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Book reviews

Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union

By Heli Askola, Oxford: Hart Publishing, 2007. 182pp. ISBN 1-84113-650-6 £35.00 hardback

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Countering sex trafficking or just a close(d) encounter?

The cross-border trafficking of women for the purposes of sexual exploitation has been the focus of considerable attention in recent years. Though far from a new phenomenon, the scale of its contemporary manifestation, its apparent connection to networks of organised crime and state corruption, its intersection with heated debates over divergent models for the regulation of prostitution, and its situation within broader contexts of globalisation, socioeconomic displacement and migration control have ensured its status as a 'high priority' in policy discussions nationally, regionally and internationally. Official statements condemning this criminal activity have proliferated and national laws have been developed in which the components of this offence are set out alongside options for the punishment of its perpetrators and the recompense of its victims. But while much ink has been devoted to the topic of sex trafficking in the past decade, there has been a lack (until recently at least) of sustained academic engagement with the theoretical constructs that underpin these responses, and an absence of literature that has sought critically to reflect upon the motivations and merits of these policy initiatives by – amongst other things – interrogating its foundational concepts of 'exploitation', 'migration', 'vulnerability' and 'choice', as well as its preoccupation with prostitution over other forms of domestic or labour servitude.

It is against this backdrop that Heli Askola's recent book makes such a valuable contribution. Focusing specifically upon anti-trafficking initiatives at the European level, and candidly acknowledging its restricted coverage in terms of the class of trafficked person (women) and the purpose for which they are trafficked (sexual exploitation), the book offers impressive and careful coverage of this fast-moving and challenging subject matter. Highlighting the limited competence of the EU in several key areas that contribute to, or flow from, the practice of sex trafficking, Askola reflects upon the obstacles that are presented to achieving a comprehensive approach, within which protection, prosecution and prevention are seen as necessary, and interconnected, components. As she explains, 'the idea of a comprehensive approach, if taken seriously, implies a fuller understanding of the heterogeneity of trafficking in women for sexual exploitation and its causes. It suggests some sort of equilibrium – for example, that the interests of states and the European polity (sovereignty, control) are carefully balanced against the human rights of individuals, be they EU citizens or not' (pp. 7–8). This kind of model, though much spoken of and much in demand, is not, she suggests, clearly visible in central European approaches, which have too often placed an undue emphasis on repressive criminalisation and/or migration control elements.

In order to support this hypothesis, and to induce us to follow her towards the development of a more adequate (and holistic) response, Askola introduces the reader to a number of possible lenses through which the phenomenon of trafficking in women for sexual exploitation might be understood – including gender equality, prostitution policy, free movement imperatives, external migration control, criminal justice and human rights. Like a kaleidoscope that shifts its design each time we adjust the filter through which we approach it, Askola reminds us that, although each of these lenses can and does provide valuable insight, an exclusive commitment to any one would distort the nature of the problem and disguise the parameters of its most appropriate remedy. Drawing on comparative

analyses of domestic responses in the Netherlands, Sweden and Italy, Askola highlights the extent to which, despite prima facie differences in terms of sociocultural context and prostitution politics, the law and order paradigm continues to enjoy a privileged position, such that – in each setting – 'the interests of the victim are subordinate to the (short-term) interests of the investigation and prosecution' (p. 117). Thus echoing the concerns of other critical commentators, Askola highlights the extent to which this preoccupation with the dualisms of guilty/innocent, victim/perpetrator and active/passive – which rarely accord with the messy and multifaceted realities of contemporary people trafficking – sets up dubious hierarchies, which ensure the protection only of those (often minor) victims who exhibit no knowledge, complicity or consent in relation to the original movement or subsequent prostitution.

