

Korvinus, A.G. e.a. (2006). Mensenhandel: de achtergronden en omtrekken van het begrip uitbuiting in art. 273a Sr. *Trema*, 29(7), 286-290.

## **Trafficking in Human Beings: The concept of exploitation in the Dutch trafficking provision<sup>1</sup>**

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*Trafficking in human beings (THB) is regarded both in the Netherlands and internationally as a serious crime and a violation of the victim's human rights. Combating THB must be given the highest priority. However, which activities exactly should be combated then? The new provision on THB in the Dutch Criminal Code which entered into force on 1 January 2005<sup>3</sup> has led to a considerable broadening of the behaviour that can be regarded as THB. Yet, the legislator has not defined precisely enough the legal terms that appear in the broadened article of the Criminal Code, leaving it to those who implement the provision in practice to draw the line. As a result, the new provision on THB cannot automatically stand the test of the 'lex certa' criterion. For the area of exploitation in other sectors than the sex industry, it contains undesirable loose ends. This article by the Bureau of the Dutch Rapporteur on THB sets out markers for a more precise definition.<sup>4</sup>*

### *Introduction*

On 1 January 2005, the new criminal provision on trafficking in human beings (THB) entered into force. It encompasses legislation for the implementation of international regulations and to a large extent it follows the wording of the Palermo Protocol<sup>5</sup> and the EU Council Framework Decision on combating trafficking in human beings.<sup>6</sup> It is also partly modelled after the old Article 250a of the Criminal Code.<sup>7</sup> In addition to conduct already criminalised as an offence under Article 250a, exploitation in other work or services (hereinafter referred to as 'other forms of exploitation') and the forced removal of human organs come within the reach of the new trafficking provision. The result is a broad and complex provision that needs to be translated into practice in more concrete terms.

This particularly applies to the central term of exploitation. Exploitation is the ultimate aim of the acts which, in relation to adults in combination with certain means of coercion,<sup>8</sup> are a

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<sup>1</sup> This is a translation (of 8 January 2007) of 'Mensenhandel: het begrip uitbuiting in art. 273a Sr.', published in a magazine for the Dutch judiciary in September 2006, *Trema – Nr. 7*, pp. 286-290.

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<sup>3</sup> The provision was introduced as section 273a, but renumbered as section 273f of the Criminal Code as of 1 September 2006. As regards the content of the provision, no changes were introduced. The text of the provision as it reads today is annexed to this paper.

<sup>4</sup> This paper is an elaboration of the results of an expert meeting on the scope of the Dutch THB provision, which the Bureau of the Dutch Rapporteur on THB organised on 1 December 2005.

<sup>5</sup> Protocol to prevent, suppress and punish trafficking in persons, especially women and children (New York, 15 November 2000). This protocol supplements the United Nations Convention against transnational organized crime, also signed on this date.

<sup>6</sup> Council Framework Decision of the European Union on combating trafficking in human beings, 19 July 2002, OJ L203 (01.08.2002).

<sup>7</sup> According to article 250a of the Criminal Code, sexual exploitation and prohibited forms of running a prostitution business were criminal offences.

<sup>8</sup> Means of coercion summarised in article 273f paragraph 1 sub 1 of the Criminal Code: coercion, force or other act of violence or through the threat of force or other act of violence, extortion, fraud, deception or through the abuse of authority arising from actual circumstances, the abuse of a vulnerable position or by giving or receiving payments or benefits in order to obtain the consent of a person who has power over another person.

Korvinus, A.G. e.a. (2006). Mensenhandel: de achtergronden en omtrekken van het begrip uitbuiting in art. 273a Sr. *Trema*, 29(7), 286-290.

criminal offence under Article 273f paragraph 1 sub 1.<sup>9</sup> In the Explanatory Memorandum to the provision,<sup>10</sup> the legislator has left it to the courts to further define 'other forms of exploitation'. Hence, it is not sufficiently clear in advance what abuses in labour situations can be qualified as exploitation within the meaning of THB. The aim of this paper is to contribute to a further clarification of the term exploitation.

