

Submission on ‘Work in Prison in the UK’: Call for Input on Contemporary Forms of Slavery as Affecting Currently and Formerly Incarcerated People

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Executive Summary

Working prisoners in the United Kingdom can be employed by the state or private entities, either in prison or outside prison. Work can be seen as a positive element of incarceration. However, incarcerated individuals are excluded from labour rights, either through explicit exclusions in legislation or because they are not viewed as working under an employment contract. As a result, incarcerated people work for extremely low wages (far below the UK minimum wage) and without protection of other labour rights that other workers have. This creates ‘structures of exploitation’ of imprisoned individuals, while the authorities or private entities benefit from this situation. The law should change to protect the rights of working prisoners equally to other workers so that work is not experienced as punishment but as a route to resocialisation.

1. Introduction

As early as 1932, the International Labour Organisation said that:

wherever human labour is performed in conditions of subordination, dangers arise; and with prisons, these conditions and the resulting dangers are pushed to the extreme. As a rule, the work of prisoners is performed under compulsion. Thus a penalty involving the obligation to work may easily become the cause of social evils.¹

The UN Committee on Economic Social and Cultural Rights has found that work as a penal sentence is incompatible with the prohibition of forced labour.² The Council of Europe’s European Prison Rules also provide that ‘[p]rison work shall be approached as a positive element of the prison regime and shall never be used as a punishment’.³ Indeed, work in prison can be a source of income, recognition and self-esteem; it can provide opportunities to socialise with others, including people from outside prison; it can also help alleviate boredom and monotony while in prison. Skills and income earned through work can also help in the process of resocialisation after

¹ Cited in Gerard de Jonge, ‘Still “Slaves of the State”: Prison Labour and International Law’, in Dirk Van Zyl Smit and Frieder Dunkel (eds), *Prison Labour: Salvation or Slavery? International Perspectives*, (reissued by Routledge 2018, originally published in 1999) 313 at 323. On the ILO approach to prison labour, see Faina Milman-Sivan and Yair Sagy, ‘On the International Labour Organization and Prison Labour: An Invitation to Recalibrate’ (2020) 159 *International Labour Review* 505.

² See CESCR, Concluding observations on the third periodic report of Japan, adopted by the Committee at its fiftieth session (29 April-17 May 2013), para 14: ‘The Committee notes with concern that the State party’s Penal Code provides for imprisonment with assigned work as one of the penal sentences, in breach of the Covenant’s prohibition of forced labour (art. 6). The Committee calls on the State party to abolish forced labour either as a corrective measure or as a penal sentence, and amend or repeal relevant provisions in line with its obligation under article 6 of the Covenant. The Committee also encourages the State party to consider ratifying International Labour Organization (ILO) Convention No. 105 (1957) concerning the Abolition of Forced Labour’. I am grateful to Shinya Ito for bringing this to my attention.

³ Council of Europe, European Prison Rules, article 26.1.

prison. However, in many legal orders in Europe and elsewhere working prisoners are excluded from labour rights.⁴

2. Work in prison in the UK

In the United Kingdom work is not part of incarcerated people's sentence. However, prisoners often work for the state or private entities, while being excluded from labour rights, such as the right to a minimum wage, which other workers have under the UK National Minimum Wage Act 1998. As a result, individuals who work while incarcerated find themselves in 'structures of exploitation', from which state authorities and private entities benefit.⁵

Work within prison

There are different types of work within prison, and work opportunities also vary from one prison to another. Working prisoners are not viewed as working under a contract of employment, and are excluded from many legal protections that are grounded on the contract of employment.⁶ For instance, looking at the question whether the Factories Act 1937, which applies to those working in factories, also applies to prisons, it was ruled in *Pullin* that this is not the case:

for the Factory Act to apply there must be found to exist [...] the relationship of master and servant and employment for wages. There is no employment for wages in the case of prisoners. Prisons are put under the control of the Secretary of State, who exercises his control through the Prison Commissioners, and through visiting magistrates who visit the prisons to see that the provisions of the Prison Act 1952, are being carried out.