Significantly, in a context in which it has become politically commonplace to assert that trafficking in human beings represents an infringement of the victim's human rights, Askola takes some necessary steps in her penultimate chapter towards deconstructing this claim. In particular, she emphasises the extent to which such arguments too often 'remain rather superficially at the level of rhetorical exhortations that are easily made (and as easily, it seems, ignored)', without offering any kind of serious challenge to existing political priorities – and the privileging of law and order agendas that they entail (p. 134). Without seeking to jettison reliance on rights talk altogether – in regard to sex trafficking or other social justice issues – Askola emphasises its inherent indeterminacy and malleability, and rightly discourages us from seeing it as offering a panacea. These insights are valuable ones, particularly in a context in which international reports have emerged that purport to rank countries' domestic anti-trafficking responses in a global hierarchy, thereby encouraging a considerable amount of 'posturing' amongst nation states and a dubious tendency to see anti-trafficking commitment (frequently framed in the discourse of rights) as in some way an index of 'civilisation'. At the same time, though, there is a sense in which, perhaps, Askola's deconstruction does not go quite far enough, failing to engage fully with the indeterminacy and malleability of the very construction of people trafficking itself. Indeed, while her discussion is peppered with important acknowledgements of the complexity of the trafficking phenomenon – as well as of the fluidity of the dividing lines that differentiate it from people smuggling or poor migrant working conditions – there is a tendency at times to rule out those marginal cases in order to focus upon a trafficking prototype that fits with international and regional definitions, but rarely with reality. While such a focus may be strategically necessary – both to permit engagement with those regulatory regimes on their own terms and to ensure that discussion can move beyond the perilously complex terrain of definition – it has the effect of sidelining some of the complexity and intersectionality that Askola has hitherto drawn our attention to.

Having charted her way through this wide-ranging analysis of the divergent agendas and priorities that operate upon legal and policy responses to sex trafficking in the EU, Askola arrives at her final chapter in which she puts forward her blueprint for a 'more comprehensive' approach. The utopia that she urges us to strive for is one in which the phenomenon of people trafficking in general, and sex trafficking in particular, is situated within, rather than abstracted from, the contextual continuums in which it emerges and flourishes. It is a response which 'stems from a broader commitment not only to enforcing human rights and the equal protection of women but to eradicating poverty, gender inequality, the wealth demarcation between the rich and the poor, and global economic and social injustices' (p. 162). But this is not a thesis devoid of pragmatism, and in reflection of that, Askola divides her proposals into short- to medium-term, and longer-term, objectives. In the former category, she insists upon increased levels of victim protection (including residence permits), non-instrumentalisation of the victim in the service of law enforcement, more flexible European (im)migration policies and increased (and more secure) funding for preventative awareness-raising campaigns in countries of origin. In the longer term, she calls upon the EU (and the nation states within it) to address more meaningfully the conditions that induce migrants to take unacceptable safety risks or to sign up to exploitative arrangements – through development initiatives, gender mainstreaming and empowerment programmes, as well as interrogation of the sociosexual scripts that legitimate heterosexual men's entitlement to demand access to commercial sex markets.

The book thus throws down a significant challenge to EU policy-makers (and indeed to all those engaged in anti-trafficking initiatives at the local, national, regional or global level). It covers an extensive amount of ground, displays a commendable grasp of the recent legal developments and combines this with a measured and careful examination of the broader ideological and political paradigms that construct and constrain both the EU's anti-trafficking competency and its ultimate response. While the restriction upon both women and sex trafficking is justified – not least on the premise

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that this is the formulation of contemporary people trafficking that has most extensively captured the political and public imagination – one consequence of this approach is that it, somewhat inevitably, leaves certain important questions unaddressed. For example, does the privileging of sexual exploitation over other forms of domestic servitude or labour exploitation (in agriculture, factories, restaurants and so on) obscure the moral disapprobation that drives national initiatives and dissolves the boundary between trafficking and any commercial sex work that is undertaken, in whatever conditions, by non-nationals? Do legislators, officials and campaigners – within and across national jurisdictions – mean the same thing when they talk of exploitation, lack of choice or vulnerability in both these sexual and non-sexual contexts? In a world in which the purposes for which people trafficking occurs, as well as – often - the individual migrant's complicity therein, are conditioned by the demand *within* EU member states for cheap labour, how might regional and national organisations more candidly acknowledge and redress their own contributory responsibility? And – just as fundamentally – in a world in which the 'comprehensive' anti-trafficking response that Askola envisages seems, on some days at least, to be hopelessly utopian, whilst the realities of sex trafficking indicate an array of degrees of choice, experiences of violence, access to earnings, opportunities for freedom and personal unease with the sale of sex, can we be confident that we are really improving the lives of the worst off by denying them this high risk alternative whilst failing to offer them any alternative form of repair?

