rights organisation, which resolve:

- a) Cases of breach of certain rights (topical model),
- b) All areas of interest of a particular minority group (in this case, certain topics can be given priority too).

Interights (2006) recommends in its manual to set *criteria according to which a case will be selected* to which an organisation will devote its attention strategically. This is important also from the point of view of case management, from the point of view of elimination of moral risks (e.g. abuse), and from the point of view of evaluating the potential success of a case. Criteria can include, for example, the organisation's effectiveness or priorities. The selection of cases needs to be set up in a transparent manner, so that it is possible to explain well the cases that are rejected (Interights, 2006). Depending on the type of organisation that wages the strategic litigation, strategic cases are ensured from the organisation's own advisory experience, work in the terrain with networks of cooperating organisations, through training and educational events, web ads, through partnerships with other entities, etc. (Interights, 2006; Smith, 2003; Geary, 2009).

The publication "Strategic Litigation regarding Racial Discrimination in Europe" points out that *the aims and strategies selected during representation may vary depending on the organisation's focus* (Interights, 2006). Based on the offered typology, organisations can be divided into those primarily focused on the client and those focused on a political impact. *Focus on clients* is characterised by emphasis on helping individuals. Organisations with this focus often work with an aim of providing assistance in "their" areas of focus to as many individuals as possible. If such organisation opts for strategic litigation, the selection of each case tends to depend more on the needs of clients than on the potential impact (the difference compared to "regular" representation is that the case is approached strategically). The advantage of such organisations is that thanks to their insight regarding the particular issues, they are better able to select and structure goals and prepare strategic cases. Organisations *focused on the political impact* often have to search for cases with strategic potential. They seek to bring about potential influencing of the existing situation and social change. Since goals are not set only based on the client's needs,

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such approach introduces more questions into debates regarding values and priorities when defining the approach to be followed when resolving disputes (Interights, 2006).

For an effective litigation strategy, it is necessary to know and even to *clarify the role of involved parties* cooperating in the case. These are usually NGOs' law firms, legal NGOs, national human rights institutions, research organisations or *amicus curiae* (friend of the court) groups.<sup>28</sup> We are interested mainly in NGOs without a legal orientation, the role of legal entities and the client's role. Ilieva (2005) sees *the role of NGOs* mainly in identification of a case, supporting of a case, making public the results and initiating other changes.<sup>29</sup> Her understanding of "case servicing" is also interesting. This amounts to ensuring legal services, which can vary among use of a legal network, use of a lawyer employed in an organisation, use of a legal clinic or recommendation of another entity for cooperation (Ilieva, 2005). An NGO should ensure evidence and documentation and prepare and work with witnesses who will testify in the case and support them during the process as well as protect them against victimisation. An NGO should also ensure other support, such as support in the form of court expertise, development of civil networks, involvement of the media, training of judges and the legal community and obtaining international support. If the NGO is one that legally represents its clients itself, its activities are similar. As Interights (2006) points out, it is always necessary to enter into partnerships and make use of the capacities of other NGOs when carrying out supporting activities. It cites as an example Amnesty International, which does not have much experience with litigation, but has a lot of experience with waging campaigns (Interights, 2006: 47).

If an organisation lacks its own lawyer, then it is a good idea to consult an external legal entity regarding the first steps. The selection of legal representation can depend on a lot of circumstances – from finding "the right person" based on the specialisation (criminal, civil, etc.) to considering whether to attempt to involve a large law firm or to contact lawyers who are not indifferent to issues of social change. However, it is also necessary to take into consideration the financial situation of the complainant or the organisation that will pay the expenses. When looking for a suitable lawyer, we can use the following resources: legal networks or organisations such as the Bar Association and legal aid organisations, NGOs that have their own lawyers or "legal clinics" at universities, or simply to rely on others' recommendations (Geary, 2009). Nonetheless, it is a good idea to visit the selected organisations or persons and to discuss with them how they envision that the case would be conducted. Geary recommends taking into consideration the amount of fees (or pro bono services), focuses and experience, resources including time capabilities, supporting personnel, acceptance of cooperation with external involved parties, own support networks, etc. Personal persuasion is also important, even if the particular lawyers are bound to represent their clients' interests. Personal persuasion is important, because those involved can cooperate even for years, and the sharing of common values can make cooperation much easier (Geary, 2009).

An often neglected, but important topic is the *client's role*. Interights, in connection with the agenda of the clients<sup>30</sup> (the plaintiff in the strategic dispute), points out that the

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needs of these persons are often forgotten due to “greater” goals, even though their satisfaction and willingness to continue is key for the success of the case (Interights, 2006). These needs include the effects of more extensive living conditions of the client and the potential impacts of a conducted case on their lives as well as on their surroundings, which may suffer as a result (Interights, 2006). Certain cases, such as cases involving violations of children’s rights, also require more thorough security planning. It is necessary for everyone who is involved in the case to feel safe and be protected (Geary, 2009: 18).

As has already been stated, in regular legal representation, steps are often taken based on the individual client’s instructions, and the course of the dispute is governed by the client’s wishes. However, for a strategic dispute, the approach is selected also with consideration for the need to solve the problem itself from a political point of view. This fact shifts the client’s role and the role of the client’s legal representation to a different relationship level. Something else that is relevant is the issue of the powers that helping professions have in relation to the people using their services. Interights, which relatively extensively examines the client’s role, points out that it is necessary to ask many questions: “Should the lawyer encourage the client to continue the case even despite the low probability of success? If necessary, will the client be willing to undergo the lengthy appeal process? Is the lawyer required to explain the entire strategy to the client, regardless of whether doing so would influence the case? Is it ethical not to inform the client about the additional reasons for this strategy? Is there any justifiable reason not to inform the client about the strategy?” (Interights, 2006: 70). However, there are a lot more questions that need to be answered. Another issue that needs to be resolved is the issue of *confidentiality of the information* that is disclosed to legal representatives or others. Without the client’s consent, publishing or publicly talking about such information is not permitted (Geary, 2009; Interights, 2006).

With regard for the client as well as for the wider aim of the conducted activities, it is useful to consider whether strategic litigation is the right method. Strategic litigation can have its advantages and disadvantages.

First we will mention the *advantages and benefits* of strategic litigation. These include the fact that in the event of success the case can bring about a change in legislation or in its interpretation and application in practice. Such changes can benefit either the entire community or at least a significant part of it. The impacts can be far reaching. Strategic litigation tests the limits of states’ responsibility and creates precedents for future complainants (particularly in relation to systems of established law). Other advantages of strategic litigation include the ability to table publicly particular topics, to support political and public debate and to create pressure from international courts and tribunals, which can lead to political change. Strategic litigation also helps with establishing equal protection under the law and expands access to justice.

However, its *disadvantages and limits* include the fact that the outcome is almost always uncertain, and the process can be very lengthy. This requires a lot of patience from the person on whose behalf the dispute is being waged and from the organisation

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participating in supporting that person. Another disadvantage is that during strategic litigation, the entire process of verification can be very tedious – law firms have their strategies, which, however, may conflict with activists’ strategies. It is also necessary to realise that the client on whose behalf the dispute is being waged may not always be the “right” person – problems can arise from the inconsistency of testimony, a lack of resources, fear, and misunderstanding of the entire process or unwillingness to accept out-of-court settlements (which is not always a desired outcome in strategic disputes). Another disadvantage is undoubtedly that the length and progression of the case can have a negative and even a traumatising effect on the complainant. In some cases, there may even be other risks, such as the risk of being attacked by opponents. Unfortunately, in practice just one successful case is not always enough. If the case ends with a defeat, such outcome could also cause complications for future complainants. Another disadvantage is that waging a strategic dispute can be very costly, and it is difficult to predict in advance the total costs that will be incurred for the dispute. Sometimes, there is even a risk that in the event of a defeat, it will be necessary to pay the counter-party’s costs.<sup>31</sup> Last, but not least, it is necessary to realise that courts may not always be impartial or may have low credibility, or the enforceability of rights may be difficult for another reason (ILGA – EUROPE, year not specified; Geary, 2009; Interights, 2006; Rekosh, 2003).

Another disadvantage is that there are varying financial costs related to waging strategic litigation. Although legal representation can be obtained free of charge as a Pro Bono service, legal assistance from NGOs, legal clinics, etc., there are often additional costs. For example, it is also necessary to take into consideration costs such as court expenses and fees, costs for telephone calls, postage, travel, translations, opinions prepared by court experts, etc. In order to cover these costs, it is also possible to apply for financing through grants. However, as Interights points out, donors may ask that cases pertain to certain areas. Interights adds that it is also necessary to consider potential conflicts of interest, such as cases of protection of individual rights in relation to the state and the potential acceptance of public funds (Interights, 2006: 43).

Objections also pertain to situations when it can be reasonably assumed that the particular dispute cannot be won. Rekosh recommends in such situation to call for measures that would correct the situation, to monitor courts, to attempt to overturn decisions through other means such as campaigns and domestic advocacy and to use international resources for advocacy (Rekosh, 2003). International advocacy is important for many reasons. According to Rekosh, it enables obtaining of written basis materials that can be used to defend an argument in one’s home country, both for mobilisation of the community and for increasing awareness or domestic advocacy efforts. Cooperation with international organisations can prompt pressure to bring about compliance with standards and can have an effect through publication of the problem in monitoring reports of various bodies, in some cases even including punishment of rights violations (Rekosh, 2003). With the winning of the dispute, achieving of a court decision or even achieving of a legislative change, the work does not end. “A political change without implementa-

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tion remains unfinished,” Interights emphasises (2006: 76). It is necessary to think up in advance a strategy of corresponding character, which may include community services, a new state policy and cooperation with organisations in the terrain (Interights, 2006).

As we see it, the strategy of waging disputes is a complex activity, and in many cases also quite complicated. For practice, it is necessary to consider from the available variants always the one that best corresponds to the needs of the particular situation. Knowledge of theoretical conclusions and frameworks is necessary during creation and selection of the best strategies.

## **3.2 LEGISLATIVE FRAMEWORK OF STRATEGIC LITIGATION**

The following text examines legal issues and problematic moments of strategic litigation. It first examines general terms and basic aspects of court proceedings, and then it provides information about legal representation, and in its conclusion it briefly presents an overview of the rights of crime victims.

### **3.2.1 BASIC LEGAL REGULATION**

Basic legal regulations that establish the legal framework for strategic litigation are:

- The Charter of Fundamental Rights and Freedoms<sup>32</sup> – it stipulates that everyone has a right to legal assistance in dealings with courts, other state bodies and public administration bodies, from the beginning of the proceedings. The Charter states that only the law defines which activities are criminal offences and what types of punishments can be imposed for such offences.
- The Civil Code<sup>33</sup> defines possible types of legal representation (based on the law, a decision by a public body or based on an agreement – power of attorney). For representation based on a power of attorney, the Civil Code specifies what the power of attorney should look like, what it should contain and what types of legal consequences can result for the representative and the principal as a result of granting of a power of attorney.
- The Civil Procedure Code specifies the particular requirements for legal representation of the parties to civil court proceedings.
- The Penal Code<sup>35</sup> defines actions that are considered criminal offences and sets punishments for committing them.
- The Criminal Procedure Code<sup>36</sup> defines the procedures and processes of investigation, prosecution and assessment of criminal offences by courts, the police and public prosecutors (law enforcement authorities). In the Criminal Procedure Code, the entitlements of a crime victim and his or her legal representative.
- The Social Services Act<sup>37</sup> defines the conditions for providing assistance to persons in unfavourable social situations and the principles governing such activities. Particularly important for the purposes of strategic litigation are the definition of individual types of social services<sup>38</sup>, social service providers’ obligations<sup>39</sup>, the confidentiality obligation<sup>40</sup> and definition of prerequisites for the profession of a

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social worker<sup>41</sup> A major role is also played by standards of quality of social services, which are an annex to Decree No. 505/2006 Coll., which implements certain provisions of the Social Services Act (particularly standards related to protection of persons, negotiations with parties interested in services, individual planning, maintaining of documentation and complaints regarding the quality of provided services and standards related to personnel ensuring of services).

- The Law on the provision of financial aid to victims of crime enables victims of criminal offences to receive certain financial compensation from state resources if compensation is not obtained from the perpetrator.<sup>42</sup>
- The Act on Victims of Crime<sup>43</sup> mostly has replaced the Act on Providing of Monetary Assistance to Victims of Criminal Activity and also to a great extent expands the rights of crime victims.

### 3.2.2 GENERAL INFORMATION ABOUT COURT PROCEEDINGS

#### 3.2.2.1 CIVIL PROCEEDINGS

The purpose of civil proceedings; is to provide an area for protection and implementation of rights of individuals. The term “protection and implementation of rights” means basically anything, from recovering a sum due by the debtor to divorce division of joint property of spouses.

The civil proceedings enable anyone to defend their rights in front of the judge freely. The process includes two parties – the plaintiff and the defendant – who argue with each other to find out which side the law lies on (*accusatorial* principle<sup>44</sup>). Both parties, namely the one who had initiated the dispute (the plaintiff) must provide the court with *evidence* to support their allegation. The defendant must be able to *bear the burden of proof*. Except for certain specific types of proceedings (non-contentious proceedings<sup>45</sup>), the court alone does not search for evidence. Thus, if the judge comes to the conclusion that the party’s allegation is incomplete, unreliable or not very well proven, then the court does not have to believe such allegation (or considers it as not proven), which means that in this case this party will lose the dispute.

#### 3.2.2.2 CRIMINAL PROCEEDINGS

In view of the public nature of the criminal law, criminal proceedings differ from the procedure proceedings. *The accused* (the defendant in the civil procedure) is the person accused of a crime (i.e. the alleged perpetrator). Within the criminal proceedings, the plaintiff is represented by a public prosecutor, who is not identical to the injured party or *victim*. Such arrangement follows from the different role of the criminal law within the legal order, in comparison to the civil law. *The purpose of the criminal law* is to uncover crimes and punish their perpetrators rightfully.<sup>46</sup> At all times, one should keep in mind that a crime is what the Criminal Code defines as a crime. In other words, nobody will be punished for conduct which is not considered a crime by the Criminal Code. It is the court that may decide whether a crime was committed or not. This so-called legal order

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(Novotný–Vanduchová–Šámal, 2010: 55), comes from the Charter of Fundamental Rights and Freedoms<sup>47</sup> (“no crime, no punishment without the law”). The person who suffered bodily harm or property damage or other damage (the injured party) may participate in the criminal procedure and assert his/her rights, too. However, in terms of the purpose of the criminal procedure, the fact that he/she would attain justice in relation to himself/herself is not so fundamental. Nevertheless, at any stage of the criminal procedures, the investigative, prosecuting and adjudicating bodies must do everything so that the injured could fully assert his/her rights, of which he/she must be instructed intelligibly.<sup>48</sup>

Along with the court, a very important role within the criminal proceedings is played by the *police* and the *prosecuting office*, jointly referred to by the Criminal Procedure Code as the law enforcement authorities. The role of these bodies depends on the current phase of the criminal proceedings. It is important to distinguish two basic phases: the pre-trial procedure and the trial procedure. The phases are separated by submission of an indictment which, depending on the result of the criminal procedure, may or may not be completed. If the charge is not filled, the criminal procedure will not be continued and must be terminated.

*In the pre-trial procedure*, the law enforcement authorities must try to find out the particulars of offence, i.e. they must find out beyond any reasonable doubt whether a crime was committed, who committed it, and what damage was caused. The criminal procedure in the pre-trial procedure, contrary to the civil proceedings, is governed by the so-called *inquisitorial rule* – the law enforcement authorities must base on their own initiative, do everything in order to fulfil the purpose of the criminal proceedings (Šámal–Král et coll., 2002: 21), namely to find out whether a crime was committed, and ensure that the perpetrator will be punished. Moreover, they must act impartially, searching for any evidence which would testify in favour or against the individual accused.<sup>49</sup>

Unlike in the civil proceedings, *the searching for- and submitting the evidence is not primarily the duty of the parties*. It is the police that play the main role in terms of searching for evidence. The police are granted numerous competences by the Criminal Procedure Code, for example, they can ask individuals for explanation; examine an item and the scene of crime; claim a blood test; make audio and video records of individuals, etc. The pre-trial procedure includes the use of intelligence means – pretended transaction (e.g. purchase), monitoring of individuals or items (wiretapping) and use of representative (representative provocateur). The use of the intelligence means is subject to a special approval by the public prosecutor. However, the role of the public prosecutor within the pre-trial procedure is important for another reason. Public prosecutors *supervise the pre-trial procedure in terms of lawfulness*<sup>50</sup> to prevent possible willfulness or inactivity on the side of the police. For example, public prosecutors may order investigation of crimes; repeal a decision made by the police body; order that another police officer will take over the investigation, etc.