### *Serious offence*

Trafficking in human beings is a serious offence. The Explanatory Memorandum states that Article 273f deals with excesses and forms of modern slavery. The fact that the provision is not intended for less serious offences can be deduced from its inclusion under Title XVIII of the Criminal Code: Offences against personal freedom, immediately preceding the provision on slave trade, as well as from the heavy penalty of up to maximum six years imprisonment for 'plain' trafficking in human beings, rising to fifteen years under aggravating circumstances.

The wording in various subsections of Article 273f paragraph 1, however, gives a potentially considerable range to the article. As a result, from a purely linguistic point of view, behaviour of various grades of severity can be brought within the scope of the provision. Subsections 4 and 6 in particular expand the scope. For example, according to paragraph 1 sub 4, THB could already be said to occur when a person 'induces' another person, by means of 'deception', to make himself available for performing work or services. Subsection 6 places the bar even lower: for example, the informed consumer buying a product produced elsewhere in the world under exploitative conditions, may be guilty of the offence of THB. An informed buyer of a cheap, hand-knotted Persian rug or a delicious chocolate bar manufactured from cocoa harvested by children may be a profiteer and a trafficker within the meaning of this subsection.

### *Teleological approach*

Although the bar for applying Article 273f of the Criminal Code is thus set very low if a literal interpretation is taken, in view of the underlying convention and the context of organised crime in which THB is placed nationally and internationally, the provision and the penalty that the offence carries should only be used for excesses. Not every abuse in relation to work or services should be categorised as THB. Limiting the scope of application is justified from a teleological approach in combination with the human rights perspective. In terms of legislative history, the importance of protecting fundamental human rights is paramount to the interpretation of Article 273f. For the non-exhaustive account of exploitation in paragraph 2 is largely<sup>11</sup> based on Article 3(a) of the Palermo Protocol and Article 1 paragraph 1 sub c of the EU Framework Decision, which in turn derive terms from *inter alia* Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950. The latter article obliges Contracting States to provide effective protection against slavery, servitude and forced or compulsory labour and refers to the prohibition on slave trade, slavery and bondage in Article 4 of the Universal Declaration of Human Rights (10 December 1948). Furthermore, both the international documents which underlie the amendment of the Dutch trafficking provision state that the protection of human rights is central in combating THB. A teleological

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<sup>9</sup> Contrary to the text of the Palermo Protocol, Article 273f of the Dutch Criminal Code qualifies the forced removal of organs not as exploitation, but as a separate aim of THB.

<sup>10</sup> Lower House 2003-2004, 29 291 no. 3.

<sup>11</sup> It does not, however, correspond exactly with the definition in the Palermo Protocol or the Framework Decision which also differ on some details.

Korvinus, A.G. e.a. (2006). Mensenhandel: de achtergronden en omtrekken van het begrip uitbuiting in art. 273a Sr. *Trema*, 29(7), 286-290.

interpretation (true to source) therefore leads to the conclusion that the protection of the human rights of individual victims must play a crucial role in combating THB. It is in fact the human rights approach that sets the limits to the scope of the definition of THB; labour situations deemed socially undesirable only then constitute exploitation within the meaning of the trafficking provision if they cause a violation of fundamental rights, such as human dignity, physical integrity or personal freedom of the individual concerned. Against reprehensible circumstances that do not constitute exploitation in this sense other sanctions under criminal labour or administrative labour must be used. In that case, the protection of the interests harmed does not justify the application of the severe THB article.

*The concept of exploitation in Article 273f of the Dutch criminal code*

Exploitation is the central element in the crime of THB. After all, according to the Explanatory Memorandum, 'trafficking in human beings is (aimed at) exploitation.' Yet, other than a non-exhaustive summary of practices that exploitation at least comprises (paragraph 2), neither Article 273f nor the Explanatory Memorandum contains a description of what exploitation should be taken to mean in concrete terms. Because of the potentially broad applicability of the provision on the one hand and **the (international) context in which THB is discussed** on the other hand, further specification of this term is needed.