The Health and Safety at Work Act 1974 provides that the employer has duties also towards those who are not employees (section 3), which suggests that the employment status of prisoners does not make a difference to the health and safety duties that are owed to them by the employer. However, section 52 requires a contract. Moreover, many of the detailed regulations, such as the Manual Handling Operations Regulations (1992), are restricted to employees with contracts. This suggests that the question whether there is a contract is crucial.

Many other labour rights are dependent on employment status in UK law. The employment status of working prisoners was discussed in the UK Supreme Court decision *Cox v Ministry of Justice*,⁷ where a working prisoner in the prison kitchen accidentally injured the catering manager. The question was whether the prison service was vicariously liable for the act of the working prisoner. In the Court's judgment it was pointed that the relationship of the working prisoner and the prison authorities differs from an employment relationship: prisoners do not work on the basis of contract, but because they have been sentenced to imprisonment, and are only paid nominally. However, these features 'rendered the relationship if anything closer than one of employment: it was founded not on mutuality but on compulsion'.⁸ The Supreme Court concluded that the prison service was vicariously liable because those working in prison kitchens are integrated into the operation of the prison as their activities are essential for the running of the prison, they work in

⁴ See special issue forthcoming in the *European Labour Law Journal* in 2024 (V Mantouvalou ed of special issue), which covers several European legal orders, illustrating the extent of the challenge.

⁵ Virginia Mantouvalou, *Structural Injustice and Workers' Rights* (OUP, 2023) Chapter 4. It has been suggested that working prisoners can be deployed to address post-Covid and post-Brexit labour shortages. For discussion, see Virginia Mantouvalou, 'Human Rights for Working Prisoners', UK Labour Law Blog, 8 September 2021.

⁶ *Pullin v Prison Commissioners* [1957] 1 W.L.R. 1186; *Keatings v Secretary of State for Scotland* 1961 S.L.T. (Sh. Ct.) 63 (1961).

⁷ *Cox v Ministry of Justice* [2016] UKSC 10.

⁸ *Ibid*, para 14; see also para 35.

circumstances where they may commit negligent acts, and they work under the direction of staff of prisons.⁹ The principle of *Cox* that the relationship between the prison authorities and working prisoners is even closer than an employment relation because they are compelled to work makes us question whether it is legitimate to exclude them from basic labour protections.

Prisoners are explicitly excluded from minimum wage for the work that they do in prison. The legal framework applicable to all pay for work within prisons is as follows. Section 47 of the Prison Act 1952 provides that the Secretary of State may ‘make rules for the regulation and management of prisons... and for the... employment ... of persons required to be detained’. The National Minimum Wage Act 1998 explicitly excludes working prisoners by providing that a ‘prisoner does not qualify for the minimum wage in respect of any work which he does in pursuance of prison rules’. The Prison Rules 1999 state that ‘[a] convicted prisoner shall be required to do useful work for not more than 10 hours a day’ (31.1), and that ‘prisoners may be paid for their work at rates approved by the Secretary of State’ (31.6). For this work within prisons, pay is regulated through Prison Service Order 4460. The Order explains that setting and administering the pay of prisoners is a responsibility of the Governors of prisons. This work includes things such as cleaning or cooking in prison facilities but also work in prison workshops that are located outside prison cells but within prison walls. It is prisoners who are more trusted who do the cleaning and cooking. All work performed in prison has to be paid at least at the minimum weekly rate, which is £4 a week according to PSO 4460, Annex B. Moreover, under section 2.5.1 of the PSO 4460, there can also be piecework schemes, whereby prisoners are paid according to the quality and quantity of items produced. In this case, prisoners may be paid even below the prison employed rate. With respect to the UK Working Time Regulations, these do not explicitly exclude working prisoners but the regulations do not apply in prison for there is no contract of employment between employers and prisoners.