*Within the trial procedure*, the role of the prosecuting office is different. The public prosecutor who files the charge unambiguously represents *the public action* and his/her

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effort is focused on proving the guilt in the accused. The most important phase of the trial procedure is the *trial*, making the decision on the guilt and the punishment of the accused as well as on compensation for the victim, if claimed (see below). If, after the judgments, the decision is appealed by either party, the next phase is the appellate *proceeding*. Within the appeal proceedings, the court makes decision during a *public hearing*. If the accused is sentenced, the last phase of the criminal proceedings is the *execution proceedings*, for example, execution of judgments of imprisonment.

### 3.2.3 INTRODUCTION TO LEGAL REPRESENTATION

In both types of the proceedings mentioned above, the parties of the dispute (within the civil proceedings), or the accused and the injured within the criminal proceedings, may want a lawyer to act in the name of them i.e. to be their *legal representative*. Except for certain exceptions specified by law<sup>51</sup> for selected types of proceedings, legal representation is not mandatory. As for the legal representative, it usually is a lawyer or other persons listed by the Civil Procedure Code (e.g. general representative, in the civil proceedings). However, it is assumed by the Civil Procedure Code that the legal representatives are attorneys-in-law.<sup>52</sup>

*The legal representation by an attorney* is established on the *power of attorney* basis, which may be agreed for the whole proceedings (it means that it is not possible to hire the attorney e.g. for only one court hearing). Based on the power of attorney, the party in the proceedings may be represented by other entities (e.g. the public notary, the trade or non-profit organization, etc.).

As regards the above-mentioned general *representative*<sup>53</sup>, any natural person may be delegated. It is often employees of non-government organizations focused on human rights who undertake the role of the representative in order to help – usually to groups of people who cannot afford an attorney-at-law mainly for financial reasons. During the trial, the representative should not appear repeatedly within different legal issues as the court may decide not to accept the representation.

As far as the *legal representation within a criminal proceeding*, the injured has the *right to be represented by a representative*. It is obvious that in most of the victims of a criminal act, the awareness of criminal proceedings and use of legal instruments available within the Criminal Procedure Code, in terms of compensation, is rather poor. Thus the representative is an ideal solution for them. It is important to know that the representative does not necessarily mean a person with legal education. According to the Criminal Procedure Code, any person with full legal capacity is acceptable (i.e. persons with limited legal capacity would be rejected). However, for practical reasons, the representative acting on behalf of the injured should be an attorney-at-law i.e. somebody with adequate education and practical experience in criminal proceedings. That is to say, the exercise of the rights of the injured (victims) within a criminal proceeding, as well as enforcement of compensation is often accompanied with many legal and practical issues (Šachová–Lomozová, 2009).



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Regarding criminal proceedings, the representative can take part in any legal act which the injured may take part in, i.e. the representative is authorised to file a petition with the court on behalf of the injured, as well as submit applications and complaints or apply remedial measures (appeal). If the injured has authorized his/her representative, it is the representative who is informed about the trial.

In terms of payment for legal representation of the injured by the representative, under certain circumstances it is allowed by the Criminal Procedure Code that the cost of the legal representation may be borne by the state.<sup>54</sup> *Free-of-charge attorney's services* can be provided to the injured that are able to prove that they are not able to cover the attorney's work on their own. The decision on attorney's services is provided for free or for a lowered fee is made by the judge. The application is submitted by the injured themselves and the public prosecutor is asked for an opinion, too. In the case that the application is approved, the representative is an attorney-at-law and the cost of his/her services are covered by the state.

### 3.2.4 THE RIGHTS OF VICTIMS OF CRIMES

The victims of criminal offences, including victims of human trafficking, are called "the injured". *The injured party or the victim* is the one who suffered a bodily harm or property damage or non-property damage due to a crime, or the one at whose expense the perpetrator enriched himself/herself. Within our legal environment, besides the rather legalistic term "the injured", the victim of a crime is now perceived as a real person, not just a person needed by law enforcement authorities to clarify and punish the offence. Victim of crime can be only a natural person (contrary to the "injured", which may include a legal entity as well) who has suffered certain harm which needs to be rectified with contribution of the state both financially and by provision of adequate support (psychological, social). The term "victim of a crime" is now used in the newly adopted act on victims of crimes<sup>55</sup> as well as in the act which allows a one-off compensation for consequences of offence, which is provided by the state.<sup>56</sup> In the act on victims of crimes, the victim is defined as a natural person "*who suffered a bodily harm or property damage or non-property damage due to an offence, or the one at whose expense the perpetrator enriched himself/herself*".<sup>57</sup> In the case of the victim's death, direct relatives (i.e. the parents and children), siblings, adoptive parents, the spouse, husband/wife or registered partner ("close" persons) are considered as the victims as well.

#### 3.2.4.1 THE RIGHTS OF THE INJURED WITHIN CRIMINAL PROCEEDINGS

Within criminal proceedings, the injured (victims) have numerous rights. They should be aware of them to be able to assert them in an effective manner:

- The right to select and representative<sup>58</sup> and the right to be accompanied by a trustee<sup>59</sup>
- The right to claim compensation for damages<sup>60</sup>
- The right to claim an interpreter<sup>61</sup>

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- The right to propose additional evidence<sup>62</sup>
  - The right to inspect the files<sup>63</sup>
  - The right to take part in negotiating an agreement on guilt and punishment<sup>64</sup>
  - The right to take part in the trial and the public hearing dealing with the appeal or approving the agreement on guilt and punishment<sup>65</sup>
  - The right to express the opinion before the end of the proceeding<sup>66</sup>
  - The right to make complains against the decision in the pre-trial proceeding<sup>67</sup>
  - The right to appeal against the decision made by the first instance court, regarding the statement on compensation.<sup>68</sup>

Furthermore, from the view of the injured, it is important to know that the law enforcement authorities cannot deal with offences endlessly – they are bound by time limits. Following from the longest time limits defined by the Criminal Procedure Code, the total time of the pre-trial proceeding should not exceed one year.<sup>69</sup> In the case that an indictment is not filed, the prosecution procedure needs to be ceased.

Regarding the entitlement to compensation, the injured should be aware of the fact that the *claim for the compensation must be filed before the evidence proceedings within the trial is commenced*.<sup>70</sup>

The most important rights of the injured (victims of crimes) include the *right to select an representative* and the *right to claim compensation for damages*. To assert the compensation claim effectively, it is necessary to use all rights offered to the injured by the Criminal Procedure Code. People who do not speak Czech have the right to use in front of the law enforcement authorities their mother tongue or they can speak the language they want, declaring that they are able to use it properly. This is one of the fundamental principles<sup>71</sup> of criminal proceedings.<sup>72</sup> The costs incurred by employing an *interpreter*, on condition that the interpreter's services are necessary within the criminal proceedings, are covered by the state.<sup>73</sup> Translations of the file(s) which the injured not speaking Czech wants to browse are covered by the injured themselves.

To assert the claim for compensation of damages in an effective way, it is recommendable to use the right to inspect *the files* maintained within the given matter by law enforcement authorities. The injured have the right to inspect the files from the beginning of the criminal proceedings, which may be rejected for serious reasons only.<sup>74</sup> Furthermore, the injured may *propose additional evidence*, including the evidence which is not directly connected with his/her claim for compensation (Šachová–Lomozová, 2009: 26).

The injured has the right to *make complaints*<sup>75</sup> against the decision in the pre-trial proceeding, which is important mainly in the case that the police or the public prosecutor makes decision that the criminal proceeding will be ceased. *However, such a complaint must be filed within three days from the date when the decision was announced*. Furthermore, a *request for a review of police procedures* and/or the procedures conducted by the public prosecutor may be filed at any time during the pre-trial proceeding. This is recommendable in the case of delay or other irregularities (for example, proposed witnesses

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have not been interrogated, dilatory police officers, inactivity, malfunction of supervising public prosecutor, etc.).

As for the *right to take part in the trial*, it is important in terms of fulfilment of the claim for compensation for damages. The injured is informed that the trial is about to take place, which is the last chance to claim the compensation (unless they had already done this). If the injured neither claims for the compensation nor takes part in the trial, the claim cannot be asserted within the criminal proceeding any further. The only possible solution would be to file a civil complaint.

The injured may, as well as the accused, *give a closing speech*.<sup>76</sup> In the case that the criminal proceeding is followed by an appeal proceedings, the injured may take part in the public session on the appeal, too. Furthermore, the injured may *appeal* against the first instance court's judgement; however, this only applies to the claim for the compensation. Thus, the injured cannot, for example, call for more severe punishment for the defendant, etc. In case that the court of appeal revokes the judgement of the first-instance court in terms of the compensation for damages only, the injured is recommended to address the matter within a civil procedure.

*The agreement on guilt and punishment*<sup>77</sup> is one of possible ways to bring a criminal proceeding to an end. If this is the case, the judgments is not pronounced but the accused has confessed that he/she had committed the offence. The agreement on guilt and punishment is negotiated between the public prosecutor and the accused. The agreement includes the specification of the scope of the compensation, which the accused then passes onto the injured. The agreement on guilt and punishment is subject to approval by the court. Nevertheless, in the case of human trafficking, an agreement on guilt and punishment is out of question since human trafficking is a very serious crime and any agreement on guilt and punishment would not be permitted.<sup>78</sup>

#### **3.2.4.2 EXTENSION OF THE RIGHTS OF VICTIMS – VICTIM OF CRIMES ACT**

The rights of victims of crimes have been significantly extended by the new Victim of crimes Act.<sup>79</sup> It was already mentioned that within this act the term “victim” is used (in comparison to “the injured” used within the criminal law). Moreover, a category of particularly vulnerable victims has been introduced. The victims of crimes have been given the following new rights:

- The right to professional assistance, including legal aid, under certain circumstances provided free of charge,
- The right to information (the police and other entities shall provide information without request)
- The right to protection against imminent danger,
- The right to protection against secondary victimisation,
- The right for trustee's accompaniment,
- The right to make the victim's statement about the impact of the crime upon the victim's life.

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Non-government organizations providing services to victims of crimes will have to ask for accreditation and registration in the register of providers. Furthermore, the organizations providing assistance to victims of human trafficking should know that these victims belong to the category of *particularly vulnerable victims*,<sup>80</sup> which, by law, are provided with stronger protection and support.

The act has introduced the right of victims of offences for provision of *professional assistance* and the *right to information*. The *professional assistance* includes psychological and social consultancy, legal aid, provision of legal information and restorative programmes.<sup>81</sup> The professional assistance is not connected with the criminal proceeding and can be provided when purposeful for the victim. The professional assistance *free of charge* must be provided to particularly vulnerable victims only. Anyway, it is not forbidden by the law for other persons so it may be provided for free if the provider decides to do so.

The professional assistance will be only provided by organizations or individuals recorded in the *register of providers* of professional assistance to victims of crimes, which will be administered by the Ministry of Justice. For non-government organizations, it means that first they need to apply for accreditation. The provision of legal information and restorative programmes will be subject to accreditation under the new Victims of crimes Act, while the provision of psychological and legal consultancy will run on the basis of the existing registration under the Social Services Act. Based on the accreditation (or the registration in the case of the social services), the providers of professional assistance can apply for registration in the register of providers by the Ministry of Justice – except for attorneys-at-law and Probation and Mediation Service Centres, who will be added in the register even without accreditation or registration.

As far the *legal aid* is concerned, it will be only provided by attorneys-at-law. Other providers of professional assistance (e.g. non-governmental organizations) can provide the victims with legal information only. The new act does not provide more detailed specifications of the legal information, though.<sup>82</sup> Nevertheless, the act somehow enhanced availability of legal aid in terms of funding. In the same way as before, legal representation free of charge may be provided to the victims who claim for it in compliance with the Criminal Procedure Code; furthermore, from now on, the court can decide on legal aid to be provided free of charge (or for reduced rate) to particularly vulnerable victims who had suffered heavy bodily harm in consequence of deliberate offence, and to survivors of the victims who died in consequence of criminal offence (crime).<sup>83</sup>

*The right to information* according to the new act has introduced the duty of the police to inform the victim of a crime about ten important facts which are very important in terms of fulfilment of the victim's rights. For example, now the police must inform the victim where and to which body their complaint needs to be filed, who they can ask for professional assistance, what phases the criminal proceeding will consist of, what the role of the victim really means in the context of the phases of the criminal proceeding, what measures can be taken in terms of the victim's safety, etc. The police are bound to provide

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the information as soon as they get into contact with the victim. The information required by law must be provided to the victim *without request and in writing*. By law, the duty to inform is now imposed to providers of professional assistance, public authorities, health insurance companies and prison service. Information about release or escape of the accused from the remand prison, prison house, protective therapy or detention facility is extremely important. This information must be communicated by prisons and medical facilities to the victims without delay, within 24 hours. The victim needs to apply for provision of this type of information by these institutions beforehand. In the case of potential threat to the victim in relation with the convict (accused) being currently at large, the police must take appropriate measures to protect the victim even in the case that the victim had not submitted the request.

The victim has the right to *protection against imminent danger*. The police are competent to take measures needed for victim's safety, either in the form of short-time protection, or through ordering the person out of the shared house or flat, concealed identity or provision of special witness' protection.

The *right of the victim to protection against secondary victimization* is very important as well. This includes the right to require debarment of contact with the suspect or perpetrator. The police must always meet this requirement, especially in the case of a particularly vulnerable victim. Questions asked during interrogation or explanation procedures, if directed into intimate area, must be asked tactfully so that the interrogation does not have to be repeated. The victim has the right to object to a question. In particularly vulnerable victims, the explanation and interrogation procedures follow additional rules. The interrogation is facilitated by a person with proper qualifications so that the procedure is conducted only once.

By law, the victims now have the *right to trustee's accompaniment*. The trustee is any person with legal capacity selected by the victim. Such a right is extremely important for victims of a crime, mainly from the view of the mental support provided to them within the criminal proceeding. However, the trustee cannot interfere in the course of the individual legal acts. Another new feature is the possibility to *make the victim's statement about the impact of the offence upon the victim's life*, which may be in writing.

#### **3.2.4.3 ON-OFF COMPENSATION FROM THE STATE FUND**

The victims of crimes who suffered bodily harm in consequence of an offence may, under certain conditions, ask the Ministry of Justice for financial support. This is not compensation but rather (a symbolic) amount of money to overcome the currently worsened life conditions.

The financial support is provided in the following situations:

- The damage of health (or the death) has not been fully compensated,
- The perpetrator has been sentenced (or released from the indictment for insanity); if the perpetrator is unknown, the financial aid may be provided in the case

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that the law enforcement authorities know without doubts that the crime had been committed and the health was damaged in consequence of it,

- The victim has used all legal means to enforce the compensation of damages from the perpetrator,
- The victim got to know about the damage less than one year ago (from 1 August 2013, this limit is extended to two years; the financial aid may be requested within five years from the date when the crime was committed at the latest)

According to the previous legal regulation<sup>84</sup>, the flat amount of the financial aid was CZK 25,000, or compensation of proven loss of earnings and costs of medical treatment, up to maximum CZK 150,000; in case of the survivors it was CZK 150,000, up to CZK 450,000 (maximum). The Victims of crimes Act now reduces the flat rate to CZK 10,000. However, in the victims that suffered heavy bodily harm the flat amount is increased to CZK 50,000. The flat amount for survivors is newly increased to CZK 200,000. The proven costs have been increased to CZK 200,000 in the victims; in the case of survivors, the aggregated sum must not exceed CZK 600,000.

It is important to know that all amounts received by the victim from the perpetrator as the compensation for damages (after the financial aid received), must be returned to the Ministry of Justice. The financial aid is provided only to citizens of the Czech Republic, foreigners with permanent residence, foreigners with residence beyond 90 days, applicants for international protection and asylum seekers.