Exploitation is commonly<sup>12</sup> described as 'the attempt to obtain as much gain as possible', 'to abuse' and, specifically in relation to a person, 'to put [a person] to work under unfavourable conditions in order to gain as much profit as possible'. This can be summarised as excessively taking advantage of another person.

Within the meaning of the THB article, exploitation must be related to a situation of work or services. As argued, there must also be an excess (i.e. a violation of fundamental human rights). Article 273f paragraph 2 gives a non-exhaustive summary of what such exploitation can be taken to mean: exploitation of another in prostitution, other forms of sexual exploitation, forced or compulsory labour or services, slavery and practices comparable to slavery or servitude. As stated, this is listing situations that the legislator typifies as exploitation, rather than providing a clearly defined, substantial criterion.

In relation to the sex industry, the legislator and the Supreme Court identify a situation of exploitation when the person involved is in a situation inferior to the circumstances in which an articulate prostitute would normally operate in the Netherlands.<sup>13</sup> Due to the nature of the work, forced work in the sex industry quickly becomes exploitation, since the physical integrity is by definition at stake. The same applies to the forced removal of organs. For exploitation in other sectors than the sex industry, a similar criterion (the situation in which an articulate worker normally operates) may be useful as a starting or reference point, but a more stringent standard is nevertheless more appropriate. In these cases it is usually not the nature of the work that is decisive in relation to the key question whether fundamental human rights are being violated when the (labour) conditions deviate from the normal situation. The seriousness of the deviating circumstances, the route leading towards them and the effect on the person concerned are then above all the factors determining whether or not exploitation is involved. After all, not every circumstance that is unacceptable to an articulate Dutch worker will immediately constitute a violation of human rights.

What precisely the lower limit should be for other forms of exploitation is unclear. An unambiguous description of an excess in the area of work or services cannot be given.

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<sup>12</sup> Definitions from the Van Dale Dictionary of the Dutch Language, *Van Dale groot woordenboek der Nederlandse taal* (Utrecht/Antwerp, 1999).

<sup>13</sup> e.g. Supreme Court 5 February 2002, which refers to the Explanatory Memorandum to the (old) Article 250ter of the Criminal Code.

Korvinus, A.G. e.a. (2006). Mensenhandel: de achtergronden en omtrekken van het begrip uitbuiting in art. 273a Sr. *Trema*, 29(7), 286-290.

Whether or not a situation is excessive must be assessed on a case by case basis. **The determining factor at any rate** is the (inherent) violation of fundamental human rights. In order for a situation to be categorised as excessive, either at least one obvious excess must be evident, such as living in the workplace under extremely poor conditions (e.g. the obligation to rent only a chair that one can sleep on in shifts), debt bondage or multiple dependency tying the victim to the person putting him/her to work, or an accumulation of less serious abuses.<sup>14</sup> In the latter case, where elements are ‘stacked up’,<sup>15</sup> each of the individual abuses could perhaps be dealt with under employment law, but the excess lies in the combination and accumulation of such elements. Factors such as the seriousness, the duration, the extent and the economic benefit gained by the perpetrator also play a role here.

The single or composite excess must in principle be viewed objectively; circumstances are excessive if they are unacceptable in Dutch society and legal order, i.e. according to the prevailing standards in the Netherlands. In objectifying this, fundamental human rights once again play a central role. To qualify a situation as exploitation, it is therefore not crucial whether the victim considers himself or herself to be exploited. However, the subjective perception of the victim can play a role when answering the question to what extent he or she could have escaped from the exploitative situation (see below).