These are challenging questions that may well give rise to some uncomfortable responses. Askola's book, in a number of ways, makes an important contribution to sex trafficking debates and plays a valuable role in situating the peculiarly modern manifestation of this phenomenon in its social, economic, political and sexual context. At the same time, though, there is considerable work yet to be done – both within and outwith the specific instance of sex trafficking – if we are to interrogate candidly the interdependency both of supply/demand and of countries of origin/destination. Further reflection is required not only on what 'exploitation' means in the fluid and multiple contexts of people trafficking, but also upon what it is that makes such exploitation wrongful, and upon whether – and how – it would be appropriate to intervene. Sex trafficking may constitute a particularly vivid, prevalent and – by some measures at least – problematic instance of this phenomenon, but it cannot be understood properly outside the spectrum of associated practices of domestic prostitution, clandestine cross-border movement, irregular migration status and intolerable working conditions. Likewise, while the EU polity represents an important site of counter-trafficking innovation, both symbolically and practically, it provides just one forum and one jurisdiction amongst the many others that must be self-reflectively and proactively engaged if genuine improvements in the plight of the vulnerable are to be secured. None of this should be seen to offer a criticism of Askola's book, which is both inevitably restricted in its remit and yet commendably aware of its broader context. It is, instead, to make a call for additional contributions alongside Askola's, so that our theoretical and critical understanding of the phenomenon of people trafficking, and of the parameters and demands of the responses that it has elicited, might come to match the strength and persistence of its official condemnation within the policy statements and practice guidelines that are regularly issued by EU and UN institutions.

The Changing Law of the Employment Relationship: Comparative Analyses in the European Context

By Nicola Countouris, Aldershot: Ashgate Publishing, 2007. 251 pp.
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Outsiders looking at the field of labour law are likely to be perplexed by the fact that so much writing in the field focuses on the *scope* of labour regulations. One could have expected such a fundamental issue to be more or less resolved after so many years of academic struggling. Yet it appears to be the fate of the field that the question of its very application remains central in academic debates – indeed probably the single most important and debated question of labour law – and it is likely to remain so, perhaps perpetually. This new book by Nicola Countouris from the University of Reading is a useful and important contribution to the already rich literature on this topic.

Countouris starts from the common premise that there is sometimes misaligning between the group of people in need of labour laws' protection and the actual group of people that labour laws (as legislated and interpreted) cover. Sometimes this mismatch is the result of changes in employment practices based on external business reasons. Other times the exclusion of some

workers from the scope of protection results from direct evasion attempts by employers, i.e. changes in employment practices (or even just changes in titles or legal forms) designed specifically to escape employer responsibilities. Either way, the law must respond by clarifying who exactly should be covered by labour laws.

The book distinguishes between two major lines of legal response. The first is to redefine the boundaries of employment relations. Labour laws have traditionally applied to 'employees' (as opposed to self-employed independent contractors) in their relationship vis-à-vis 'employers', so exclusion of workers in need of protection could be attacked by clarifying or changing the definitions and tests used to identify an 'employee' or an 'employer'. Another option along the same lines is to add a third (intermediate) category between employees and independent contractors and provide partial protection for this group. The second line of response is based on targeted protection for workers who have been excluded to one extent or another, i.e. adding specific regulations to address the rights of groups such as part-time, fixed-term or Temporary Employment Agency (TEA) workers. This last approach can be used either to provide full protection (similar to 'traditional' employees) for such workers, or alternatively to legitimise their inferior status – or any other solution in between.

The book provides a comprehensive review and analysis of developments on both fronts, in four countries (the United Kingdom, Germany, France and Italy) as well as the International and European levels (the International Labour Organization conventions and the European Community laws, respectively). Countouris is well aware of the difficulty with such a comparative analysis, citing warnings by Kahn-Freud and Lord Wedderburn, among others, that it is useless, and even misleading, to compare laws of different countries without a deep understanding of the social, political and industrial relations context (pp. 10–11). Nonetheless, this appears to be the rare case in which an author is sufficiently familiar with four different legal systems (and capable of citing materials in four different languages) to avoid the risks of comparative analysis. Moreover, notwithstanding the necessary caveats, the particular topic of the scope of labour law is especially inviting for comparative research, given the fact that the economic incentives *causing* the mismatch between those protected and those in need of protection are very similar everywhere.