### 3.3 STRATEGIC LITIGATION WITHIN LA STRADA ORGANIZATION

Up to this point the text has been devoted to the theoretical aspects of the concept, now we will deal with its practical applications. We will present how the strategic management of disputes is performed in La Strada organization. We will also describe how the view of the concept created during the years was, what methods were used, and above all what was the procedure of searching for own approach in relation to the needs of clients who cooperate with the organization.

In the context of strategic litigation the organization deals with two groups of clients: with trafficked and exploited persons who take advantage of several social aids during the cooperation and try to solve their issue in a comprehensive way including using the opportunity of shelter services (further referred to as “*complex of social services*”); and with the persons who are provided with *legal representation together with social counseling*. La Strada organization can be characterised as an organization focused on the clients. However, it does not prevent them to approach some cases from the strategic point of view.

The reasons why the organization decided to use strategic litigation are primarily of system character. Generally speaking, the social and legal practice of a victim/victims representation in the criminal proceeding suffers due to the lack of experience – the number of criminal cases regarding human trafficking that are sued or solved in the preparatory proceeding within one year, is very small; and there is even smaller number of those regarding exploitation beyond the area of sex-business.<sup>86</sup> The trafficked and exploited per-

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sons fail to obtain the compensation they deserve. In reality it is not common for victims of the human trafficking, rape or other criminal acts to take advantage of attorney's services while struggling for their rights.

The existing practice is affected by the fact that:

- the judiciary in some areas is completely missing (e.g. human trafficking beyond the framework of sex-business, compensations),
- the witnesses are daunted during the criminal proceeding or they are not motivated to give their evidence in the criminal proceeding, especially in its later stages (the proceedings last approximately three years), which can result in the lack of evidence needed for the judgments of perpetrators<sup>87</sup>,
- with regard to low frequency of solved cases and also the general overload of the law enforcement authorities in criminal proceedings (further referred to as BACP), the latest knowledge and available specialist information are not used in many cases,
- in some cases the witnesses are influenced by BACP,
- the victims are not able to reach their rights without assistance of an attorney.

The organization tries to respond to these "weak points" in the framework of the strategic litigation. The organization deal not only with the impacts on a particular client, but it also takes into consideration actual consequences regarding the broad group of clients. The acquired knowledge is further used in other cases and also in the area of advocacy/lobby.

La Strada organization perceives the strategic representation in two levels:

- As a specific procedure exercised in individual legal representations funded from the sources of organization with a particular client cooperation,
- As a method that continues to develop with every other experience of included subjects and a gained decision, and has a capacity to change deep-rooted practise.

For the present-time form of the practice in La Strada organization, development of attitude to the strategic representation is of high importance. It can be read like a story of the search for the most suitable way, however, where the organization did not succeed to avoid those ways that were in the given situation blind. However, they can work in some places.

The organization started to fund the services of law agencies in 2004. Since this practice was not common among the non-governmental organizations that help victims of criminal acts or similar target groups, it was necessary to search for the experience in other places.<sup>88</sup> During the period when there was no possibility to pay for the law services for the clients, the services of non-governmental organizations' attorneys were used only scarcely, most often in the area of migration. The first experience with the cooperation with law agencies proved that even among the legal public the representation of victims is not common. For example one of the first lawyers who started to cooperate with

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the organization based on the previous recommendation, solved the requirement for the compensation for damage that was formulated in this way: *“I join with the claim for compensation for damage at the amount of xxx.”* The interpretation was formally correct, however, the wording was completely insufficient for gaining the compensation.

Later, in 2007, the organization hired a trainee attorney who cooperated with the organization very closely. The solicitor’s work place was directly in the organization and she was dealing with the human trafficking not only in the area of law but in its broader context. This type of practice had some weak points. The cases governed by the solicitor were often in dispute with the law enforcement authorities in criminal proceedings that criticized this type of practice. The close connection of the solicitor and the organisation was perceived by the others as a demonstration of the organization’s opinions or an extended arm of social work, rather than the legal practice in favour of victims. This practice had unfavourable impact on the represented victims. The complicated cases proved to be those where the organization provided their services to more clients who were victims in one case and at the same time they could be in a conflict of interests – in this case it was necessary to appoint an individual attorney for each case.

In 2008–2009 the organization was actively searching for suitable law agencies and a particular type of cooperation was being established. In 2009 the basic frameworks were described in the methodology for quality standards of social services regarding the cooperation with natural persons. At the beginning of 2009 the organization started to use the term “test case” with the aim to develop the area of legal representation and to handle the cases on the strategic level. The used term represented the development of the agenda regarding the cooperation of the representative/attorney, client or social worker, and to a lesser extent the connection of practice and legal activity. The organization assumed that probability to gain the right for the trafficked persons is higher if there is cooperation with a multi-disciplinary team. With the connection of the *proficient know-how* issues of human trafficking, *development of the practice while using the services of victims’ attorneys* in the criminal proceeding, and *support of a client* who is a witness and at the same time a human trafficking injured, the organization started to struggle for making the rights of trafficked persons possible, for example compensation or punishment of the perpetrators on the general level. The principal aim of the “test case” concept was the development of know-how while exercising the rights of trafficked persons that could be further performed by other entities. The second equally important aim was to gather verdicts or decisions that would be of general importance for the development in human trafficking.

As it appeared later, the term “test case” was not fully suitable as its meaning suppresses the main target of the organization. In this way the clients of the organization have more possibilities to reach their rights – especially to find a safe place, prevent the situations leading to secondary victimization and compensation<sup>89</sup> (these are the most often mentioned “orders” made by clients who ask for legal services). Subsequently, another suitable term describing the activities and organization’s values more accurately was searched for. The final term was *“strategic litigation”* and in 2010 the framework of



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this concept was clarified by the means of the methodology within the system of social services standards.

At the end of 2011, the first meeting of attorneys who cooperate with the organization's clients, law enforcement authorities in criminal proceeding attorneys and social workers was held. The aim of the meeting was to present the issues regarding the human trafficking and to make compensation a reality for trafficked persons, and also to respond to the cooperation between law agencies and non-governmental organizations. At the turn of 2011 and 2012, an internal evaluation of the practice of the strategic litigation within the organisation took place with the focus on the client's experience and opinions and the experience of social workers. It is necessary to add that about five cases regarding strategic litigation are commenced every year. Many of them are in the procedure for several years before they are solved.

Nowadays (2010–2012) the La Strada organization has several areas that are approached from the strategic view – the area of representation of the victims by an attorney in the criminal proceeding, alternatively compensation for the victims of criminal act and the human trafficking cases regarding other forms of exploitation and forced labour. The strategic litigation clients come from the group of clients who take advantage of shelter social services of La Strada, the Charity Czech Republic or Diakonie organizations. The clients are offered the services of representative who have legal education and who work for law agencies. The attorneys are trained and coordinated by La Strada organization in compliance with the quality standards regarding the social service. The cooperation with attorneys is based on a long term vision.<sup>90</sup> The role of attorneys in criminal proceeding has become the subject of expert discussions.<sup>91</sup>

As it is apparent many stakeholders are involved in strategic litigation. Besides La Strada organization, also the clients, attorneys (usually with the qualification of a lawyer or trainee lawyer), or sometimes social workers cooperating with the organization are included in the process. A detailed description is given in the methodology of the quality standards in social services. To sum it up, La Strada organization is responsible for the attorneys' offer to the clients, negotiation within the framework of cooperation, legal services settlement and above all the decision whether the case will be managed on a strategic level. La Strada cooperates with a prospective partner organization solves clients' complaints and deals with analytical outputs coming from the practice; it is also responsible for keeping donors informed. Clients who are injured can choose their attorney; they sign the power of attorney, cooperate on the case and give their consent to the exchange of information necessary for cooperation within the whole system. An attorney and the La Strada organization make an agreement on cooperation, they complete the entrance training focused on the work with clients, pass over the information upon the consent of a client and invoice their services. They particularly struggle to protect their clients and are responsible for the correct legal procedure. Social workers cooperating with the non-governmental organization that provides shelter social services (just in some instances),

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provide social services to a client, cooperate with an attorney according to the agreement and provide support during the transportation within the case.

All the above mentioned proficient subjects are independent. They provide their services within the framework of valid legislation and according to the proficient ethical rules. Clients are independent persons, fully responsible for their acting. It is not possible to foresee the procedure of individual stakeholders beyond the agreed conditions; however, the most important are the interests of a client. Strategic litigation and the so called general representation have a common goal – to fulfil the rights and claims of a client according to the concluded order.<sup>92</sup> Beside this individual level, however, the strategic representation struggles for the extension of the rights of hypothetically considered group of persons who are in the same or similar situation.<sup>93</sup> Despite the fact that each entity acts individually and La Strada is not able to influence or modify the procedure that had been set by a lawyer agency, it is possible to assume, based on the concluded agreements, that variable steps will be discussed with a client in a suitable way. That is also stipulated in the quality standards regarding social services. With regard to a strategic dimension of representation, however, it is possible that the client will be asked whether he/she wants to go on in “the dispute” even though there are low chances to win. In this case the clients are not kept under pressure and they are given sufficient amount of information.

Possible unsettled conflicts of interests of “client” and “political” organization are kept to minimum due to regular monitoring carried out within the framework of provided social services and following other measurements that are stipulated to protect the rights of clients (complaints, responses to the cases at meetings, etc.). These strategic acts, especially medicalization of cases are subject to the rules given by social work with clients; the organization is particular about keeping all information secret. If a client decides to make his/her case *public*, it is necessary to follow the rules regarding informed consent. For the purposes of *education and specialised activities* it is possible to use anonymous data or data that are publicly available (e.g. jury verdicts).

One of the most outstanding moments of the strategic litigation development was the entrance of La Strada organization into a particular case – famous “Tree Workers Case”<sup>94</sup>. The organization identified in semi-finished case the exploitation of forest workers including human trafficking. They established cooperation with lawyers who represented the injured and offered them support. Thanks to the support of international organizations they succeeded to gain financial means for this case (where the organization supports also representation of those injured who are not its clients). Thanks to the external financial support it was possible to fund also the representation in “civil” disputes. The case, which has been in procedure since 2010, does not have any output yet. The case, despite the effort of lawyers, was broken into several cases that have been gradually filed *ad-acta* or they were governed by 2012 according to the Police Act. At the present time hearings of witnesses are taking place. The lawyers try to prosecute claim in insolvency proceeding. However, this issue of human trafficking and exploitation is of high importance – thanks to the actions of other groups of the society more people know about the

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problem; and on top of that a documentary film was made by a German director and the case is presented as a sample in international documents.

As it is evident from the above mentioned information, La Strada organization concentrates especially on the area of cooperation of legal agencies, clients and social workers. Strategic level in the area of advocacy activities is evident especially by giving priorities for the development of theoretical and practical information base, and also particular exploitation of the results from the legal representation. There are only a minimum number of judicial cases from practice and most of the solved cases cannot be made public due to desired security of injured; for this reason the organization concentrates on abstraction and analyses of the experience of individual injured, or their attorneys and their aim is to change the legal practice or legislation. These are not the only reasons why the activity focused on judge courts monitoring has developed.

## **4. INTRODUCTION OF STRATEGIC LITIGATION: FROM THEORY TO PRACTICE**

Strategic litigation belongs to those activities that need to be adequately designed. The following section builds on the experience gained by the social workers and other personnel, related to the introduction of the strategic litigation. The experience is complemented by comments from the clients. The whole design process is inspired by the way the social workers and other personnel approach the case work with their clients (Úlehla, 1999), i.e. including the preparation, implementation and evaluation.

### **4.1 PREPARATION OF STRATEGIC LITIGATION**

It is useful to elaborate the project plan prior to the very implementation of the strategic litigation. The project should include questions and answers of the following kind:

WHAT?

What will the organization do? What can one learn about the activity? Who has done something like that? What is the practical experience? Will the organization follow wishes of individual clients or rather policy needs?

WHY?

What does the organization want to achieve by the strategic litigation? What does it want to change in the society? What is the organization's orientation, how does the strategic litigation practice match it?

WHO?

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Who is going to be involved in the strategic litigation? Will the social workers be needed? What should be their qualifications and skills? What is the professional and personal profile of a legal representative supposed to be like? Where to find such specializations? Who else should become a team member?

#### WHERE?

Where will the organization provide the services? What background and material resources will be necessary (e.g. a car)?

#### FOR WHOM?

Who will be the clients? How will they be selected? What criteria should they meet? What should be the client's motivation for cooperation, and what is the goal? Where will the services be offered? How to arrange access for the people, for whom the service is designed?

#### HOW?

How will the strategic litigation system work? What rules will apply? How will the communication within the team work? How will be dilemmas solved in practice? Who will have the last word when developing strategy and procedure in a case? What will we aim at in practice? How will we integrate the knowledge gained in the course of strategic litigation provision back into practice and into advocacy? How will the results be evaluated?

#### COSTS?

What will the costs be? How will the organization cover them?

## 4.2 INTRODUCTION TO PRACTICE

The following model is based on the role of a social worker cooperating with a client and an legal representative, or with a social worker from a partner organization, or a person from another entity.<sup>95</sup> And again, it is useful to ask a number of questions: what to do, why to do it, who should do it, where, how, who will pay.

#### WHAT?

In real life it is good to know what similar activities are already implemented and which organizations provide the strategic litigation. This helps to avoid discovering the already discovered. The whole issue can be moved forward if the organization builds its plan critically on something that has been already tested. It is good to know that the strategic litigation can have many forms, and may differ in the approach to clients, in presentation of the topics, in working with the results, in cooperation with other entities, and last but not least – whether there are social workers in the organizations or not.

Recommendations:

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- *Read what has been published on the strategic litigation topic.*
  - *Collect experience from other entities.*
  - *Define leading principles (e.g. whether we focus primarily on the client or on political impact).*

#### WHY?

The participants, such as social workers, clients and others, should be aware of the reasons why the organization gets involved in the strategic litigation, and what it wants to achieve in the process.

Recommendations:

- *Discuss in the team and with the client – what social changes are necessary, what direction the organization should take, what it wants to achieve.*

#### WHO?

The practice shows it is convenient to put together “minimum” implementation team that includes those representing, mostly the legal representative, and those represented, i.e. the clients and other persons – social workers, interpreters, cooperating institution’s staff, legal counsels – analysts etc. The roles and responsibilities of individual participants in the team should be generally outlined, in particular who and under what conditions is in contact with the clients, and what access to personal and sensitive data the person has.

*The social worker* should meet – apart from the eligibility criteria according to Act No. 108/2006 Coll. On Social Services – the requirement of quite thorough knowledge in the field where the strategic litigation takes place, i.e. criminal law and legislation related to compensations. Where possible the person should also have practical experience from examinations, recognitions etc. The person should be also able to explain to the clients what is going on during the criminal proceedings.

Recommendations:

- *Initial and continuous education in the area of criminal law, specialization of one person within the organization on cooperation with law enforcement authorities, internships for the “junior” team members – participation in the treatment of current cases, possibility to consult issues with the attorney or counsel – analyst, monitoring of specialized sources.*
- *Define the social worker’s competences in advance.*

As regards to *the* legal representative, certain personal qualities are necessary that allow cooperation with the organization providing aid and participation in the strategic litigation area. Cooperation with the clients suffering from traumatic experience, cooperation with the social worker and the interpreter, and also acceptance of the values and objectives of the organization – all that creates considerable professional, personal and

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time demands. Representation of the injured party in itself requires professional specialization and willingness to always learn new things.

Recommendations:

- *Pay due attention to the selection of the right person for the post of advocate. Base your search on recommendations, practical experience or activities of the law office considered. Inform the candidate before the cooperation starts about the activities exceeding the ordinary practice, and about the ways the organization works.*
- *Arrange induction training in the organization, informing about the specific features of the clients (e.g. PTSP, asylum accommodation, various types of residence permits etc.).*
- *Outline the possibility of involvement of other entities in the cooperation model within the framework of the strategic litigation, for instance social workers from a partner or other organization, and explain this sufficiently and clearly.*
- *Cultivate the organization's cooperation with team of advocates in a long run – joint meetings, seminars.*
- *Be aware of the "risks" of the cooperation with the team of selected advocates: limited capacity in the event of more simultaneous cases, limited replacement capacity in case of antipathy or objections of the client, limitations based on gender (where the clients prefer contact with male or female representation).*
- *Have a procedure ready to treat the client's complaints (applies to the social worker as well), know the activities and powers of the bar association.*
- *Where the advocate does not specialize solely in this field of legal representation, there could be conflict of interest (e.g. the same advocate is a public defender of the perpetrator in the same case).*
- *Have established replacement procedures for the advocates; solve the issue of involvement of trainee attorneys (in the cases of serious impact on the client's psychological condition try to make sure the client is in contact with a familiar person).*

Another team member is the *interpreter* who should have at his/her disposal general information on the organization and its activities, objectives and practice of the strategic litigation. It is also recommendable for the interpreter to master the terminology related to criminal proceedings, and be able to communicate the terms to the client. The interpreting should be in line with the NGO's or the advocate's goals. Selection of the right interpreter for police examinations and court hearings is very important.

