

Workers' Perspectives on State-Constructed Vulnerability to Labour Exploitation: Experiences of Migrant Fishers in Ireland

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Abstract

This article examines migrant workers' experiences of state-constructed vulnerability to labour exploitation, through the case study of non-European Economic Area (EEA) migrant fishers in Ireland. It draws on the findings of interviews with 24 migrant fishers, together with information obtained from public bodies and legal analysis. Building on the work of Mantouvalou, Zou, and others, we demonstrate that the Irish legal and policy framework – most importantly, immigration law – places migrant fishers in a position of 'hyper-dependency' and 'hyper-precarity' in their work relations. We outline how this state-constructed vulnerability to labour exploitation is experienced in practice through an in-depth account of the interviewees' experiences of working conditions; immigration status; and racism and discrimination at work. In particular, the interviews reveal the work permit scheme for non-EEA fishers to be a powerful structure of exploitation, within which workers have little bargaining power and protective employment mechanisms are rendered ineffective.

Keywords

migrant workers, workers' perspectives, employment law, immigration rules, labour exploitation, discrimination

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Introduction

Legal frameworks produce vulnerability to labour exploitation for precarious migrant workers through restrictive immigration rules and exclusions from employment and equality law (Anderson, 2010; Mantouvalou, 2015; Pavlou, 2021). However, there is a dearth of socio-legal literature incorporating workers' perspectives on this process. This article is premised on the idea that 'workers play a central role and have a voice in defining and achieving decent work' (Lozano et al. 2022). It explores the case study of non-European Economic Area (EEA) migrant fishers in Ireland, drawing on 24 qualitative interviews with fishers, together with information gathered through questionnaires to public bodies, as well as legal analysis. We present an in-depth account of the interviewees' experiences of working conditions; immigration status; discrimination at work; and employment law inspection and redress. The findings provide a concrete illustration of how legal frameworks produce vulnerability to labour exploitation for marginalised economic migrants who suffer multiple layers of disadvantage. The key contribution of the research is, therefore, to develop our understanding of how state-constructed vulnerability to labour exploitation is experienced in practice. The article also offers important insights into the design of solutions to the structural problems of labour exploitation of migrant workers, based on the lived experiences of migrants themselves.

Academic and policy studies have highlighted the global challenge of widespread and systemic poor labour practices in fishing, particularly in the case of migrant workers (Stringer et al., 2016; Jones et al., 2020). In some cases, these practices amount to forced labour and/or human trafficking for the purposes of labour exploitation (ILO, 2014). In Ireland, the spotlight has been on these issues since 2015, when *The Guardian* newspaper reported severe and widespread abuse of migrant workers within the Irish fishing industry (The Guardian, 2015). The reports prompted the immediate formation of a Government Task Force and ultimately the adoption of an 'Atypical Working Scheme for non-EEA crew in the Fishing Fleet', an immigration scheme which sought to formalise and regularise the workers' immigration and employment status. However, allegations of labour exploitation in the industry persist and the US Trafficking in Persons (TIP) country report for Ireland 2021 concludes: 'Undocumented workers in the fishing industry... are vulnerable to trafficking. Migrant workers from Egypt and the Philippines are vulnerable to forced labour on fishing vessels' (USDS, 2021: 305).

The article is structured in four parts. In Part 1, we outline the connections between labour exploitation, vulnerability and the law. The research methodology is briefly described in Part 2. Part 3 sets out the relevant Irish legal and policy context, explaining how the law operates to place both documented and undocumented migrant fishers in a position of 'hyper-dependence' and 'hyper-precarity' (Zou, 2015). Part 4 presents the findings of the interviews. We show that the participants' working conditions reflect a continuum of exploitation, from occasional minor violations of employment law to highly coercive work relationships. We suggest that the Irish immigration regime for non-EEA fishers (referred to as 'migrant workers' or 'migrant fishers' in this article) creates fertile conditions for such exploitation. We find that direct outreach by state inspection and regulatory bodies to vulnerable migrant workers is limited and inspection

practices do not always encompass best practice in terms of interpretation or worker privacy.