Because the root causes of the problem are similar, solutions could also be similar (subject to adjustments that might be required by the differences in background rules and legal traditions). Thus, for example, the review of judicial efforts on the Continent to broaden the definition of 'employee' and make it more inclusive (Chapter 2) is a useful lesson to courts in the United Kingdom who have been much less creative in this respect. The response to the growing phenomenon of indirect employment – in particular employment for lengthy periods through TEAs (Chapter 3) – is yet another example for the potential usefulness of comparative insights (here too, the United Kingdom legislature and courts fared much worse than their Continental counterparts). In both cases, there is no fundamental reason that prevents British legislators or judges from adopting similar solutions. Exposing them to this possibility may not be enough, but it is certainly an important step.

Yet how do we know that the more inclusive approach is better? How do we go about deciding what *should* be the scope of labour law? A good starting point is the understanding that there is a complex relation between *factual* and *legal* employment relationships, which Countouris acknowledges (p. 2). While he does not fully develop this issue – focusing explicitly only on the *legal* dimension – the basic distinction is far from trivial and has certainly caused confusion. To explain this confusion it is useful to go back to the common premise with which we started. Assume that E asks W to perform work for her in return for remuneration. As a factual matter, the relationship between E and W has certain characteristics, in terms of duration, continuity, exclusivity, investment in tools, the level of autonomy or control and so on. As a legal matter, a legal system could maintain that given those characteristics (or others) – we can call them C1, C2, C3 etc. – the relationship between E and W is an employment relationship, and as a result, E must abide by labour laws' requirements in her relationship vis-à-vis W.

But things could then change, in two main ways. First, E might decide that the business will benefit from diversifying and using other workers, or from organising the work differently, thus changing the characteristics of the relationship which the previous decision relied upon. It may be that the new characteristics of the relationship are, for example, C3, C4 and C5. In this case, the *factual* relationship has changed, and the question is whether the new characteristics of the relationship fall within the scope of labour law or not. Second, E might try to save the cost of labour laws by changing the *appearance* of the relationship. For example, she might require W to sign a contract determining that he is an independent contractor, that he controls his own work and can come and go as he pleases – even if this is not truly the case. In such a

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scenario, the factual relationship has not changed (except for some contractual terms that are not followed). So there is no reason to change the *legal* view of the relationship either. Nonetheless, it is often difficult to determine whether the change has been real or merely an appearance (i.e. a sham arrangement).

This brief analysis reveals the two main challenges, in my view, for legal scholars struggling to clarify the scope of labour law. First, given the changes in employment practices – real factual changes in the characteristics of employment – it is crucial to consider which characteristics justify and require the application of labour law. In other words, the question is which set of Cs (C1, C2, C3, etc.) puts workers in need of protection and should accordingly trigger the application of labour laws. This is necessarily a *purposive* exercise – we have to understand the goals of labour laws in order to ascertain the characteristics that should trigger their application. Second, given the changes (in other cases) in the appearance of the relationship – the popularity of sham arrangements that do not change the real characteristics of employment – it is crucial to come up with methods to detect and prevent such evasion attempts. Or, more generally, we need to find tools that will allow us to detect the *real* Cs that characterise a given relationship, as opposed to those Cs that appear merely on paper.

With this framework in mind, it is difficult to accept the calls for dismantling the legal distinction between 'employees' and 'independent contractors' (see, e.g., Fudge, 2006). There is obviously a *factual* difference between different forms of work organisation that could justify differential treatment. For example, having control over one's working time and business decisions, the ability to spread risks and so on – we can call those characteristics C6, C7 and C8 – puts one in a very different position vis-à-vis the one inviting and using the work. There is no justification for applying labour laws in such cases. Of course, there are likely to be cases that fall somewhere in the middle – for instance, a relationship with some characteristics of employment (C1, C2) and some characteristics of self-employment (C7, C8). For these cases an intermediate category becomes useful. If, for example, C1 and C2 could justify the ability to bargain collectively and strike, but C7 and C8 suggest that there is no reason to apply the Minimum Wage Act – or vice versa – an intermediate category could be used to determine that relationships characterised by C1 and C2 should trigger the application of certain specific labour laws but not others. Furthermore, it is entirely possible that some laws which are currently considered part of labour law should in fact be extended and apply to independent contractors as well, or even to some other broader group (pp. 81–83; and see Supiot, 2001; Freedland, 2006; Arup & Mitchell, 2006). But this does not change the fact that a group of regulations that can conveniently be termed labour law should apply to a group of workers characterised by certain Cs that can conveniently be called 'employees' (Davidov, 2006).