The organizations have been informed repeatedly that the interpreter can have a major influence over the results, as he/she can reduce the client's anxiety. The clients also consider it convenient when the interpreter is able to explain things properly, but under no circumstances he/she should intervene in the proceedings. Good interpreter is "half success" of cooperation with law enforcement authorities.

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Recommendations:

- *Actively build up a team of professional interpreters who cooperate with the organization on long term basis.*
- *Recommend the right interpreter for cooperation with law enforcement authorities.*

In many organizations the clients are not attended by just one key person, they are in contact with *other personnel* as well. Where the strategic litigation agenda is just one partial activity, the other personnel do not necessarily have enough adequate information. However, the clients can still contact them and ask for some specific help within the cooperation.

It happened in La Strada organization that the clients aimed their questions related to the strategic litigation in their cases at the social workers who accompanied the client e.g. from examination or other sessions falling under the criminal proceedings. The clients often approached the workers during the night shifts in the asylum home and asked questions the workers were not ready to answer. Therefore it is very important for those workers without any special competences in the strategic litigation area to be trained and aware of their responsibilities.

Recommendations:

- *Provide training on the objectives and practice of the strategic litigation for those workers in the organization who get into personal contact with the clients, even though they do not perform any tasks within the strategic litigation, or define the subject competences and procedures. The staff has to be aware of the boundaries of their authorizations, when to contact the social workers.*

The number of clients cooperates with a partner or other organization. Key *social workers from partner or other organizations* may – if the client is interested – assist with the strategic litigation cooperation at the initial stage and throughout. Problems can arise due to the demanding coordination and complicated information flows, and also a lack of information on the strategic litigation in the partner organization, or experience in cooperation with the advocate.

The practice often shows how difficult the cooperation with a partner or another organization can be. A worker in such an organization becomes another link in the whole chain, and it is quite complicated to coordinate the cooperation, outline responsibilities and clarify how the information flows between the individual actors will work. The limitation in such a case is the haziness of rules within the cooperation, and the consequent misunderstandings that can have a negative impact on the cooperation with the clients. It can happen that the volume of transferred information related to the client's case is unnecessarily abundant, or some of the information exceeds the scope of necessary sharing. On the contrary, in some cases the information can be transferred inadequately. Therefore it is very important before such cooperation takes place to define the roles of all the actors within the strategic litigation.

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Recommendations:

- *Appoint the contact person in the partner organization with detailed knowledge of the strategic litigation practice and of the system of cooperation with the advocate.*
- *Propose and clarify in advance the system of transfer of specifically defined information agreed by both the organizations (always to be agreed by the client, too).*

It is beneficial when the organization has an *analyst or even analytical team*, with legal or other relevant education, monitoring in detail the strategic litigation field.

Recommendations:

- *Have an analyst available that follows the issues both in theory and practice.*
- *Where the person does not work directly with the clients, it is necessary to establish in advance the system of access to information – sensitive and personal data of the clients. (The information is not needed for the purpose of analysis, and the disclosure would be a breach of the client's right for privacy, and also of the laws on social services and personal data protection.)*
- *Establish system of mutual information sharing within the organization and outputs and useful information flows (e.g. verdicts passed in other cases, foreign experience, opinions) towards the advocates.*
- *Modify the routine court attendance by the advocate with regards to the client's privacy.*
- *Make sure the analyst understands the values and objectives of social work so that these can be incorporated in the analytical outputs of the organization.*

WHERE?

It is necessary to have a suitable room for the strategic litigation practice, where consultations with social worker, client and advocate will take place. It is also necessary to establish and deal with the mode of cooperation in other places where the strategic litigation process may happen, namely at courts and during examinations. In criminal cases it is necessary to take care of the safety of all the participants.

According to experience security measures are very important for the clients, arranged by the police, for example providing escort to the court or other meetings as part of the criminal proceedings where there can be certain risks. These services are received with quite varied response. On the one hand we see positive reaction to the measures, where the client feels safe and sufficiently protected. On the other hand we hear the views that the police protection is not satisfactory and the clients are afraid of continued risks. It is the “best practice” to set up and explain the police security measures and their execution in advance.

Recommendations:

- *Prepare framework security plan, and inform all the involved parties.*
- *Consult the security measures with the police actively and preventively.*



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- *Establish a hotline to be used by the clients and other involved parties at any time, when they feel threatened or at risk.*
  - *In the cases of court proceedings taking place far from the client's residential address consult the police protection at the hotel, or transport from the place of residence to the court building with an escort.*
  - *In the cases where media are present in front of the court building contact the prosecution or judge and make sure the client is safe.*

#### FOR WHOM?

Strategic litigation is performed at two levels: individual case and initiation of social change. The number of participants invests their time and effort into the strategic litigation process, which is arranged with regards to both its individual and general – strategic potential. Therefore it is recommendable for the client to know that apart from the interest in solving her case there is another, general objective, and she should ideally identify with it.

Recommendations:

- *Define transparent criteria of selection / acceptance of the clients for the strategic litigation.*
- *One of the criteria should be motivation to solve the case.*

#### HOW?

There are many actors active in the strategic litigation system – “inside” client, advocate or trainee attorney, social worker, social worker of cooperating organization, interpreter (sometimes more than one), analyst, and possibly other external persons. This means some additional risks. One of them is the risk of communication discord, and leakage of sensitive and personal data outside the circle of authorized persons.

From the clients' perspective it seems they prefer the communication model via their social worker, with the possibility of bilateral meetings with the participation of the advocate. There are fewer clients who prefer direct communication with the advocate.

Recommendations:

- *Think well about the communication system and the responsibilities of individual actors, decide who and under what conditions receives/transfers information, while the client's consent should be obtained regularly to the transfer of information, and if need be review the arrangements.*
- *Do not rely on everybody observing the rules – make the social worker responsible for due compliance with the agreements made.*
- *Establish cooperation mechanism. Define the system of information transfer between individual actors, set up the most convenient cooperation model (e.g. the possibility to communicate only between the client and the advocate, who in turn informs the social worker, or possibility of three-party meetings from the very beginning, and communication via the social worker to the client).*

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One should realize that the individual actors communicate outwards, e.g. with the law enforcement agencies and other organizations, such as the Ministry of Interior, to which the client has certain obligations.<sup>96</sup> Media coverage of the case can be another important component of the strategic litigation. There are many risks and problematic moments. The external entities do not necessarily understand the strategic litigation representation system, and the information shared with “other” parts of the system can be lost. One of the threats is the reliance on the external entities to solve for example the issue of logistics with another part of the system. The strategy can be disunited, in particular as regards the cooperating organizations without experience, or with a different approach to the clients. When the case is publicized there is the risk of disclosure of the fact the client cooperates with the organization and of the client’s whereabouts, and also lack of respect for the client’s privacy (published pictures, data etc.), or insensitive media coverage.

Recommendations:

- *Map the risks and develop procedures to minimize them (client’s protection against media, cooperation agreements with the police and the like).*

The strategic litigation aimed at social change includes the analytical work of the advocacy component. These activities often take place in office rooms and public forums, and can be detached from the reality of the clients and general practice. Thus the risks include detachment from reality, or from the team working with the client, using different values within one organization, and lack of respect for the fact there are real people involved in the cases, with their own rights and needs.

Recommendations:

- *Establish and then maintain good cooperation between the analytical and executive team in contact with the client.*
- *Formulate analytical outputs and knowledge base from other forums back into the organization and work with the client.*

As regards the strategic litigation within the range of offered services, it is necessary to present it to the clients, and possibly motivate them to cooperate. And there is the threat of the criteria being explained in a too instructive way, and the client modifying her story accordingly. Open information on the strategic litigation whose objective can be e.g. to obtain the first verdict in the subject matter, can even “scare” the client. The client may become afraid that the experience of the social worker and the advocate is not sufficient. Or the client can be worried of being involved in a system from which there is no way back. Another constraint is the urgency of specific case, where examination of the client has been already ordered, and she has no time for due preparation. Sometimes the client is not explained some important terms in an understandable way.

In one case in the past the parties involved could not agree in their evaluation of cooperation among the advocate, the social worker and the clients on how often the

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meetings with the advocate should be arranged. The clients mostly commented that the meetings were not too frequent, yet the frequency was sufficient, or “they understood this would be a waste of time when there is no progress in the case”. But some clients wished to have the meetings once a month, despite the fact there was no development in the case sometimes for half a year (the reason being mostly trust building). As the most important were perceived the meetings organized at the beginning, and those held immediately prior to some legal act (examination, court hearing, recognition etc.).

Recommendations:

- *Prepare materials on the topic of strategic litigation, to be taken home from the consultations.*
- *Have established, publically available and general selection criteria, and time for final decision of both the organization and the client.*
- *The services should be offered by a social worker experienced in the strategic cases and able to provide illustrative examples and at the same time to warn about possible risks.*
- *Reserve sufficient time “to think things over” for both the client and the organization, whether to join the strategic litigation system or not.*
- *Treat the clients as partners.*

During the first consultations it is necessary to collect information from the client and answer the questions, and also agree on a number of rules of cooperation. It can happen that in the first meeting with the advocate the client is not in a good mental condition (shortly after the crime, she has to recollect the experience etc.). In some cases it is useful to combine the first or one of the first contacts with the social worker and the advocate, considering the situation (e.g. lack of time). Where a group of people is involved, all of them can be present in the first meeting with the advocate, if they should become witnesses in one case. There is the risk of secondary victimization of the client (especially when the client has to tell her story again and again, in the presence of unknown people). As regards to the participation of two to four people (social worker, advocate, interpreter and social worker of the cooperating organization), there is the risk of chaotic facilitation of the consultation, where it is not clear who is in charge, and the meeting takes too long time. Where a group of people attends the first consultation, there is the threat of some clients ashamed to ask open questions or share details. Where the first meetings with larger groups are planned individually, the advocate or NGO may lack capacities to cooperate with all the clients.

In practice it has happened that the organization experienced several cases where two and more people were involved in one case as the injured. For capacity reasons or at the request of the clients the advocate held some consultations in a group. Some clients welcomed the practice and even requested it, claiming it helped them to remember details. Other clients (usually those who did not choose the practice, but it was necessary due to the capacity constraints) informed that they would have preferred individual meeting with the advocate.

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Recommendations:

- *Write down the client's story, which is then – with the client's consent – studied by the advocate, who subsequently ask only complementary questions.*
- *Compile a set of questions asked by the advocates as standard in every meeting. The social worker informs the client of the set, and the latter can get ready for them.*
- *Prepare written documents for signing (e.g. consent to information sharing, power of attorney, termination of the same, contacts etc.).*
- *Prepare draft communication agreements involving the client, the social worker and the advocate (who, to whom, how and how often), consider the possibility of signed agreement, always make written record and send to all the parties involved.*
- *In the next consultation of the client and the social worker clarify whether everybody understands the conditions, or repeat the rules.*
- *Consider carefully whether in some situations it is preferable to cooperate with a group of witnesses in one case.*

In the course of cooperation of the client, the social worker and the advocate there will most probably be periods of time when “nothing is going on”. In real life this is mostly when the investigation is carried out. These periods can be rather long – even taking months.

The clients usually appreciated they had been informed prior to the cooperation of the average length of proceedings (about 2–3 years), of the time demands and sequence of steps within the criminal proceedings (more examinations and examinations at the beginning, later quite a long pause, then court hearings, or possibly appeal). Despite having the information and dealing with the situation regularly with the social worker, most clients mentioned their feeling the case “somehow evaporated”. The waiting for the next move or message that did not come was often perceived as a very unpleasant experience.

Recommendations:

- *The social worker and the advocate should bear in mind their clients may take the experience in different ways, and agree individually with the clients how to deal with the waiting period.*

In practice it is good to foresee what risks or unpleasant moments are in store for the clients at court. One of them is the failure to exclude the public from the examination, and the client is forced to share intimate or traumatic details of her life. It is not always possible to prevent meeting the perpetrator, and there is the risk of the injured being photographed by the media, and the picture being published in newspapers. One of the clients who had the experience of being represented by the same lawyer as a victim and as the perpetrator claimed “he was surprised how much more the advocate could do for him as a defendant compared to the status of a witness”.

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The clients in the interviews spoke positively of the cooperation with the advocate namely in reference to the “good advice for the examinations”. The clients further appreciated the questions asked by the advocates in the personal meetings – they heard the same questions later during the examinations and as a result they were not surprised; presence of the advocate at the court hearings or examination; calming down the client when she forgot to bring something to the court; the fact that the advocate explained certain matters etc.

Recommendations:

- *Discuss in the team possible risks during the court hearings, and try to prevent them by timely solution.*

COSTS?

The strategic litigation is an activity that requires substantial financial resources, whose volume is hard to predict. It is convenient when the organization has available funds to cover the services, or arrange for a source to apply to when some strategic cases need to be co-financed. There is general risk of lack of funds in the initial, medium or final phases on the side of NGOs. When looking for resources and developing the strategic litigation projects; it is difficult to estimate the number of cases that will need funding (sometimes months ahead).

Recommendations:

- *Look for the most flexible sources that understand the principles of the strategic litigation.*

#### 4.2.1 DILEMMAS

All work with clients brings dilemmas and ethical problems. Some of them we have faced and we are still looking for the answers described below. They include:

- Reflection of (lack of) power of social workers (the topic of power results from the relationship between the helping subject – client), in other words, how not to project your own wishes or opinions into the consultations, how to address the issue if, for example:
  - the client’s case would bring an interesting case but the client does not wish to file a law suit,
  - the activity of the lawyer paid by the organization deserves to be a subject to a complaint or corrective action but the client does not wish to make the complaint.
- The pressure imposed by co-operating partners who often exercise their power over the decisions affecting the lives and cases of other clients, of a specific individual – then there is a question of who to support? Thus at the general level of law or options of the individual vs options of the “group” with which the organization co-operates.
- How to maintain confidentiality about what is happening in the social work and, simultaneously, allow the analytical team or media to know the information from

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the legal proceedings? (The legal proceedings are open to the public but often the public does not know that the specific witness is a client of the helping organization; analytical workers thus obtain information about the clients' lives).

- Looking for an appropriate balance between focusing on the clients and focusing on the political impact (if I act as an expert I may often achieve a higher political acceptance but in some cases I then do not respect or do not consult with the client at all).
- How much information about the specific case / client is it necessary to share between the organizations, between the workers of one organization in order to efficiently co-operate (including security assurance), but at the same time not to breach privacy (or not to disclose information, disclosure of which is not necessary).
- Is it possible to work in teams if the client refuses to share the information? What is the minimum amount of information that the organization, which pays or makes the decision about including the case as a strategic one or its inclusion in the project, must have?
- Should the social worker go to the court hearings? There are pros and cons.
  - On the one hand the worker supports the client and accompanies her, it is often somebody who the clients trust the most, the lawyer may not be capable of handling a potential crisis intervention or operatively adopt, for example, security measures.
  - On the other hand, during the public hearing the social worker may learn information that the client has not given or given in a different manner and that may disturb the process of co-operation ("objective" vs. "partial" approach in social work), the client or the court asks the social worker to provide information during the questioning, the capacity of social workers is limited and the proceedings take a long time; another problem lies in the safety of social workers and disclosing her identity to the counterparty.