#### *Exploitation within the meaning of THB*

When (the purpose of) exploitation is coupled with the use of a means of coercion, this constitutes trafficking in human beings within the meaning of Article 273a of the Criminal Code. The concept of exploitation must therefore be **interpreted/understood** separately from the demonstration of coercion. This follows *inter alia* from the fact that in the case of trafficking in minors no coercion is required, while (the purpose of) exploitation is (paragraph 1 sub 2). If the use of coercion were to constitute an element of exploitation, it would still implicitly be a requirement for trafficking in minors. With regard to adults, even a double requirement of coercion would then be introduced, as subsection 1 contains the condition of both (the purpose of) exploitation and the use of coercion. **This cannot be the objective.**

Exploitation does, however, imply a certain degree of involuntariness on the part of the person being exploited.<sup>16</sup> This involuntariness lies in the inability to escape from the exploitative situation.<sup>17</sup> In the case of measures that directly restrict a victim’s physical freedom (e.g. confinement or being kept under guard), escape is actually impossible. If, however, the victim is kept within the grasp of his or her exploiter by other means, escape may be possible practically speaking, but the subjective judgement of the victim that he/she cannot escape can form an obstacle after all. The facts and circumstances do however have to demonstrate that the victim could reasonably believe that he or she was not able to escape from the situation on his or her own. This could be due, for instance, to the (perceived) consequences of an escape or the actual living or working conditions of the victim. For example, the lack of freedom could result from a relationship of debt towards the person

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<sup>14</sup> One could think of underpayment, irregular payment, long working hours, obligation to work under a different identity, confiscation of one’s passport, the threat of dismissal if the activities demanded are not carried out, etc.

<sup>15</sup> In police circles this term is used to describe the method of linking up signals that together, though not necessarily each individually, (may) indicate the existence of an exploitative situation.

<sup>16</sup> It may be conceivable that a person voluntarily allows himself or herself to be exploited, but this cannot be considered the normal pattern. This is probably what the Explanatory Memorandum means with the comment “Typical of exploitation is the existence of coercion in the broadest sense, or abuse.”

<sup>17</sup> In addition, there is the use of one of the means of coercion, as a result of which a person finds himself/herself in an exploitative situation. That use of coercion can also prevent the exploited person from escaping from the situation.

Korvinus, A.G. e.a. (2006). Mensenhandel: de achtergronden en omtrekken van het begrip uitbuiting in art. 273a Sr. *Trema*, 29(7), 286-290.

providing the employment or a third party, the cultural context, the person being a minor or a combination of such factors. For this assessment, it is important to examine the body of facts in their totality.

Exploitation within the meaning of THB is therefore about gross abuses, whereby the victim's fundamental human rights are violated and he/she is or reasonably believes himself/herself to be seriously restricted in his/her freedom to escape from this situation.

#### *ECHR and the Siliadin case*

Whereas the wording of the trafficking provision and the Explanatory Memorandum provide few reference points for the interpretation of the term 'exploitation' or 'other forms of exploitation', the Dutch courts may, in their law-forming task to arrive at a clearly defined, distinguishing criterion, take note of the ruling of the European Court of Human Rights of 26 July 2005 in the case *Siliadin versus France*.<sup>18</sup> This is an interesting ruling because in it the Court observes for the first time a violation of Article 4 of the ECHR, in a case that is indisputably about 'another form of exploitation' within the meaning of THB, namely domestic slavery.

The ruling is unequivocal in that Contracting States have a positive obligation to protect their citizens concretely and effectively against violations of Article 4 of the ECHR, also in the relationships between citizens themselves (horizontal enforcement). The state is liable if it offers insufficient safeguards against such a violation, either in legislation or in its implementation. This positive obligation demands that each act that serves to hold a person in one of the situations referred to in Article 4 of the ECHR be punishable and – *de facto* – effectively repressed. France had not fulfilled this obligation in the case of the Togolese minor *Siliadin*, who was living and working illegally in France. The conditions and circumstances under which she lived with family B and was required to carry out household work led, in the Court's view, to a state of servitude, against which France had offered insufficient protection by failing to pursue an effective prosecution of the couple B.<sup>19</sup>

In relation to a better understanding of Article 273f of the Dutch Criminal Code, this ruling is particularly important because the European Court of Human Rights makes explicit the order among the practices prohibited under Article 4 of the ECHR, and in doing so weighs the particular circumstances of the case. As far as the interpretation of compulsory labour is concerned, for example, the Court follows the definition contained in Article 2 of the ILO Convention concerning Forced Labour.<sup>20</sup> In this convention, forced or compulsory labour or services is understood to mean all work or services exacted from any person under the menace of any penalty and for which the said person has not offered himself/herself available voluntarily. In *Siliadin versus France*, the Court holds that the menace of any penalty already exists when employers stimulated the fear of a minor, unaccompanied, illegal worker of being caught by the police. Thus, the menace of a penalty does not need to exist in a literal sense (ground 118).