In the concluding section, we argue that the Atypical Working Scheme is a classic structure of exploitation which places workers in 'a position of oppressive subordination more extreme than the typical inequality and subordination that characterises the employment relation' (Mantouvalou, 2018, 197, see also Wolff, 2018). We find that the problem of the structural oppression of migrant fishers through immigration rules is compounded by the failure of existing protective regulatory mechanisms to counteract the effect on workers of their hyper-dependent and hyper-precarious position vis-a-vis the employer. Importantly, the workers themselves emphasise the role of immigration rules - as opposed to employment protections, for example - as both the key to understanding their vulnerability to exploitation and the potential route out of poor working conditions. Throughout the interviews, the participants consistently point to the role of the state in reforming working conditions in the sector, rather than centring on the responsibilities of individual employers. We argue that these workers' perspectives require us to refocus our conceptual attention away from the intricacies of individual work relationships and towards the role of the state in creating vulnerability to labour exploitation through law.

Labour Exploitation, Vulnerability, and the Law

Migrant workers' susceptibility to labour exploitation is the subject of a growing body of legal literature, which analyses the issue from a variety of perspectives, including criminal law (Rijken ed., 2010), labour law (Costello, 2015, Pavlou, 2018, 2021) and human rights (Stoyanova, 2017). For example, the intersecting vulnerabilities of migrant domestic workers - linked to gender, race and socio-economic status - have been well-documented, as has the role of immigration law and employment law in creating and perpetuating such vulnerability (Pavlou, 2021; Mantouvalou, 2015; Murphy, 2015). In common with migrant domestic workers and workers in other industries such as agriculture, those involved in sea fishing are susceptible to labour exploitation due to a host of factors, including language barriers; lack of awareness of rights; and difficulties with accessing legal advice and justice in cases of labour rights violations (FAO, 2016). It is notoriously difficult to devise and enforce effective employment regulations in the context of the fishing industry, which is informal, isolated, and hazardous (FAO, 2016: 127).

Scholars such as Costello (2015), Pavlou (2018), and Thiemann (2018), have argued in favour of a labour law approach which would address the full 'continuum of exploitation' (Skrivankova, 2010), from relatively minor breaches of employment law up to forced labour and human trafficking. However, it is also important to acknowledge what have been described as 'uncertainty in the protective capacities of labour law' (McCann and Fudge, 2019: 281, Deakin and Sarkar, 2008) and the varying capacity of labour law frameworks to generate protective outcomes (Lee and McCann, 2011: 3). Furthermore, as McCann and Murray (2014) have shown, the design of legal frameworks in novel fields and sites of regulation (i.e., in this case study, work in fishing) is complex and uncertain. While regulatory design in such fields 'should be dynamic, in the sense of

integrating processes of empirical testing and incremental reform' (McCann and Fudge, 2019: 282), it is rarely so sophisticated in practice, as clearly demonstrated in the context of migrant fishers in Ireland in Parts 3 and 4 of this article. In the wider European context, the consequences of adopting a blunt approach to these nuanced issues are highlighted in critiques of the European Union's approach to regulating 'atypical' work based on the principle of 'flexicurity' – the balancing of flexibility and security (Bell, 2012, Countouris, 2016).

On the specific issue of discrimination, there is a growing body of literature on the subject of racial discrimination in the Irish labour market (e.g., Turner, 2010, Joseph, 2020), and 'multiple sources of information demonstrate that ethnic minority groups are discriminated against in the Irish labour market' (McGinnity et al., 2021: 27). Migrants working in low-paid precarious sectors appear to face particular problems: a recent survey of meat sector workers revealed workplaces rife with threats, intimidation and discrimination (MRCI, 2020: 10). 62% of the 151 workers surveyed stated that they have felt discriminated against, with the majority citing nationality and race/ethnic background as the reason (MRCI, 2020: 10). In Part 4, we discuss the discriminatory treatment experienced by most of the migrant fishers interviewed for this study, most notably, racist verbal abuse and pay disparities.

State-Constructed Vulnerability to Exploitation and Workers' Perspectives

In this article, we use the idea of 'state-constructed vulnerability' to bring together these various strands and analyse the role of law in the context of labour exploitation of migrant fishers. For our purposes, 'state-constructed vulnerability' refers to the vulnerability to labour exploitation directly resulting from specific legal and policy tools of the state, and/or where the state *de facto* tolerates or refuses to intervene in exploitative situations in their economic and social systems (Magugliani, 2021). We adopt a broad understanding of labour exploitation, to encompass both 'severe exploitation' (i.e., labour exploitation addressed through criminal liability), and 'routine exploitation' (i.e., labour exploitation which would typically be addressed through civil, regulatory or labour law) (Davies, 2013). In contrast, much of the legal research to date has concentrated on the challenges posed by 'severe labour exploitation', often through a criminal law or a human rights lens (e.g., Rijken, 2010, Stoyanova, 2017).