One of the social workers who have experienced the participation at court as an accompaniment and support to the client has mentioned possible advantages and disadvantages of this model, illustrating it with a particular case. The court proceedings were held abroad and the worker accompanied the client as mental support and also because the client did not know the specific language of the country. The questioning of the client as part of the main hearing was closed to the public but the social worker was asked to be present in the court room and to sit directly next to the client. During the entire questioning the client constantly consulted the worker asking for help with complicated or sensitive questions and expected the worker to intervene at certain moments. Subsequently, it was very difficult to explain to the client that the worker was there merely as company and could not intervene in the process at all. In addition, the worker also described that it was uncomfortable when asked by the court about the client and then asked the worker to provide her personal information to be put into the court hearing records. The worker

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refused to provide this information for safety reasons, but overall she described this experience as very uncomfortable. On the other hand the client has commented very positively about the presence of the social worker at court and mentioned that it was much easier for her to answer the questions and that she felt more secure.

### 4.3 EVALUATION

The evaluation of strategic litigation should be done at several levels in accordance with the defined objectives. Both formative and summative evaluations should be made. However, there is a risk involved in practice that the evaluation will not be made due to lack of time or capacities.

The evaluation may also provide interesting information clarifying some problems, for example, that the strategic litigation does not involve as many people as the organization originally expected. Where may be the obstacles to the entry of people into this service? The experience of the social worker shows that the following may be the explanation:

- People do not want to file a lawsuit because they are afraid of losing control over their own destiny. It may happen that the more informed the clients are about how the actual criminal proceedings work, the less willing they are to give testimony.
- Clients approach the organization at the stage when there is no point in strategic litigation (the court has issued a verdict or there is not enough time to prepare claim for damages).
- The organization's threshold of services is set too high.
- Social services suffer from "negative advertising", it is difficult to address the clients.
- No risk coverage for clients if they choose strategic litigation, for example, in civil proceedings.
- The cases take too long (in the La Strada organization about 3 years on average).

Recommendations:

- *Assess both material outcomes of the cases and the course of co-operation. An active involvement of the client as well as other stakeholders in the evaluation.*
- *Process the evaluation results into methodologies and, primarily, a system of co-operation.*

## 5. STRATEGIC LITIGATION FROM THE PERSPECTIVE OF THE ATTORNEYS

What is the experience the attorneys active in the application of the actual criminal law content have with the strategic litigation? What are the opinions about the substan-

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tive aspect of the human trafficking definition? What is the experience with the process aspects in the strategic litigation cases and in the practice of authorities active in criminal proceedings? The following chapter provides the answer to this question.

With respect to our topic it is necessary to understand that a criminal act of human trafficking distinguishes two separate facts of the case with a different object of attack (a minor and a person above 18). With a person above 18 it is necessary to investigate the aspects affecting their free will to make decisions. If there are mechanisms affecting the free will then it concerns one of the criteria of the criminal act of human trafficking.

### **5.1 THE CRITERION OF THE CRIMINAL ACT OF HUMAN TRAFFICKING – “USED BY SOMEBODY ELSE”**

There are two opinions regarding the interpretation of the term “to have been used by somebody else”, which is one of the criterions of the criminal act of human trafficking, among the authorities active in the criminal proceedings. Some understand human trafficking as a bilateral relationship between the trafficker and the victim, the traffickers themselves also exploit. On the contrary, some see human trafficking as a trilateral relationship between the trafficker, victim and the so-called user of the victim. The expert group has unanimously adopted the opinion that human trafficking according to the existing legal regulations is a trilateral legal relationship. The criterion of the case “to have been used by somebody else” must be fulfilled in order to prevent the confusion with the facts of some other criminal act. Therefore, human trafficking requires three individuals to be involved – victim, trafficker and customer. It is also necessary to distinguish this from another interpretation, exceeding the framework given by the law, which is “to have been used by somebody else for sexual intercourse” and “to have been used by somebody else for prostitution”. The second term is unacceptable as it requires the victim to be used “to the square root”, which means the offender would provide the victim to another person and that person would use the victim for prostitution.

### **5.2 THE CRITERION OF THE CRIMINAL ACT OF HUMAN TRAFFICKING – “DISTRESS” – IN PRACTICE**

The question is what form of distress the criminal act of human trafficking knows, especially in cases with human trafficking pursuing a different form of exploitation. How is the financial distress of injured assessed in this specific case? Does the amount of remuneration promised to the exploited employees by the exploiting employer under the human trafficking pursuing a different form of exploitation play any role? The unpaid wage or due date of the wage or other wage-related amounts of employees does not play any roles when assessing the principal facts of the criminal acts of human trafficking. The exploiting employer actually exploited the work of the employees itself. The amount of benefit is relevant for the qualified facts of the criminal acts of human trafficking. A distress may also be deemed as economic poverty in the victim’s country of origin. Social conditions do not automatically mean distress since it is not possible to say that all citizens of



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that country are in distress. However, it is necessary to take the particular situation of the victim into account.

*“It is not possible to use the perspective that people in another country are better off and I also want to be better off as the criterion of distress. Just because somebody comes, for instance, from the former Eastern bloc, it does not mean they are in distress. The subjective perception of distress is based on objective circumstances and those have to be investigated.” (attorney)*

The issue of working conditions of employed foreigners is also related to distress; these conditions should be the same as for the employees who come from the Czech Republic and, additionally, the same conditions should be guaranteed to both regular and irregular employees. In reality the employees working without adequate documents mostly do not make even minimum wage. Simultaneously, the oppressive social situation of some groups of individuals is also often abused.

*“Foreigners from poorer regions are used for inferior jobs for which they often do not get paid. There was a case in the Netherlands where the offenders threatened their injured with voodoo. A ‘De-voodooizer’ had to be invited to the investigation.” (judge)*

*“With workers who came from Vietnam the offenders knew that they had to pay huge sums of money to get to the Czech Republic. If these foreigners had not got work right away, they would have ended in financial distress, which the offenders intentionally took advantage of.” (attorney)*

A question should be asked how to detect the abuse of distress in practice? There are several options. The amount of average wage in the given locality and the fact that some workers do not receive it may be used as guidance. It is necessary to ask the injured why they “voluntarily” accepted worse conditions and to ensure that the injured individuals themselves understand their distress the offender has abused.

*“The situation when the trafficked persons are unqualified workers, registered with the labour office for a long period of time and without a job for several years could be deemed as financial distress.” (public prosecutor)*

*“Although somebody may agree to work sixteen hours a day, it is necessary to ask them about the reason for such a decision.” (public prosecutor)*

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## 5.3 THE ROLE OF ATTORNEY

The victim is the most vulnerable party of the criminal proceedings. Without the support from a representative, ideally attorney, it is not very probable that the individual would be able to exercise all his/her rights, including compensation. In other words, without the representation by a capable, initiative and inventive attorney there is only a small chance that the trafficked person or another victim of a severe criminal activity would be acknowledged his/her rights.

However, the activities of an attorney require the individual who assumes this role to have specific knowledge and competencies. The attorney has basically two roles: a guide and representative of the injured. A professional attorney should know or have the skills in the following areas:

- Co-operation with the client;
- Defence of the aggrieved party's interests and his/her guidance through the criminal proceedings;
- Choice of representation strategy;
- Preparation of the claim for compensation;
- Co-operation with other stakeholders;
- Awareness of specific co-operation with the aggrieved party.

*"I see the attorney of the injured as a person with two roles. As the representative of the injured individual, with all the rights and obligations resulting from the respective regulations, and as a guide of the injured throughout the criminal proceedings who should explain to the injured the process of criminal proceedings, acts he/she will be exposed to and the specific actions the attorney may take." (public prosecutor)*

### 5.3.1 COMMISSION FOR COOPERATION WITH CLIENT

First of all, the attorney has to agree with the client what is going to be the objective of cooperation, and what is and what is not feasible in practice. In other words, a "commission" has to be agreed in the beginning of cooperation. The attorney must know to *as much detail as possible what the client wants, what idea they have about solving their situation*, so that they do not find out during the process that either party has a different understanding of a satisfactory result. Then the attorney chooses the strategy of proxy, based on the objectives of cooperation. Different steps shall be taken by the attorney if the client's aim is first of all damages, associated e.g. with conditioned suspension of prosecution. Such defined goal is based on consideration that a man in the execution of punishment, or whoever will lose their job due to conviction, will not compensate the damage. It also needs to be made clear whether the client wants to be reimbursed for material and immaterial loss. If the client's aim is the punishment of the perpetrator in the first place, would another strategy be more suitable? How one of the judges said, the client's interests must be in accordance with the interests of the state, and it has to be acknowledged, that such state is legitimate.

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It further applies that it has to be clarified in detail in the beginning of cooperation, *what possibilities the advocate – has in the lawsuit*. Some clients have unreal ideas of the possibilities their attorneys might have. Negotiating a commission requires specific skills that are often lacked by professionals. These skills include e.g. working with individual psychological and social situation of the injured, the art to ask useful questions and define targets. They usually do not teach these skills that social workers learn in a several-year training courses at universities.

*“Client is secondarily victimized and expects elimination of this stigma from the prosecution. The act that happened might put them in a psychological role so that they might feel as if they were, to a certain extent, responsible for something that is associated with the act. And here one has to be very careful and impose to the client that the prosecution never leads to the elimination of these aspects. On the contrary, the client has to be prepared for the fact that if they have to give testimony or go to the court, it is going to be rather an uneasy experience for them.” (attorney)*

### 5.3.2 DEFENCE OF THE INTERESTS OF THE INJURED, AND ACCOMPANY IN LAWSUIT

Attorney should not only represent the client but also support them and accompany them through the entire lawsuit. Quality and professional preparation of the aggrieved for the investigation process and trial by court is very useful. Such preparation may include an explanation of what will be happening during the prosecution, what are the duties of the injured, how many interrogatories they may expect, how the courtroom looks like, etc. Further, it is the preparation for the defence strategies (e.g. asking questions), quality safeguarding of proofs (e.g. medical examination, materials for unpaid wages, expert opinions). As concerns of a Concealed Witness, s/he has to be first of all familiarised of how s/he will arrive to the court (escort) and other technical details (uncertainty and fear of the unknown represent stressing factors); also that his/her secrecy need not be maintained till the end of the lawsuit. In case of a witness who is not a secret but fears of meeting the perpetrator, well proven is the possibility to testify from another room, alternatively without the presence of the accused. Usually there are no problems with the latter as long as the application is defined correctly and ahead. Taking steps to protect the victim is suitable, besides exerting effort to have interrogatories ideally without the attendance of the accused and public, also provide for a separated room or a waiting room, avoid contact with the media (the judge enters through another door, need not notice the media), provide for police escorts to the court (transport of the trafficked person to the court can be applied for either with the police directly, or with the prosecutor). It appears that a perfectly prepared victim is not very trustworthy for the bodies in charge of prosecution; that's because it disturbs the general image of the victim.

*“Also, interrogatory can take place in a special interrogatory room, through a window. Once there is more than one person in the room, the victim is often ashamed,*

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*afraid, and unable to talk at all about certain things. In one case of human trafficking we interrogated a female victim even in another town. As an interrogatory room we used local children's home where they had a comfortable living room. One floor down there was a room with a television screen, and both rooms are interconnected via video and audio. During the interrogatory, only a police was present in the room with the victim. The defender, prosecutor and expert were in the other room and watched the interrogatory on the screen. They also asked questions from there. Everything was recorded. Then it was transcribed. The purpose of interrogatory is to get as much information as possible. The atmosphere during it may contribute. If the injured is not heard at the main trial, the court can see the aggrieved on a video, they can see her behaviour, reactions, how was the entire course of the interrogatory, that nobody was affecting anybody there, that the atmosphere there was calm, and that it helped." (public prosecutor)*

Different experience relates to the banishment of the accused during the interrogatory of the victim.

*"In one case of human trafficking I acted as the attorney of the injured. There was a situation when the injured was called as a witness in the main trial, and so she had to testify already for the third time. Of course, that after the agreement with the public prosecutor and the presiding judge we agreed that the accused would be banished for the time of the hearing. Unfortunately, the main trial dragged on, it was about two or three on a Friday afternoon. The female witness was escorted to the courtroom which meant that the hearing must have already taken place. At the moment when she was called I stood up and submitted an oral proposal of banishment of the accused from the courtroom. The presiding judge surprised me when he said that he was not going to do it, that he would not satisfy my proposal. I could not think of anything at the moment, so I just sat down and waited what would come next. Of course that the witness collapsed there, she burst out crying, to which I stood up again and said that I ask again that the accused was banished from the courtroom. To which the presiding judge said that myself, as well as all the parties to the trial, needed to acknowledge that they judged a very severe criminal activity, and therefore even the female witness had to stand something. I was very surprised, and at the moment I did not realize that I had another option which is paragraph 203(par. 3), and that I can address the senate. If I had known this at that time, it might have ended in a different way, or it would have at least been recorded. The testimony was not successful at all; it seemed as if the witness just made it all up, that she could not remember anything, she answered 'I don't know' or 'I can't remember' to any question, and she was all stressed out. I regret very much that I had not known at that time, since the presiding judge was a man, and the associate justices were two women. This fact would have certainly affected potential development of the situation."*

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### 5.3.3 SELECTION OF PROXY STRATEGY

The objectives of cooperation, the needs of the victim and the knowledge of the “culture” of the bodies’ active in the criminal proceedings influence the forming of procedural strategies of the attorney. It depends in what phase the attorney enters the case. The “culture” of the attitude of courts, prosecutions and police towards the victim and their attorneys differs from region to region. The advantage of the attorney is always their procedural experience with a specific court. What a specific court “can stand in practice” in the courtroom also differs.

In a criminal complaint it should be considered who is going to lodge it, whether the victim or another person (e.g. a neighbour, an organization, an attorney, etc.). Within the preparatory process, all proposals have to be lodged timely and in writing; they should not be left to the hearing room, although the law allows so. Prior to the commencement of the main trial, all formal information has to be available, as well as an expert opinion, including the number of points, to be able to express numerically the claim for damages, etc. These materials should be also sent to the attention of the public prosecutor. Further, you need to be prepared for the fact that the attorney need not be perceived as a partner by the law enforcement authorities in criminal proceedings; even though this would be useful for all parties.

During the court trial it should be considered what should be taken stand to, and how. In terms of procedural law and last statement, the defence always has a more privileged position than the party that represents the injured; therefore attention has to be paid to bringing in practices from civil proceedings where the parties are equal. Certain statements of the defence attorney are better to be left without a reaction; or react objectively, not emotionally.

For the main trial, it is better to get the hearing of the injured without the presence of the accused. It appears that if the application is not totally faint, the court often satisfies it. Also the expert may not recommend that the injured was heard in the presence of the accused. If the judge refuses to banish the accused, the attorney has the right to address the senate (§ 203, par. 3, Code of Criminal Procedure); if the hearing is not recorded, you need to insist in logging this fact.

Within an appellate procedure or appeal, the attorney is not served in practice; this has to be taken into account. In an appellate procedure, the attorney’s role rather resembles civil-legal proceedings; written statements are more important than what is actually happening in the courtroom. Therefore, appeals from all sides have to be watched out for. If these are detrimental to the injured, it is recommendable to submit a written statement. It is not recommended to leave the reasoning to the hearing room; the senate must be given space to become familiar with the appeals. It is advisable to find out whether an appellate proceeding to the Supreme Court was lodged and a constitutional complaint to the Constitutional Court particularly whether there is an attempt for legal “precedence”, or whether there is some unusual legal affair.

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*“An attorney is a person who can pass through the trial from a policeman to e.g. Strasbourg; it is therefore advisable to watch all the filings, and stand objective opinions to them, if possible.”(attorney)*

Recently we can see that no proceeding is initiated in a criminal case, and the investigatory body proceeds to a different law than is the Code of Criminal Procedure. In such case, if the investigatory body is inactive, or saves the case, the injured has, in fact, no chance to defend themselves against such steps. In cases when a police body takes steps to the Criminal Procedure, the criminal procedure is initiated. In this case, one can contact the supervising prosecution if the case gets delayed. However, if no criminal procedure is initiated for some reason, you can still contact the prosecution to review the procedure of the police body. The instigation should be submitted not to the Code of Criminal Procedure but accordingly with the Act on prosecution. There is however a risk that the prosecution would deal with the form, rather than the content of the acts of the police body.

*“Criminal procedure is initiated already by lodging a criminal complaint but practice differs by individual regions.”( public prosecutor)*

#### 5.3.4 CLAIMING COMPENSATION

Within a criminal procedure, an attorney considers together with the trafficked person whether they will try to claim damages for material or immaterial loss. If the client decides to claim damages, the attorney has to do their best to make the claim come true. Not always is it most beneficial for the injured to struggle for damages; particularly in a situation when the person had to be repeatedly heard in the case. In such case, trauma could intensify.