The Court subsequently compares forced or compulsory labour or service with servitude. The latter presupposes a more severe denial of personal freedom. Although it does not constitute

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<sup>18</sup> Case of *Siliadin V. France*, ECHR 26 July 2005, application no. 73316/01. A note to this ruling by R.A. Lawson was published in *JV* 2005/425 (FORUM).

<sup>19</sup> At the time of the offences (1994-1998) France did not have a provision in its Criminal Code that made THB as such a punishable offence. The couple B was prosecuted for the violation of two criminal provisions about obtaining unpaid work from a person, by abusing his/her vulnerability and dependence, and subjecting a person, by abusing his/her vulnerability and dependence, to working and living conditions in violation of human dignity.

<sup>20</sup> ILO 1930, Convention (no. 29) Concerning Forced Labour. Ratified on 28 July 1930, entering into force on 1 May 1932.

Korvinus, A.G. e.a. (2006). Mensenhandel: de achtergronden en omtrekken van het begrip uitbuiting in art. 273a Sr. *Trema*, 29(7), 286-290.

any claim of ownership, servitude is equivalent to slavery in terms of its gravity. It refers, according to the Court in the Siliadin case, to the situation in which a person not only has to carry out work or provide services, but is also forced to live in the house or on the property of his/her 'holder' and is unable to change the situation. As is evident from the Court's judgement, this is also the case when a person in a vulnerable position is required to work seven days a week without pay, lives in poor accommodation at the workplace and has little freedom of movement.

Due to the detailed examination of the particulars of a concrete case in relation to the various elements of Article 4 of the ECHR, the Siliadin ruling can serve as a guideline for the Dutch courts which will undoubtedly have to deal with gross abuses in other sectors than the sex industry within the foreseeable future, and will therefore mark out further the boundaries of the unknown territory of 'other exploitation'.<sup>21</sup>

### *Conclusion*

The 'lex certa' principle states that the law must be formulated in such accurate terms that one can establish beforehand what judicial consequences certain acts will have. The question arises whether the new THB provision in the Criminal Code can indeed stand up to the test of the 'lex certa' criterion. Based on case law, the area of THB within the meaning of exploitation in the sex industry has been further clarified over the years. However, the penalty provision for the new category of 'other exploitation' does pose considerable questions for those applying the law. The Explanatory Memorandum explicitly states that the government prefers to wait and see how the trafficking provision will be applied in practice, therefore leaving it to the courts on this point. This is risky, also in the light of the European Court of Human Rights' ruling in the Siliadin case, since it can mean that the criminal code and its implementation do not *de facto* provide a victim with the protection prescribed in the ECHR.

We have argued that in relation to other sectors than the sex industry, the bar must not be set too low when defining THB within the meaning of Article 273f of the Criminal Code. The fact that only excessive (employment) situations should be qualified as exploitation, however, does not alter the fact that the police and judicial authorities, but also other partners involved in identifying and combating THB, are required to respond to even small indications of potential exploitation. After all, there may well be more to a particular situation than first meets the eye. A proper way of dealing with the problem therefore demands on the one hand a clear penalization that is workable in practice, and on the other hand that every relevant lead be examined and lead to prosecution if possible.<sup>22</sup> Only in this way can we realise the ideal that in combating THB, the main thing is the protection of (possible) victims.