In focussing on the 'special structural vulnerability' (Mantouvalou, 2018: 198) created by the legal system itself, we build on the work of Anderson (2010), Mantouvalou (2015, 2018, 2020), Fudge (2012, 2018), and Zou (2015) (among others), who have each explored how precarious migration statuses, developed by states in the context of hostile immigration environments, create vulnerability to exploitation. This conceptual approach is distinct from that of Fineman, for example, who emphasises the universal and constant nature of vulnerability as part of the human condition and rejects the idea that vulnerability at work is socially produced or created (Fineman, 2008, Fineman and Fineman, 2018: 1–11). In her seminal work in this field, Anderson (2010) observes that immigration law controls function as a 'mould', shaping certain types of workers into precarious workers – including through the selection of legal entrants, the enforcement of certain types of employment relations, and the creation of 'institutionalised uncertainty'.

Through this moulding process, she argues, migrant workers are placed in a position of precarity, their status and situation characterised by instability, lack of protection, insecurity, and social and economic vulnerability. Here, we examine these issues in the specific context of migrant fishers in Ireland and add another dimension to the analysis by showing how law and policy structure and institutionalise mechanisms of discrimination against migrant workers.

We use the twin concepts of ‘hyper-precarity’ and ‘hyper-dependency’ as analytical tools to break down the concept of state-constructed vulnerability. Zou builds on Anderson’s work to develop the concepts of ‘hyper-dependency’ – which refers to a particular tie of migrant workers to their employers as a requirement of their legal status – and ‘hyper-precarity’ – which concerns the tenuous nature of these workers’ entitlements to employment protection, social rights and a secure residence status (Zou, 2015). Existing research shows that migrant workers in hyper-precarious and hyper-dependent employment are ‘more willing to suffer in silence and endure exploitative practices’ (Djohari and White, 2022; Potter and Hamilton, 2014). Here, we explore the application of the concepts of hyper-dependence and hyper-precarity to the situation of migrant fishers in the Irish fishing fleet.

From a methodological point of view, we begin by examining the complex provisions of immigration law and employment law as they apply to migrant fishers in Ireland in Part 3 of the article. However, to complement this ‘top-down’ legal doctrinal analysis, we turn in Part 4 to the perspectives of the workers themselves to better understand how vulnerability is constructed by the state and experienced by workers. In developing a strategic approach to tackling labour exploitation, Fudge emphasises that ‘it is important to learn from local actors, especially affected workers and their representatives, who are familiar with local regulatory and institutional frameworks’ (Fudge, 2020). Likewise, Lozano et al., (2022: 104922) emphasise the ‘unique insights’ of fishers and fish workers on addressing decent work deficits in the industry, given their lived experience. It is important to highlight that the perspectives reported in this work, derived from the participants themselves, may not be representative of the experiences of all fishers in the Irish fishing fleet. As one participant put it, ‘there were some bosses that were very good and some that were bad’ (T3; see also T5, T11, T10, T17, T19, T21). Rather, in this article, we seek to provide a ‘ground-up’ (McCann and Fudge, 2019: 274), nuanced, understanding of the experiences of this cohort of workers.

Methodology

Our analysis draws on semi-structured interviews conducted with 24 male migrant workers in the Irish fishing industry. The participants were recruited by a staff member of the International Transport Workers Federation (ITF) and the duration of the interviews ranged from 34 to 76 min. An advantage of recruiting participants through the ITF was their facilitation of access to isolated and vulnerable workers who could not otherwise have been reached by the researchers, although a disadvantage of this approach was that random sampling methods could not be used. The vulnerability of the participants was a primary concern and the interviews were conducted in line with international best practice and as sensitively as possible. With this consideration in mind, the decision

was made to preclude interviews with employers to answer the claims made by their workers. The majority of the participants in our study spoke Arabic and had ‘limited knowledge of English, as it is not their first language’ (Almalik et al., 2010: 253). Competent professional interpreters who were ‘experienced in verbal translation’ and who, insofar as was possible, shared ‘a cultural background with the person being interviewed’ (Björk Brämberg and Dahlberg, 2013: 241) were employed.