Representing by an attorney, and definition of claim for damages to be able to succeed, is a delicate thing. Some interesting tips came out of the focus group. All formal information, opinions and rating, confirmations and other documents, have to be available at all times in written form prior to the main trial. A copy of a claim should be sent to the public prosecutor.

According to the attorney, detriment *“cannot be proved in a hearing; you need to have an expert opinion with a round stamp. The focus of the attorney’s work is prior to the beginning of the main trial.”* If it is non-financial damage, one can be inspired by the existing quality court practice of civil courts. The formulation of claim for damages is, in fact, a kind of transfer of one legal discipline to another. This fact needs to be considered in the formulation, and attention paid so that the intellectual costliness of the filing is not “overdone”. In the claim for damages, the injured or – more precisely – His/her representative – can also stand an opinion to the matter of guilt; since the claim for damages is related to the evidenced guilt of the perpetrator. At the written level, such a statement is usually not a problem as it sometimes is at the verbal level. Further you need to be attentive to

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how the proposal is built; what coefficient is e.g. used to multiply the rating of damages to health, and how the proposal is formulated. It can be anticipated that, particularly in lower level courts, the contact with recent civil court practice is not very common.

*“It has to be taken into account that transfer is being made from one legal discipline to another, and mainly when a person applies some multiplication coefficients I have never seen in the criminal-law court practice in adhesion statement; therefore one needs to be careful not to overdo the intellectual costliness of the civil court practice, so as the judges do not think that it is too complicated for the logic of the criminal procedure – so I will refer it to civil.”(attorney)*

Also, expenses that will be incurred on the execution of the expert opinion have to be considered. Some non-governmental organizations may reimburse opinions but the majority does not. The person of the expert has to be chosen very carefully. Not every psychiatric court expert is an expert in posttraumatic stress disorder {1>1<1}. Not every expert is sensitive enough in communication with the victims. If the court lacks suitable experts, it has to be suggested to take on another one. Also a situation when the victim is examined by several experts needs to be paid attention to; so that the examination does not repeat for any reason. The key is to formulate the questions in the expert opinion.

Damages need not be claimed in a criminal procedure; damages can be claimed also in a civil procedure. However, it is usually less beneficial for the injured; in a criminal procedure the question of reimbursement is usually a secondary issue for the perpetrator. In a civil procedure, on the contrary, the injured carries the burden of proof as the accuser; there is a risk that in case of failure the injured will bear the expenses of the lawsuit and those of the counterparty.

*The formulation of claim for damages can be compared to “playing Black Jack. Ideal is to get twenty-one, and the closer you get, the better it is. But once you exceed it a little, you lose all the advantage of collecting those points”. (attorney)*

It appears that it would be beneficial if, out of the cases that are based on strategic litigation, certain procedures of effective damage claiming could be created for injured of human trafficking. It has to be considered that in some cases, although the attorney struggles for cooperation, public prosecutors may in practice resign to the support of the victim, and to the inclusion of the claims of the injured in the final speech (this can however be caused by general limitation of public prosecutors by the amount of deadlines they have to keep).

In cases of domestic violence, rapes, human trafficking and similar criminal activity, posttraumatic stress disorder (PTSP) may develop. It develops right after the act; latest within six months. In some cases it can be acute reaction to stress. There are even cases when this disorder developed as a consequence of the trial. In these situation, the symp-

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toms appeared after a longer time, sometimes even after the termination of the criminal procedure. The disorder appeared when the stressing factor – which is this case the investigation itself – was eliminated.

*“If you learned, as the attorney, that your client has health or mental problems, that are related to the case, then you have to say that, alternatively submit a proposal, no matter if verbal or written. If the victim does not tell, and behaves as if nothing has happened during the interrogatory, then it could hardly be reacted to as post trauma. Even in case when somebody cries. The interrogating can e.g. think that the victim does not want to talk about what happened, that the situation is not nice for them, or that the police visit is stressing so much for them. Therefore the victim has to tell that s/he has a problem and what kind of problem it is, for instance that they have dreams about the situation, that they cannot go to certain places, that they avoid certain people whose look resembles that of the perpetrators, and so on”. (public prosecutor)*

In some cases, attorneys pointed at the fact that the investigators were not sufficiently qualified to be able to recognize PTSP, or they were not willing to classify it as damage to health. Such acting can be caused by their unwillingness that is based on the fact that in case of the offence of bodily harm they had to re-qualify the act, and move the trial from “district” to “region”. They can also reproach to the victim in whom this disorder developed, that his/her testimony has changed.

*“At the first interrogatory, the victim usually plays as if nothing has happened, or s/he has some reactions directly after the attack. In a half-year horizon s/he starts to suffer the post trauma and then s/he is reproached how is such a change possible, when s/he said something else six months ago in the preparatory trial, and now comes with an expert opinion in the main trial or even before the main trial. We had lost some cases due to that; the cause was unfamiliarity of some law enforcement authorities in criminal proceedings.” (attorney)*

### 5.3.5 COOPERATION WITH OTHER STAKEHOLDERS

In criminal procedure or in contact with the trafficked person, other participants may appear the attorney meets and enters to interactions with: the defence attorney of the accused, the public prosecutor, the investigator, in some cases a court expert, alternatively another representative of the aggrieved party who need not be a lawyer, a social worker and, the judge, as a matter of course. The roles of individual participants in the focus groups were described as follows: From the *defence attorney’s* point of view – the accused has a more privileged role than the accuser; it is therefore advisable not to bring the relations with the defence to a boil. The parties are not equal as they are in civil ac-



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tions. The public prosecutor perspective shows that there is a diversified culture of how prosecutions operate; some admit personal negotiation, some can be communicated with only in writing. However, all filings should be sent in a copy also to the supervising state's attorney. *Investigators* are usually not used to cooperate with attorneys. It appears that some investigators asked captious questions; they lacked the skills required for interrogatories of traumatised injured, alternatively they were urging in their questions. On the contrary, there are investigators who considered attorneys their partners. Examples of good practice include quality administration of "technical aspects of cooperation" when the police took the property of perpetrators into custody, or recommended to get an attorney.

An *authorized expert* need not always be an expert in the investigated theme; they may even be familiar with the already mentioned posttraumatic stress disorder. It is advisable to seek for sensitive experts who are experienced in working with injured. Experiences with *attorneys who do not have legal education* are rather negative. They often have a naive view of what the strategy of representing the aggrieved should be about. A *judge*, on the other hand, may attempt to make the case easier, not to complicate and prolong it; therefore they rather move the subject of claiming damages to a separate trial according to the Civil Procedure Act. Criminal senate judges are experts in criminal law; so it has to be realized that adhesion procedure has significant features of a civil trial.

*"Individual criminal courts – and this applies both to a region and to another level – differ very significantly in what the culture of hearing and the attitude to the victims are there, alternatively to their professional attorneys, as well. Somewhere they just take the victims as a fully relevant party to the trial which has the right to express their statement to all aspects of the criminal procedure and propose evidence, and somewhere they, in fact, reduce them to a very parallel process, where they can only express themselves to the issues of damage claims. Once the attorney of the injured to thematize the questions that do not relate to the civil relationship, some judges tend to push the attorney back; whilst, at another place, they are very benevolent. Different court region, different court manners."* (attorney)

In some cases it may be useful both for the attorney and the victim, to have working cooperation with a *social worker of a non-governmental organization*. Attorneys and policemen are often not ready to ask the victim effectively what is needed; they cannot work with the individual psychological situation of the injured person. "Good relationships" between the attorney and the client can be established through a social worker.

Some *non-governmental organizations* can have a supporting role in representing the victim of crime. Some of them, like La Strada, dispose of resources to cover the services of attorneys in criminal procedure. The problem is usually finances for representing in a civil action. In this type of procedure there is a complication that pauper clients lack resources to cover the costs of the trial if they cannot carry burden of proof. A non-

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governmental organization can also be a source of valuable information relating to the issue; it can offer verdicts relating to indemnity or particular offence; records of lawsuits or other professional materials, interpretations, analyses, and the like. Non-governmental organizations can also organize educational events for attorneys.

*“It is better when an attorney can cooperate with someone who is in contact with client for some time, particularly if the client is a person who is not well oriented in the society, is isolated or perceived as someone whose position is weaker. Within the People in Need NGO there are e.g. field social workers who know the clients for a long time. However, an attorney cannot build the case on everything that the social worker says. Communication with a field worker however enables him/her to have a feedback, and compare the attitudes of work with the client.” (attorney)*

Also *media* sometimes enter certain cases. The trafficked person is often not interested in being contacted by media, and they do not wish their presence during interrogatory. Then they can ask the court to banish the public (ideally in advance), or to have an escort or guiding the trafficked person through other parts of the building to avoid media. It has to be realized that the judge does not know how the witness looks like, and also comes to the courtroom through another door; thus s/he need not know that medial try to contact the aggrieved in front of the courtroom. In such situation, even public prosecutor may intervene. In some cases, an attorney can consider to what extent s/he wants to be a partner to media. An attorney has, if they agree so with a client, a far more free hands for statements to be made to the press and other media. With his/her statements, s/he can also prevent misinformation that the media can then present due to lack of information.

#### **5.4 ROLE OF THE INJURED**

The trafficked person that comes out of vulnerable groups or injured of specific criminal activity, are also carriers of certain ways of acting and strategies that need not be obvious at first sight, but may cause troubles. In the area of human trafficking it can happen that a trafficked person can be under the thumb of the perpetrator during the trial. The trafficked person worries about his/her safety, or whether they will receive outstanding claims. If the trafficked person cannot be taken out of the perpetrator's influence zone, there is a risk that s/he will testify in the perpetrator's benefit at the court. The trafficked person is often used to an irregular approach of employer in their homeland (e.g. Ukraine), they do not require anything in writing, rely on verbal agreement, count with late payment of salary, etc. In practice, the trafficked person often believes that problems will finally be solved and the outstanding salary will be reimbursed to them by the employer. On top of that, some employers allow their employees to get forward in the hierarchy if they show loyalty, and thus favour illegal activity. In such a situation, a claim for damages is hard to demonstrate. It may also happen that, after direct relief following the

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conviction of the perpetrator, the trafficked person usually lacks the energy to continue in claiming damages, and is only happy about the fact that the perpetrator was sentenced. Civil procedure emphasizes the activity of the prosecutor; also the financial aspect of the case discourages the trafficked person from taking the next steps. Better linking of criminal procedure to subsequent damage claiming within a civil procedure might help the trafficked person in the indemnification process.

#### **5.4.1 REIMBURSEMENT OF NON-PROPRIETARY LOSS**

Since 2011, the injured can claim also non-proprietary loss within a criminal procedure. When determining the amount of it, one needs to come out of a quality made expert opinion which clearly states the extent of loss. Within proclaiming the amount of loss, witnesses or family may be questioned.

*“The judge wants to see the injured and hear them, for instance in the main trial. S/he can also hear the family of the injured.”(judge)*

When judging the amount of reparation money and aggravation of social position, Edict No. 440/2001 Coll. is applied, on Compensation of Pain Suffered, and the Aggravation of Social Position. In 2014, when the new Civil Code comes into effectiveness the Edict however ceased to be valid, which can bring problems in claiming the damages of the injured in terms of specification of their claim.

When deciding on the amount of damage, *the judge considers the expert opinion. The expert can increase relevant rating by up to 50%. In a separate trial, the judge is not bounded by the expert’s decision, and may increase the rating, as well as the compensatory damages in terms of legal justification.*

As concerns, indemnification of severe mental diseases caused by shocking experiences or other negative psychological factors and depressive situation, it is usually waited until the victim is examined by an expert, until the health state of the victim stabilizes which can be a problem, considering the running criminal procedure. A victim often fails to undergo an examination by the end of the criminal procedure, and is left to lodge the claim in a civil act.

#### **5.4.2 POSITION OF THE INJURED IN CLAIMING COMPENSATION IN CIVIL ACTION**

The injured are usually recommended to lodge their damage claims within a criminal procedure, since there they are not burdened with fees and burdens of proof. However, with the reasoning of the costliness of proclaiming the claim for damages, the injured with their claims are often referred to civil actions. On the other hand, there are claims that can be paradoxically lodged better in a civil action. Those are mostly labour-law disputes in which the burden of proof is usually transferred to employer, although the dispute can be about the defendant.

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*“The main motivation of a criminal court is fast and final judgement.” (judge)*

Against frequent referring the injured to civil disputes there is a fact that, if for example a trade company stands on the part of the defendant which was established in order to cover criminal activity, it may happen that this company does not have any property at all that could be used within a civil action to cover the claim for damages. The only possibility of the aggrieved is then to claim damages from concrete perpetrators in a criminal procedure. The question is whether referring the aggrieved to civil actions is not overused.

*“The injured has no right to be heard in a criminal procedure. The gravity centre is in a civil action. This means by referring the injured to civil actions, do not violate the right for a just trial.” (attorney)*

Discussion is also provoked by a court verdict in a criminal procedure by the so-called penalty order against which the injured has no right to legal remedy, even if the injured lodged a claim for damages. The judge asks in the discussion: *“If the damage is not in the description of the act, why would the judge acknowledge it?”* However, if the claim was duly and timely lodged, for instance already at the time when a criminal complaint was lodged, and the judge does not decide in the penalty order for damage compensation, s/he has to justify why s/he did not deal with the claim of the aggrieved. It would help if the judgement of conviction from a criminal procedure helped the injured not to impose fees in a civil action concerning their compensatory damages.

## **5.5 RECOMMENDATIONS**

It shows that the attorney’s work is a specialized activity that requires specific knowledge and skills in criminal law, and as the case may be, in civil law (e.g., for immaterial damages), but also in areas going beyond the framework of law as such. For instance, the attorney should be able to make useful cooperation agreements, have some fundamental awareness of the impacts of crimes on the injured’ lives, and be able to define litigation strategies according to the particular person’s needs. Evidence shows that in many cases the injured, due to their lack of legal education, were not able to defend their rights effectively. Even if the injured is represented by an attorney, their position is not equal and their rights are not consistently exercised.

Not only are the problems with the injured’ status due to the complexity of legislation, they also stem from poorly handled implementation practice and lacking cooperation among the stakeholders. As one of the attorneys has stated, *“the victim as the defendant does not enjoy the advantage of having a right not to testify. Many things are left just at the law enforcement agencies’ discretion. Thus, the injured find themselves in a situation of constantly having to plea and ask for something. In most cases, for example, the defendant does not have the advantage of having a right not to testify. The issue is not*

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just legislative but also practical. Therefore, we need to realize that in a system set up in this manner, the law enforcement agencies have the powers to make the situation more bearable for the injured.” The focus groups’ comments have not only pointed out problems but they also mentioned examples of good practice, in which the initiative of the law enforcement agencies combined with their professional and willing approach helped the injured exercise their rights or depending on the situation, prevented their secondary victimization from deepening. In most cases, the defendant does not have the advantage of having a right not to testify.

The recommendations presented below have been formulated by members of the focus groups. The most discussed needs include the following:

- *Train attorneys* in working with clients: How to work with crime injured; how to effectively enforce damages; how to accompany clients through the criminal procedure. Special seminars should be held for attorneys, and specialized education at law schools would also be beneficial.
- *Train judges and public prosecutors* in non-legal areas and find ways how to stimulate judges and public prosecutors to participate in training sessions. Usually, training courses that are not mandatory are attended by persons who need it the least.

*“It is crucial to ensure that judges and other stakeholders are better trained in the relevant areas, be it the psychology of interrogating an adult or psychology of interrogating a child, the youth etc. Therefore, it is important that judges and public prosecutors, and potentially other legal professions as well, are familiar or able to get trained in non-legal professions. We need to realize how much this is important, whether in the early stage of police interrogations or later on at court, which is nothing else but a kind of stage, sort of a theatre with a formalized procedure and formally assigned roles. And all these roles can also be identified psychologically. The capability of the public prosecutor and the judge to ask questions aptly makes a great difference, and so does the judge’s ability to conduct the hearing so as to prevent questions from being asked that might even defame the victim, which may happen in many cases though. It is therefore important, and pressure should be exerted in this respect, that the stakeholders are trained in and familiar with these aspects so that the situation does not remain unchanged: I know the word of law and the formal procedures, yet I lack the other things, such as the psychological aspects.” (judge)*

- *Train the police staff* by means of seminars and debates on the topic of the injured’ rights and needs of the victims of severe crime, which should also be attended by attorneys and representatives of non-governmental organizations. It would also be beneficial to present cases where the cooperation of the victim with the attorney, police and the public prosecutor led to the successful sentencing of the perpetrators. Furthermore, it would be useful to present the attorneys’ needs

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to the police staff and public prosecutors and to discuss the various options of cooperation.