In a Report that was published by the Howard League for Penal Reform in 2011, it was documented that the average pay for prison service work is £9.60 per week, which was described as derisory,¹⁰ while it has also been reported that some prisoners work up to 60 hours per week.¹¹ A freedom of information request revealed that in 2022 prisoners earn 50p per hour for work in prison workshops (when the minimum wage was £9.50 per hour).¹² Work in prison workshops can be either for the state or for private employers that send work to prisons.¹³

Work outside prison

Prisoners may also be working outside prison, for instance when they are in open prisons or on release on temporary licence (also known as ROTL). Work outside prison is not directed by prison rules, and is therefore not excluded from the national minimum wage. Prisoners do not receive the minimum wage for the work that they do outside prison either. This is because of the Prisoners’ Earnings Act 1996, which applies when a prisoner is paid for ‘enhanced wages work’ and the person’s weekly earnings exceed a prescribed amount. Enhanced wages work is work that is not directed in accordance with prison rules. In this case, the prison authorities may make deductions

⁹ Ibid, para 32.

¹⁰ The Howard League for Penal Reform, ‘Business Behind Bars’, available at https://howardleague.org/wp-content/uploads/2016/05/Business_behind_bars.pdf

¹¹ Arianna Silvestri, ‘Prison Conditions in the UK’, European Prison Observatory, available at <https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Prison%20conditions%20in%20the%20UK.pdf>

¹² ‘Pay Prisoners National Minimum Wages, says Union Leader’, *Inside Time*, available at <https://insidetime.org/pay-prisoners-national-minimum-wage-says-union-leader/>

¹³ For example, DHL employ a lot of people in prisons. Some employers offer positive examples, employing ex-offenders too, such as Timpson. Others less so.

from their pay – this is discretionary. PSI 76/2011 involves work only done outside prison for outside employers (1.4). This means that it applies to open prisons or to work done regularly outside prison by those who are in prison (1.11). On this pay, authorities can impose a levy (of up to 40%) on any income above £20 net pay per week. Net pay means in this instance pay after deductions for tax, national insurance, payments that are required to be made after court order, or following a maintenance assessment under the Child Support Act 1991. The amount of this levy is used to support, *inter alia*, voluntary organisations on victim support and crime prevention.

Working prisoners cannot earn an income that will contribute towards their own needs while in prison, the support of their dependents outside prison, or rebuilding their own life after prison. Because of working conditions for incarcerated individuals, it has been suggested that those who have worked in this context ‘come to expect – and sometimes embrace – low-wage precarious work outside prison’.¹⁴

3. Concluding Remarks

The legal framework on work of incarcerated individuals can be associated with violations of human rights law, including the prohibition of forced and compulsory labour.¹⁵ Imprisonment is still accepted as a normal sentence.¹⁶ With increasing levels of incarceration and prisons’ overcrowding in the UK, prison conditions are set to deteriorate, which is highly concerning and problematic.¹⁷ Against this background, work in prison should be constituted by law as a positive element of incarceration: exclusions from labour rights while in prison should no longer be viewed as normal. In the context of discussions on whether prisoners could be employed to help address labour shortages, Frances Crook, formerly Chief Executive of the Howard League for Penal Reform, explained that prisoners can work for private companies and that this can be valuable for them and for society at large. But for prison work to be fair, radical change is needed: prisoners have to earn real wages, have workers’ rights, and pay tax and social insurance contributions.¹⁸ Legal change in the UK framework is essential and long overdue if prison labour is to serve purposes of resocialisation rather than creating structures of exploitation.

¹⁴ Erin Hatton, ‘Introduction’ in Erin Hatton (ed), *Labor and Punishment – Work in and out of Prison* (University of California Press, 2021) 1 at 6.

¹⁵ See further, Mantouvalou, *Structural Injustice and Workers’ Rights*, above n 5, pp 135-140.

¹⁶ There is literature that suggests that prisons should be abolished. A classic account is Angela Y Davis, *Are Prisons Obsolete?*, (Seven Stories Press, 2003).

¹⁷ See Cat Jones and Clare Lally, ‘Prison Population Growth: Drivers, Implications and Policy Considerations’, Parliamentary Office of Science and Technology, Brief 58, January 2024.

¹⁸ Frances Crook, ‘If Prisoners Are to Help with the UK’s Labour Shortages, they Must not Be Exploited’, *The Guardian*, 26 August 2021. See also *Inside Time*, above n 12.