Table 1. provides breakdown of the participants’ immigration statuses.

Although information pertaining to non-EEA fishers in the Irish fishing fleet overall is relatively limited, the available data, as of 14 July 2021, reveals that there was a total of 230 individuals holding valid letters of permission under the Atypical Working Scheme at the end of December 2019 (Parliamentary Question (PQ), 13 July 2021). Table 2 provides a break-down of nationalities of current holders of valid letters of permission.

There are no official estimates of the number of undocumented fishers currently working in the Irish fishing fleet. The ITF estimates, from their outreach activities, that there are at least 250 undocumented fishers in Ireland, with the key nationalities the same as those participating in the AWS.

In addition to the interviews, the research team distributed questionnaires to the Workplace Relations Commission, the Marine Survey Office of the Department of Transport, and the Department of Justice. Comprehensive information was provided by the WRC (WRC responses to questionnaire, 2021; WRC Queries Relating to Non-EEA Workers, 2021) and the MSO (MSO Queries Relating to Non-EEA Workers, 2021a & 2021b).

Hyper-Precarity and Hyper-Dependence in the Irish Legal and Policy Framework

In this section, we outline the relevant strands of the legal and policy framework in Ireland. These include the immigration rules enshrined in the AWS; questions of employment status and specific working time rules for fishers and the legal barriers to undocumented workers pursuing employment claims. The aim of the section is twofold: (i) to identify the main legal sources of vulnerability for migrant fishers ‘on paper’, and (ii) to provide context for the interview findings.

Table 1. Immigration statuses.

Immigration Status	Number of Participants
‘Stamp 4’ long-term residence permission	2
Atypical Working Scheme Permission	10
*Undocumented	8
Partly documented (‘Stamp 1’ temporary residence permission without accompanying AWS Permission)	4

*The undocumented workers were in a variety of situations: the majority (5) had been working with an AWS permission which was not renewed for various reasons, including dismissal and injury.

Table 2. Nationalities of permission holders.

Philippines	111
Egypt	48
Ghana	28
Indonesia	28
Other nationalities	12
Total	227

Background to and Evolution of the Atypical Working Scheme

Prior to 2016, there was no legal route for migrant fishers to enter Ireland for the purposes of labour migration; most workers were undocumented and operating as supposed independent contractors on vessels. Some of the serious labour-related issues identified in the *Guardian* investigation included workers being confined to vessels unless given permission to go on land; receiving no proper rest days; and being paid less than half the Irish minimum wage (*The Guardian*, 2015). In response, the aim of the Task Force on Non-EEA Workers in Irish Fishing Industry was to put in place a ‘comprehensive regulatory environment covering all aspects of the employment of non-EEA workers’ (Task Force 2015: 15). The Task Force proposed a holistic approach, with its centrepiece the atypical scheme of work permits for non-EEA fishers. This is not a legislative measure as such: in the Irish system, atypical working schemes are administrative measures emanating from the Department of Justice and Equality. Atypical working schemes provide for permits for ‘atypical, short term employment’ not governed by the Employment Permits Acts 2003 – 2014 and thus usually constitute a form of regulatory regime for temporary labour migration.

Under the Atypical Working Scheme for Non-EEA Crew in the Irish Fishing Fleet (AWS), there were 500 twelve-month renewable permits made available, first to existing members of the fleet and then (from July 2016) to external applicants. The Scheme is limited in scope to the Polyvalent, Beamer and Specific segments of the Irish sea-fishing fleet (the ‘whitefish’ fleet) over 15m in length. This would relate to approximately 180 vessels out of the entire fleet of approximately 1900.

Some key features of the Scheme include the following:

- In order for a permit to be granted, the sea-fishing boat licence holder (employer) must enter into a certified contract of employment with the crew member, which includes the right to a safe working environment, regular breaks and rest periods, annual leave and payment of statutory minimum wage, enforceable in Irish law in the usual way.
- If either the employer or employee breaches the contract, the permit is revoked and no further atypical worker permission should be granted to the party in breach.
- The AWS permission must be renewed on an annual basis.
- A crew member may enter a new contract of employment with another employer, with any change subject to the same conditions as a new application under the scheme.

- According to the Department of Justice, AWS permit-holders are not eligible to apply for long-term residency, unlike the vast majority of labour migrants who enter Ireland via standard employment permits schemes (PQ, 14th July 2021).