- *Amend the Criminal Procedure Code* to strengthen the injured' rights.
- *Adjust the damages for suffering* that are defined by a legislative decree; in such a case the rates of damages would also be binding upon the courts.
- *Create an independent pro-bono organization* that would specialize in representing the injured. The organization should have enough quality attorneys who would be specialists in the specific branches of law. The organization should be as independent as possible of the power of the state, among other things to prevent any fear of initiating potential litigations against the state on behalf of their clients.
- *The use of the institute of free legal defence should be linked to the applicant's actual assets and income.* It happens that the application for free legal assistance is rejected on the grounds that the applicant is employed and thus, is deemed to be able to pay the usual rates for legal assistance, which is not realistic since the rates charged for legal assistance may lead some applicants to subsistence issues.
- *Medialize cases of human trafficking* to inform the public about the unfair practices of some employers from whose services the public might use. This should change the public view of migrants as persons who take jobs from the natives or just commit crimes in the host country.
- *Prepare a foreign comparative study that would describe the rights of crime injured in other countries, identify examples of good practice and point out the issues faced by injured in the Czech Republic.* Included should also be an analysis of needs (public prosecutors and the Czech Police), which is currently not available. The study should originate in the academic circles.

## 6. CONCLUSION

Strategic litigation is one of the possible tools which to grant a particular person but even a group of persons facing similar difficulties access to exercising their rights, or at least make such access easier. Since these issues have not been described in detailed in Czech and even foreign context; a portion of this study focused on presenting strategic frameworks, theoretical platforms but also numerous practical applications. Strategic litigation (which is a term most frequently used for such activities) may have various forms, and it may also be carried out by various entities. All these activities are usually aimed at changing the system by means of representing a particular person or group before court with the objective of achieving a precedent verdict or establishing a practice to point out system insufficiencies in order to cultivate the system as such. Emphasis may be placed primarily on helping a particular person, whose case is then used to achieve strategic goals, or preferentially to generate political effects and impacts.

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Strategic litigation is performed by both non-governmental organizations in cooperation with attorneys-at-law and law firms acting independently or with the support of a non-governmental entity. Before strategic litigation is initiated, it is necessary to clarify the organization's role toward the client to be represented. The people whose lives and effort to access rights are key to the strategic litigation should know the advantages and drawbacks of the method so that they can make as informed a decision as possible whether they wish to participate in such an activity. It is necessary to deal with numerous practical issues, among them the financing of the litigation and the related costs, the strategy to be followed after the actual litigation is over, and risk management.

Since 2004, La Strada has specialized in the legal representation of its clients. Based on its experience and by studying foreign literature, they have developed a specific method how to support a group of clients, to whom they provide services by means of an attorney-at-law acting as the client's representative. The organization has formalized this activity and called it strategic litigation. Emphasis is placed on developing the cooperation among the system stakeholders and achieving a system change in exercising the injured' rights, both on the procedural and the material levels. Presently, the organization focuses on damages for suffering and representing their clients who have suffered from trafficking outside the sex business for the purpose of other forms of exploitation and forced labour. Their experience shows that introducing such a model in the organization requires a great effort and human, financial and special resources. Not even a sufficient theoretical know-how provides answers to all challenges that the organization and their clients face. Strategic litigation is an activity that must respond to the new challenges and remain an open process.

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# CONCLUSION

*Vít Střítecký, Daniel Topinka*

Human trafficking for the purpose of other forms of exploitation and forced labour represents an agenda that rightfully draws ever greater attention of experts and practitioners working in law enforcement and legal professions and, last but not least, in the field of human rights in general. Various quantitative and qualitative analyses indicate that this phenomenon has been on the rise, creating an environment of very complex international social networks. In this respect, it poses an every greater challenge that substantially affects developed countries too. As shown in the study, however much human trafficking and the related issue of forced labour may be predominantly connected with Asia and Africa, our analysis of the situation in the EU indicates that this phenomenon is not marginal in this region either.

Therefore, it is not surprising that ever greater attention is paid to his phenomenon in Europe and on other continents as well. Due to the growing resources and expanding reach of organized crime, the activities have intensified on the part of national and international stakeholders who attempt to develop more effective tools to fight this phenomenon that poses a social risk. From this viewpoint, it comes as no surprise that the greatest attention has been paid to the stakeholders in the law enforcement sector, whose key agenda is not only to prosecute illegal activities but also to protect the injured and last but not least, to form and apply preventive measures.

In view of the above, this study attempt, on the conceptual level, to point out the fact that the nature and complexity of human trafficking and other illegal activities connected with it implicitly require a broader understanding the “security sector”. In this broader concept, the traditional law-enforcement agencies, such as the police and other agencies specializing in protecting borders and dealing with migration issues, the judicial branch and private security agencies, are complemented by other stakeholders, whose primary activities are not of the coercive nature. In this respect, this book has convincingly shown that non-governmental organizations providing counsel, social services and even protection to the injured also represent significant entities in this sector.

The aforementioned key starting points of this monograph have suggested three main dimensions of this publication, which have also determined how each of the parts have been handled in terms of concept and methodology. From the conceptual viewpoint, this book presents a detailed discussion of how the concept of human trafficking has evolved, how it formed discursively on the strategic level in the context of key international stakeholders’ activities. Subsequently, legal concepts and frameworks in different national contexts were described, reflecting the specific definition debates connected with human trafficking for the purpose of forced labour and other forms of exploitation.



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Last but not least, the study focused on strategic litigation, which is connected with the social and legal assistance provided by non-governmental organizations.

Following the conceptual discussion, the first part of the book brought a discussion of the various forms and types of human trafficking, which is conducted with the assistance of diverse semi-legal or illegal stakeholders. A significant shift has been identified in that the traditional and predominant orientation on human trafficking for the purpose of sexual exploitation. The first part of the book showed that, over recent years, the concept of human trafficking is ever more connected with forced labour and other (non-sexual) forms of exploitation but also with new agendas (e.g., trafficking in human organs). The discussion primarily attempts to define this phenomenon more clearly in order to facilitate more effective cooperation in the area of policies and strategies, law, human rights, and social aspects.

In the second part, dedicated to the legal frameworks and concepts, the book presents a unique comparative analysis of the legislation and verdicts pertaining to human trafficking for the purpose of forced labour. The analysis compared the legislative framework and understanding of the issues at hand and their manifestation in verdicts on an empirically rich sample of nine European countries. The comparison of relevant laws and regulations was based on key defined terms, which followed upon a broader conceptual discussion of human trafficking for the purpose of forced labour. This comparative effort has the important outcome of a prescriptive reflection of the Czech legislative and even a broader non-legislative framework, the purpose of which is to create a more effective system of fighting modern slavery and related negative phenomena that go with it.

The final part of this monograph then confirmed the expansive nature of our analysis of the security threat posed by human trafficking for the purpose of forced labour and other forms of exploitation, which traditionally used to be understood in a narrower sense. This expansion stemmed from the unique experience of La Strada in strategic litigation, both from the legal viewpoint and in terms of social support and assistance. Thus, in this part the book offered a conceptual discussion complemented with empirical experience of the stakeholders with the practice of strategic litigation, which has opened some significant space for making this system even more effective in the Czech Republic.

This book brings an up-to-date view of the major issues at hand that go beyond the national frameworks and boundaries and whose significance grows in direct proportion to the actual occurrence of human trafficking for the purpose of forced labour and the complexity of this phenomenon. By connecting the aforementioned dimensions, we can relatively wholly understand the various trends and manifestations connected with the issues on both the national and the international levels. In this respect, the book may undoubtedly be beneficial for security and law experts as well as for social workers who come in direct contact with the phenomenon and its social consequences.

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## ENDNOTES

- <sup>1</sup> As already mentioned, the results published in the 2012 Report are based on the changed methodology (c.f. Kutnick–Belser–Danailova–Trainor, 2007).
- <sup>2</sup> I would like to thank Paul Rigby and Margaret Malloch from the Scottish Universities Insight Institute for the invitation to join the seminar Human Trafficking: Conceptualising Definitions, Responses and “what needs to be done” organized on 12 and 13 December 2012 in Glasgow.
- <sup>3</sup> The commercial sex industry and its diverse actors (providers of sexual services, consumers of sexual services, intermediaries) and venues (street, brothels, apartment-setc.) may be regulated explicitly as a form of legitimate income generating activity, criminalized or left in a legal limbo, i.e. not criminalized but not considered explicitly as form of legitimate income generation.
- <sup>4</sup> This section is based on Hancilova–Bucikova (2012).
- <sup>5</sup> Several international instruments set the international framework until 1949: the 1904 International Agreement for the Suppression of the White Slave Trade, the 1910 International Convention for the Suppression of White Slave Traffic, the 1921 Convention for the Suppression of Traffic in Women and Children and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age. In 1949 the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), replaced them. This Convention, like all preceding instruments, failed to define trafficking, and adopted an abolitionist approach to trafficking and prostitution of women, i.e. an approach that aims at eliminating prostitution on the grounds that it is considered a form of violence against women and girls. The Convention equates trafficking to exploitation of prostitution irrespective of whether or not the person providing sexual services has given consent (E/CN.4/2000/68, 2000, para. 23; E/CN.4/2003/75, 2003, para. 53; Outshoorn, 2004, p. 8) and criminalizes acts associated with prostitution, though not prostitution itself. It has been criticized for restricting the definition of trafficking to trafficking for prostitution of women, and thus excluding men and women who were trafficked into other economic sectors from its protection. It has also been criticized for disregarding women as independent actors endowed with rights, and for contributing to women’s marginalization and vulnerability to human rights violations (E/CN.4/2000/68, 2000, para. 22).
- <sup>6</sup> The UN Human Rights Commission (E/CN.4/2003/75, para. 52-3) notes that in 1994 there were two basic challenges to “abolitionist” position on trafficking and prostitution: the regulationist school that wanted to decriminalize all aspects of prostitution and wanted to license and regulate it. According to this school, sex work is a legitimate enterprise and sex work may be carried out under licence from the State. This would mean compliance with certain zoning laws, ensuring health and safety standards, and labour law protection for the sex worker. The second model saw prostitution as sex

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work but wanted to rely on the organization and unionization of sex work to protect the rights of sex workers and to ensure their health and safety. These models challenge the basic assumption of the mainstream abolitionist frame work in that they regard prostitution as legitimate work.

- <sup>7</sup> The Global Alliance Against Traffic in Women (GAATW), a coalition of civil society organizations, advocated for prostitution to be defined as work. The civil society organizations close to abolitionists united in the Coalition Against Trafficking in Women (CATW) and started to advocate for a Convention Against Sexual Exploitation, and later for a new UN protocol on trafficking with the aim “to prevent a distinction between trafficking and prostitution in the trafficking protocol on which the UN was working in the late nineties” (Outshoorn, 2004: 6–11). The CATW framing of the debate on prostitution and trafficking as violence against women has helped to galvanize international attention on the phenomena and has informed many of the debates on trafficking for sexual exploitation and prostitution that have taken place in various countries (such as Sweden), during the 1990s and 2000s.
- <sup>8</sup> At the extreme ends, both camps tend to, albeit to a varying degree, disregard the diversity of sex markets and experiences of actors, and the complex personal experiences of persons engaged in prostitution (overwhelmingly women, but also men and children of both sexes). The discourses also tend “to artificially abstract the licit/illicit industry dichotomy from the messiness of its operation in the global (capital) economy. In addition, the threat of essentialism looms large here, as other forms of discrimination (race, age, class, etc.) that may also feature in the commercial sex transaction are ‘trumped’ by the preoccupation with gender/sex difference” (Della Giusta–Munro, 2008: 6).
- <sup>9</sup> In practice assistance providers who adopt an abolitionist perspective are either not interested in using the trafficking in human beings framework, because this would, in their eyes, legitimize it, and thus contribute to arguments distinguishing between forced and consensual prostitution or they use it in a way which sets trafficking for the purpose of sexual exploitation on par with prostitution. Furthermore, it can be argued that assistance service providers adopting an abolitionist perspective may involuntarily contribute to depriving individuals of the right to be adequately assisted and protected by state institutions (e.g. in court), as well as in accessing other state support services. For instance, when cases of trafficking in human beings are tried as offences related to prostitution, the status of injured of serious crime is not granted to witnesses during legal proceedings, and they may not be able to qualify for assistance provided to injured of trafficking in human beings.
- <sup>10</sup> I use the term “social institution” in the meaning of Rom Harre (Harre, 1979: 98 quoted in Miller, 2012): “An institution was defined as an interlocking double-structure of persons-as-role-holders or office-bearers and the like, and of social practices involving both expressive and practical aims and out comes” (Miller, 2012).

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- <sup>11</sup> Evidence from research on how policy and social context impact on sex workers' HIV risk, and the provision and coverage of HIV services, shows that in places where sex work is criminalized, "the response to HIV has often been stymied and limited by structural forces including stigma, discrimination and violence against sex workers" (World Bank, 2013: xxvii). At the same time, "expanding a community empowerment-based approach to comprehensive HIV prevention intervention among sex workers has demonstrable impact on the HIV epidemics among female sex workers" (World Bank, 2013: xxvii). It is also "cost-effective, particularly in higher prevalence settings where it becomes cost-saving" (World Bank, 2013: xxviii). The report reiterates that "by reducing violence against sex workers, additional significant HIV prevention gains in terms of new infections averted will also be observed across settings" (World Bank, 2013: xxviii).
- <sup>12</sup> Among the UN and other international organizations, some agencies make a distinction between consensual sex work of adults and coerced prostitution/trafficking (see for example, the UNAIDS, 2009 Annex XX). The ILO has dealt with forced prostitution under the Forced Labour Convention No. 29. (ILO, 2005, para. 24; ILO, 2009b Casebook: 9), and it appears the ILO considers consensual prostitution of adults a form of work (cf. Lim, 1998: v). Many UN agencies and international organizations, including for example the Council of Europe, avoid this discussion altogether, pointing out that this issue is left to the discretion of the states.
- <sup>13</sup> As with other concepts encountered in this paper, there is also no consensus on how to define "organized crime".
- <sup>14</sup> The prohibition of forced labour or services, slavery or practices similar to slavery and servitude is established in Article 4 of the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1976, Article 8) and in the International Covenant on Economic, Social and Cultural Rights (1976, Articles 6 and 7).
- <sup>15</sup> I recall this from my discussions with the officials of the US Embassy in Yerevan, Armenia.
- <sup>16</sup> This section on abuse of position of vulnerability is based on UNODC 2012a.
- <sup>17</sup> For more details refer to the section on forced labour, exploitation and slavery in this chapter.
- <sup>18</sup> Information of La Strada, Czech Republic.
- <sup>19</sup> Information from participants of THB seminar organized by Scottish Universities Insight Institute, Glasgow, 13–14 December 2012.
- <sup>20</sup> Any child marriage can be considered a forced marriage as children are not capable of giving a full and informed consent.
- <sup>21</sup> Experts were chiefly from international organizations and academia.
- <sup>22</sup> Within the interviews, we worked with the participants' informed consent and confidentiality in social work practice. Informed consent and obtaining it in practice meant that group interview participants were informed that the discussions were recorded
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and how the recordings would be used later. Outputs from qualitative interviews were submitted to conversation partners for peer validation, i.e. sent to everyone for amending and/or commenting on the final text. Social workers' confidentiality was reflected in the text by not stating the details of specific cases unless consent had been given and/or the cases have been anonymized so that it is not clear which specific case it is.