To be sure, there is plenty of room for discussion and disagreement *within* this basic structure. Personally I consider democratic deficits (subordination in a broad sense) and dependency on the specific relationship (economically and for social–psychological needs) to be the main Cs that justify labour law's protection – with other Cs useful to identify these basic vulnerabilities (Davidov, 2002). Others may have different views.

Countouris does not deal directly with the questions of what Cs should justify the application of labour laws (or part of them) or what methods could be used to distinguish between real and sham Cs. He does, however, provide a very useful, thorough and timely account of developments and debates revolving around these issues. The biggest strength of the book lies in its analytic approach to this review. It was already noted that the book separates between the approach of broadening the definitions of 'employer' or 'employee' to cover more workers, and legislation to protect (to one extent or another) atypical workers separately. Consider the first route for example. Countouris goes on to distinguish between 'qualitative' and 'quantitative' exclusion – the first based on the appearance of independence and the second on lack of sufficient continuity (p. 59); then focusing on *qualitative* exclusion he distinguishes between judicial intervention and statutory intervention (p. 60); then when focusing on *statutory* intervention (for example) he lists three types of interventions used by the different legal systems he surveys (pp. 63–68). Later, when dealing with regulation of 'atypical' work relations, he makes a distinction between five phases of legislation (p. 142): prohibition, conversion, encouragement/discouragement, normalisation with parity and normalisation without parity – phases which in turn have led to typification, tolerance, stabilisation, promotion and acceptance of atypical work. And so on – the book is filled with these analytic, systematic distinctions that help explain the wealth of often-disordered developments in this field.

So far I have concentrated mainly on the *first* line of response to the problem of the changing nature of the employment relationship. But it is the inclusion of the *second* line as part of this project which is perhaps

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the main conceptual contribution of the book. Debates on the issue of part-time or fixed-term workers are usually conducted separately from debates on the scope of labour law. Part-time workers, for example, are undoubtedly 'employees', so the issue of the application of labour law does not arise directly. Nonetheless, working part-time causes at least *some* exclusion from labour entitlements for various reasons, so Countouris is right to consider this part of the same problem. Regulations intended to provide equal treatment for part-time workers do not bring them into the scope of labour law – they are already included – but they certainly try to bring them into the *full scope* of labour rights and entitlements.

The focus on particular groups of workers who have been partially excluded is becoming increasingly important in recent years (even if, usually, not within the scope of labour law debates). The book pays much attention to part-time, fixed-term and TEA workers, but there are also other and more specific groups that have recently been the target of concern and even regulation. In the United States, for example, special attention has been given to workers in the apparel industry, who often work in sweatshop conditions. Innovative solutions that have been used to protect these workers include a combination of public and private pressure on the *clients* buying the products (rather than the direct employers) (Weil & Mallo, 2007). This has been done by targeting enforcement efforts to the specific sector, but also by new legislation aimed particularly at garment manufacturers (see the California Labor Code, as amended in 2000, section 2673.1). In Israel, to give another example, recent discussions focus on the plight of cleaning and security workers, who commonly encounter non-compliance with labour laws, and lack effective access to collective bargaining (Davidov, 2005). A Bill recently proposed by the government places responsibility in some circumstances on the clients towards workers in these particular sectors, in an effort to curb incentives for such abuse. In the United Kingdom as well, there is recently focus on 'vulnerable workers' and an attempt to identify specific groups that require regulatory intervention or unique enforcement strategies (see BERR, 2008).

The quest for defining the scope of labour law and ensuring protection for all those in need of protection is never-ending. This should probably not surprise us, given the economic incentives for (short-sighted) employers to evade labour laws. But we should not be deterred either. The new book by Nicola Countouris is yet another important step in that bumpy road.

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