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<sup>21</sup> Since publication of the original version of this article, the first verdict in a case of THB for other forms of exploitation in the Netherlands was given on 21 November 2006. Five suspects were convicted for forming a criminal organisation to illegally produce hemp, but they were acquitted on the charge of THB. Although the court found that they had, by misuse of a position of vulnerability, put to work undocumented Bulgarian migrants in a criminal setting, it ruled that the labour situation did not constitute exploitation. Important factors for the court were the absence of multiple dependency of the workers on the suspects, the fact that the work was occasional and the underpayment not excessive.

<sup>22</sup> In this sense too, the Instructions for THB of the Board of Procurators General dated 6 March 2006 entered into force on 1 April 2006.

Korvinus, A.G. e.a. (2006). Mensenhandel: de achtergronden en omtrekken van het begrip uitbuiting in art. 273a Sr. *Trema*, 29(7), 286-290.

### **Section 273f of the Dutch criminal code**

1. Any person who:

- (a) by force, violence or other act, by the threat of violence or other act, by extortion, fraud, deception or the misuse of authority arising from the actual state of affairs, by the misuse of a vulnerable position or by giving or receiving remuneration or benefits in order to obtain the consent of a person who has control over this other person recruits, transports, moves, accommodates or shelters another person, with the intention of exploiting this other person or removing his or her organs;
  - (b) recruits, transports, moves, accommodates or shelters a person with the intention of exploiting that other person or removing his or her organs, when that person has not yet reached the age of eighteen years;
  - (c) recruits, takes with him or abducts a person with the intention of inducing that person to make himself/herself available for performing sexual acts with or for a third party for remuneration in another country;
  - (d) forces or induces another person by the means referred to under (a) to make himself/herself available for performing work or services or making his/her organs available or takes any action in the circumstances referred to under (a) which he knows or may reasonably be expected to know will result in that other person making himself/herself available for performing labour or services or making his/her organs available;
  - (e) induces another person to make himself/herself available for performing sexual acts with or for a third party for remuneration or to make his/her organs available for remuneration or takes any action towards another person which he knows or may reasonably be expected to know that this will result in that other person making himself/herself available for performing these acts or making his/her organs available for remuneration, when that other person has not yet reached the age of eighteen years;
  - (f) wilfully profits from the exploitation of another person;
  - (g) wilfully profits from the removal of organs from another person, while he knows or may reasonably be expected to know that the organs of that person have been removed under the circumstances referred to under (a);
  - (h) wilfully profits from the sexual acts of another person with or for a third party for remuneration or the removal of that person's organs for remuneration, when this other person has not yet reached the age of eighteen years;
  - (i) forces or induces another person by the means referred to under (a) to provide him with the proceeds of that person's sexual acts with or for a third party or of the removal of that person's organs;
- shall be guilty of trafficking in human beings and as such liable to a term of imprisonment not exceeding six years and a fifth category fine\*, or either of these penalties:

2. Exploitation comprises at least the exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory labour or services, slavery, slavery like practices or servitude.

3. The following offences shall be punishable with a term of imprisonment not exceeding eight years and a fifth category fine\*, or either of these penalties:

- (a) offences as described in the first paragraph if they are committed by two or more persons acting in concert;
- (b) offences as described in the first paragraph if such offences are committed in respect of a person who is under the age of sixteen.

4. The offences as described in the first paragraph, committed by two or more persons acting in concert under the circumstance referred to in paragraph 3 under (b), shall be punishable with a term of imprisonment not exceeding ten years and a fifth category fine\*, or either of these penalties.

Korvinus, A.G. e.a. (2006). Mensenhandel: de achtergronden en omtrekken van het begrip uitbuiting in art. 273a Sr. *Trema*, 29(7), 286-290.

5. If one of the offences described in the first paragraph results in serious physical injury or threatens the life of another person, it shall be punishable with a term of imprisonment not exceeding twelve years and a fifth category fine, or either of these penalties.

6. If one of the offences referred to in the first paragraph results in death, it shall be punishable with a term of imprisonment not exceeding fifteen years and a fifth category fine\*, or either of these penalties.

7. Article 251 is applicable mutatis mutandis.