<sup>23</sup> Participants (in alphabetical order): Mgr. Jan Čáp (Organized Crime Department, CID), Mgr. Klára Kalibová (lawyer, In-IUSTITIA, o.s.), Mgr. Danuta Koné Król (Supreme Prosecutor's Office), Mgr. Gabriela Kopuleťá (trainee attorney), Mgr. Jan Litomiský (field worker, Diaconia of the Evangelical Church of Czech Brethren), JUDr. Štěpánka Míková (attorney), Mgr. Romana Píšová (attorney), Mgr. Dana Pluhařová (La Strada Czech Republic), Bc. Tereza Šimonová (La Strada Czech Republic), Mgr. Daniel Tobola (attorney). Moderators: Daniel Hůle, Štěpán Moravec.

<sup>24</sup> Participants (in alphabetical order): Mgr. Jan Čáp (Organized Crime Department, CID), Mgr. Katarína Danková, (lawyer, Magdala Project), JUDr. Matouš Jíra (attorney), Mgr. Klára Kalibová (lawyer, In-IUSTITIA, o.s.), Mgr. Danuta Koné Król (Supreme Prosecutor's Office), Mgr. Gabriela Kopuleťá (trainee attorney), JUDr. Štěpánka Míková (attorney), Mgr. Romana Píšová (attorney), Mgr. Dana Pluhařová (La Strada Czech Republic), Bc. Tereza Šimonová (La Strada Czech Republic), Mgr. Daniel Tobola (attorney).

Speakers: JUDr. Iveta Eichlerová (Regional Prosecutor's Office, Brno), Doc. JUDr. et Bc. Tomáš Gřivna, Ph.D. (attorney, member of the Legislative Council of the Government, university teacher), Mgr. Tomáš Lehovc (District Court, Prague 1), Mgr. Ondřej Peřich (Regional Court, Ústí n. L.), Mgr. Michal Tománek (District Court, Prague 1), Pavel Uhl (attorney). Moderators: Štěpán Moravec, Mgr. Petra Kutálková.

<sup>25</sup> While emphasis was put on gathering experience and information concerning the application of the definition of human trafficking outside of sexual exploitation and compensation, the discussion rather focused on more general topics. In their contributions, the participants talked about more general issues concerning the position of the injured or injured in the Czech criminal procedure and the possibilities of how these persons could be supported to achieve their rights. The topic of the actual construction and application of the definition was exhausted rather quickly. This may be caused by several circumstances – it may be the fact that there is a minimum of cases solved as human trafficking for the purposes of other forms of exploitation and a few of those that would deserve this qualification enter the criminal procedure in general. The cause might also be the fact that the group consisted of both people that “worked on other trafficking form” cases and experts that did not have such practical experience. It might also be the fact that the topic of the definition of human trafficking, or its use as an “entry condition” for the qualification of clients as trafficked persons, is, with a few exceptions, more of non-governmental organizations' topic rather than a topic concerning representatives of the injured.

<sup>26</sup> La Strada believes that human trafficking and exploitation are unacceptable. It is a specialized organization dealing with these phenomena, identifying their causes and

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consequences, affecting public policies and providing social services to people that became the injured of trafficking or exploitation (La Strada, 2012). The organization's work is shaped by six basic values: human rights, empowerment, feminism, equal opportunities, no abolitionism and transparency. The organization's grounds, or more precisely their currently negotiated form, naturally shaped strategic litigation and are reflected in the form and content of this article. Another value framework, emphasising gender sensitivity, is reflected in the text in how we, as female authors, work with the language, e.g. not replacing feminine nouns with generic masculines. However, there are a few exceptions in this text. In the parts specifying legal frameworks or based on the experience of representatives of the injured and law enforcement authorities, we accepted the majority discourse judgment law and worked with the generic masculine. The shape of the article (and practice of strategic litigation) also reflects the influence of the organization's clients. The quintessence of the process was expressed by Payne, saying in his reflections on the socially constructed nature of client age and social work that "...social work is a reflexive process in which clients change the workers and the fundamentals of social work, thus changing the 'theory' of social work" (Payne, 2005: 9).

<sup>27</sup> The article provides information for litigation involving the ECHR (European Court of Human Rights). Of interest in practice are the challenges that remain for litigating organisations for other activities related to "policy" and "advocacy" even after a verdict is reached for the benefit of the cases that are being decided.

<sup>28</sup> Although this is an institution that is routine primarily in the legal systems in English-speaking countries, it is interesting that the Czech Republic acted as an *amicus curiae* party in 2004 through its embassy in the case of exploitation of cleaning workers by Wal-Mart. More information is available at: [www.walmartjanitors.com/staticdata/Amicus\\_Curiae\\_Brief\\_of\\_the\\_Czech\\_Republic.pdf](http://www.walmartjanitors.com/staticdata/Amicus_Curiae_Brief_of_the_Czech_Republic.pdf).

<sup>29</sup> This includes initiation of changes in legislation and political reforms (both after realisation of the case and preventively) and publications regarding the topic (Ilieva, 2005). Certain sources also use the term "complainant".

<sup>31</sup> There has been interesting experience in Great Britain, where between the Child Poverty Action Group (CPAG) and the state there is a general agreement that if the CPAG loses a dispute, the state will not require payment of the counter-party's costs (Smith, 2003: 8). Less common strategies include insurance for in case of defeat, which, however, can be very expensive (Geary, 2009: 33).

<sup>32</sup> Judgment by the leadership of the Czech National Council of 16 December 1992, regarding the announcement of the Charter of Fundamental Rights and Freedoms as part of the Constitution of the Czech Republic, see Article 37 paragraph 2 and Article 39.

<sup>33</sup> Act No. 40/1964 Coll. of 1 April 1964, the Civil Code, see Sections 22-33b. As of 1 January 2014, this act will be replaced by a new Civil Code (No. 89/2012 Coll.), which addresses representation in Sections 436-488.

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- <sup>34</sup> Act No. 99/1963 Coll. of 4 December 1963, the Code of Civil Court Procedure, as amended, see Sections 22-31.
- <sup>35</sup> Act No. 40/2009 Coll. of 8 January 2009, the Penal Code, as amended.
- <sup>36</sup> Act No. 141/1961 Coll. of 29 November 1961, on criminal court proceedings (the Criminal Procedure Code), as amended.
- <sup>37</sup> Act No. 108/2006 Coll. of 14 March 2006, on Social Services, as amended.
- <sup>38</sup> Heading I of the Act on Social Services.
- <sup>39</sup> Section 88 of the Act on Social Services.
- <sup>40</sup> Section 100 of the Act on Social Services.
- <sup>41</sup> Sections 109–111 of the Act on Social Services.
- <sup>42</sup> Act No. 209/1997 Coll. of 31 July 1997, on Providing of Monetary Assistance to injured of Criminal Activity and on amendment and supplementing of certain other legislative acts, as amended.
- <sup>43</sup> Act No. 45/2013 Coll. of 30 January 2013, on injured of Crime and on amendment of certain other acts (the Act on injured of Crime). This act will take effect on 1 August 2013.
- <sup>44</sup> Refer to Sec.79 (1), par. 120 (1), par. 118a and following of the Civil Procedure Act.
- <sup>45</sup> Sec. 120 par. 2 of the Civil Procedure Code.
- <sup>46</sup> Sec. 1 of the Criminal Procedure Code.
- <sup>47</sup> Article 39 of the Charter of Fundamental Rights and Basic Freedoms: “It is the law that says which conduct is a crime and how it is to be punished, as well as what other damage regarding rights or property was committed and how it is to be penalised.”
- <sup>48</sup> Sec. 1 (15) of the Criminal Procedure Code. Introduced in the Criminal Procedure Code by the Act on injured of offences, effective from 1 August 2013.
- <sup>49</sup> Sec. 2 (5) of the Criminal Procedure Code.
- <sup>50</sup> Sec. 174 of the Criminal Procedure Code.
- <sup>51</sup> For example, the proceeding facilitate by the Constitutional Court.
- <sup>52</sup> For the conditions for provision of legal services, refer to Act no. 85/1996 Coll. of 13 March 1996, on Advocacy. According to this Act, legal services in the territory of the Czech Republic are provided by attorneys-at-law and European attorneys-at-law, i.e. the attorneys authorised to work in other member state of the European Union. Furthermore, legal services may be provided by other professions (e.g. notaries) within a scope of work defined by special law.
- <sup>53</sup> Sec. 27 of the Civil Procedure Code.
- <sup>54</sup> Sec. 51a of the Criminal Procedure Code.
- <sup>55</sup> Act no. 45/2013 Coll., of 30 January 2013, on injured of offences and on amendments and supplements of certain acts (injured of Offences Act).
- <sup>56</sup> Act no. 209/1997 Coll. of 31 July 1997, on provision of financial support to injured of offences and on amendments and supplements of certain acts. According to this act, the victim is the natural person who suffered bodily harm in consequence of the offence and, furthermore, the survivors of the victim who had died in consequence of the offence.
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- <sup>57</sup> Sec. 2 (1) of the injured of Offences Act.
- <sup>58</sup> Sec. 50 of the Criminal Procedure Code.
- <sup>59</sup> Sec. 21 of the injured of Offences Act.
- <sup>60</sup> Sec. 43 (3) of the Criminal Procedure Code.
- <sup>61</sup> Sec. 2 (14) and Sec. 28 of the Criminal Procedure Code.
- <sup>62</sup> Sec. 43 (1) of the Criminal Procedure Code.
- <sup>63</sup> Ibid.
- <sup>64</sup> Ibid.
- <sup>65</sup> Ibid.
- <sup>66</sup> Ibid.
- <sup>67</sup> Sec. 142 (1) of the Criminal Procedure Code.
- <sup>68</sup> Sec. 246 (1) (d) of the Criminal Procedure Code.
- <sup>69</sup> Furthermore, it is specified by the Criminal Procedure Code which exceptions may be applied in terms of extended deadlines; however, exceptions are subject to approval by the public prosecutor and must be explained in writing ahead of time.
- <sup>70</sup> Sec. 43 (3) of the Criminal Procedure Code.
- <sup>71</sup> Sec. 265 of the Criminal Procedure Code.
- <sup>72</sup> Sec. 2 (14) of the Criminal Procedure Code.
- <sup>73</sup> 3 Sec. 151 (1) of the Criminal Procedure Code.
- <sup>74</sup> Sec. 65 (2) of the Criminal Procedure Code.
- <sup>75</sup> A complaint may be filed against any decision, by any person affected by the decision – refer to Sec. 142 of the Criminal Procedure Code.
- <sup>76</sup> Sec. 316 (2) of the Criminal Procedure Code.
- <sup>77</sup> Sec. 175a and foll. of the Criminal Procedure Code.
- <sup>78</sup> Sec. 175a (8) of the Criminal Procedure Code.
- <sup>79</sup> The Act was adopted by the Parliament on 30 January 2013, to be valid and effective from 1 August 2013.
- <sup>80</sup> This category includes children, disabled people and injured of sexual offences in case of danger of secondary victimization due to the victim’s age, gender, race, nationality, sexual orientation, health etc.
- <sup>81</sup> Restorative programmes include joint activities of the perpetrator, victim and/or other persons involved in or affected by the offence, who strive for elimination of consequences of the offence.
- <sup>82</sup> Within the legislative process of preparing the injured of Offences Act, the La Strada presented their opinion, stating that availability of legal services for injured of offences is about to worsen in the case that only attorneys-at-law are supposed to provide them. It is obvious from the practical experience that injured of offences primarily contact non-government organizations, because they trust them due to their less formal approach and their “low-threshold”. One of the first versions of the act, being prepared with La Strada’s participation, explicitly included non-government organizations among the providers of legal aid and legal representation. The attitude of non-
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-government organizations towards the bill on injured of offences is available at [www.strada.cz](http://www.strada.cz).

- <sup>83</sup> Sec. 51a of the Criminal Procedure Code, effective from 1 August 2013.
- <sup>84</sup> Act on provision of financial aid to injured of offences.
- <sup>85</sup> These persons usually take advantage of shelter services in another organization.
- <sup>86</sup> At the time of the preparation of an implementation concept in La Strada organization, there was not even one legally effective judgments regarding other forms of exploitation and forced labour in CR. One was gained no sooner than in 2012. Two cases were completed this year.
- <sup>87</sup> Based on the non-governmental organizations' experience, those witnesses who cooperate with non-governmental organizations are the only ones that keep on cooperating with BACP until the end.
- <sup>88</sup> The experience was drawn (in the following years) especially from the practice of the People in Need organization that represented clients usually in the disputes regarding homes/flats, debts, etc. They used the experience from the area of facilities handling, trainee attorney employing, etc.
- <sup>89</sup> The key verdict in the area of compensation is the verdict of the region court dated 2008 that granted compensation to a client who suffered for acquired post-trauma stress disorder. It was the first case of its kind. This verdict was presented in many other cases as a sample for the claim for damage and it was also used by the state bodies for compiling of strategic documents. It is also a good example for social workers who cooperate with clients and offer them legal representation. Especially thanks to the advocacy activities in this area, the organization representative was appointed by the Minister of Justice and included in the expert group that help the injured of criminal acts. This verdict contributed to the "packet" of experience that are developed in the framework of COMPACT project whose target was to make compensation a reality for the trafficked persons and legal security within Europe to remove barriers in approach to compensation; to include the right for compensation into practice and to ensure sustainable and systematic access to compensation. At the present time the topic regarding compensation includes also the attempts to gain compensation for e.g. non-material damage that can be sued in criminal proceeding since 2011.
- <sup>90</sup> In reality we can find some exceptions when a client is identified as a trafficked person, s/he has already had his/her legal representative in a criminal or other area, and s/he wants the keep her representative for further legal help. These situations are solved individually. If clients have their representative, they can be included into the organization work system, if they wish.
- <sup>91</sup> In 2010 a stormy discussion took place between the law enforcement authorities in criminal proceeding, attorneys, non-governmental organizations and other entities; they argued over the role of attorneys in criminal proceeding. The confrontation was caused by a conflict between one of the La Strada organization attorneys and a detective from Organized Crime Detection Unit regarding an unclear interpretation of

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criminal law. The discussion went on at the meeting of non-governmental organizations and relevant state institutions. The ministry of Interior provided the document The statement of the security policy department to the position of attorneys of the injured and cooperation with BACP during the representation of clients (Ministerstvo vnitra ČR, Odbor bezpečnostní politiky, 2012). In this document the ministry gives general statement (asking questions in various stages of criminal proceeding, giving instructions to the injured, addresses, planning of hearing of witnesses, making the identity of a witness secret and handling with the power of attorney.) In 2011 another document comes to light (UOOZ, no date) Charity, La Strada – problematic issues, that include the statement to the problematic issues regarding cooperation between an attorney and the police. The document includes also a chapter “Initiatives to the La Strada methodology”. The above mentioned documents were used as an important background for the revision of methodology for social work with clients.

<sup>92</sup> Based on the individual plan of cooperation in social services. The organization has a given procedure how to provide strategy representation for clients, for both content priorities. It is a chain of consents from all the involved whether the case fulfils the priorities set by the company – the definition of human trafficking in aim of other forms of exploitations and forced labour and compensation. Since the first contact there is set three month period during which the involved (a client and organization) can make a decision. After this period, in case of consent for the strategy representation, a short report is written containing basic arguments.

<sup>93</sup> There is rightful question whether all the steps carried out by legal agencies or social workers in favour of clients could be directed by a “higher” general interest, not only by a particular requirement of a represented person.

<sup>94</sup> The first cases of the exploitation of migrants in Czech forests were monitored as soon as in 2008, but more often it was in 2009–2010. The case included hundreds of injured who came from Vietnam, Slovakia, Romania, Ukraine, Mongolia and other countries, and they did not receive their wages. Some of them were starving and suffering with cold. According to their representatives and with the European interpretation of the law regarding the criminal act of human trafficking it can be claimed, that the forest workers, or at least some of them became injured of human trafficking. The workers were originally hired by Affumicata a.s. agency (and by other companies established by the same perpetrators with the aim to employ foreigners), and they provide work directly to Less & Forest, s.r.o. company. The end user became the Lesy České republiky, a.s. organization.

<sup>95</sup> In the Czech text feminine grammatical gender is used for persons. This is because of the language frequented by the staff involved in the group discussions, and for the purpose of better readability. Thus the word attorney may refer to both males and females, and the same applies to the social workers etc.

<sup>96</sup> For example where the client participates in the Program of Support and Protection of injured of Trafficking in human beings, coordinated by the Ministry.



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