Reforms ancillary to the Scheme included the adoption of an inter-agency Memorandum of Understanding between the key enforcement bodies to streamline the effective enforcement of health and safety, marine, and employment regulations in the sector; and a programme of inspections of fishing vessels by the WRC labour inspectorate (Murphy, 2017).

However, since 2016, a range of highly respected international, regional and domestic bodies have expressed concerns about the operation of the AWS and inadequate safeguards against trafficking and exploitation (UN Special Rapporteurs 2019; GRETA, 2019; USDS, 2020; USDS, 2021; MRCI, 2017; IHREC, 2021). In 2018, the ITF sought an injunction restraining the issue or renewal of permits under the AWS, on the basis that the Scheme facilitated trafficking for the purposes of labour exploitation. The resulting settlement agreement in 2019 (between the ITF, various Government Departments and the WRC) provided for a further series of reforms to the AWS, including the requirement to provide the fisher with the contract in a language which they understand, the amendment of the model contract, and the clarification of the right to change employer (Department of Justice et al., 2019). Despite the 2019 reforms, the 2021 US TIP Report cites expert views to the effect that non-EEA migrant fishers were at even greater risk following the amendment of the Scheme because the Government failed to enforce the amended rules of the scheme, no longer identified trafficking victims – despite the fact that there have been 35 suspected victims of trafficking identified in the fishing industry to date (Department of Justice and Equality, 2017; 2018) – and had begun revoking the status and associated protections against previously identified trafficking victims within this sector (USDS, 2021). In contrast, the Department of Justice's view in 2020 was that 'changes to the atypical work permit scheme have led to a very significant reduction in abuses reported in the off-shore fisheries industry as compared with previous years' (Department of Justice, 2020). Debates on the AWS have thus been somewhat ill-tempered and marked by disagreement between the State on the one hand and monitoring bodies and civil society on the other.

Specific Employment Issues for Fishers

The perennially problematic issue of employment status is important in the context of fishing. As in Scotland and other parts of the UK (Decker Sparks, 2022), the traditional model of work in Ireland is 'share fishing'. Share fishermen receive a share of proceeds of a vessel's catch rather than a regular wage, a practice which may result in high earnings on occasion, but results in exclusion from protective employment and social welfare frameworks. The Irish courts have confirmed on numerous occasions that share fishermen are not 'employees' protected by employment rights and social insurance frameworks (*DPP v. McLoughlin* [1986] 1 IR 355; *Griffin and Deasy v. Minister for Social, Community and Family Affairs* [2002] 2 I.C.L.M.D).

The International Labour Organisation's (ILO) Work in Fishing Convention, 2007 (No. 188) recognises the specificity of the fishing sector and adopts a holistic approach to ensuring decent and safe working conditions, including providing for conditions of service, accommodation and food, occupational safety and health protection, medical care and social security. In EU Law, Directive 2017/159 broadly implements the social partners' agreement concerning the implementation of ILO Convention No. 188 (the 'Agreement'), and the Directive is transposed in Ireland through a series of statutory instruments. On the crucial issue of working time, Ireland is subject to the rules on maximum hours of work and minimum hours of rest for fishermen contained in the Agreement annexed to Directive 2017/159. Under Article 2, the Agreement applies to share fishers as well as to fishers working under contracts of employment. Article 11(b) of the Agreement was purportedly transposed by the European Union (International Labour Organisation Work in Fishing Convention) (Working Hours) Regulations 2019 ('SI 672 of 2019'). The Regulations provide, among other things, that fishermen should not work more than 14 h per day (with at least 10 h per day rest) or more than 72 h per week (with at least 77 h rest per week) (Regulation 7(1) and (2)). However, the transposition is deficient in a number of respects. Crucially, SI 672 of 2019 does not define the reference period necessary for the calculation of the average daily working hours (as required by Regulation 6) rendering it inoperable in practice. The Regulations fail to provide a remedy before the Workplace Relations Commission or the Labour Court where a breach occurs and therefore workers have no access to redress for breach of the rules. Reflecting the ongoing confusion as to the applicable legal framework for the working time issues of fishers, a series of first-instance determinations in favour of migrant fishers in respect of working time under standard employment legislation are under appeal to the Labour Court on the basis that the WRC's adjudication service has no jurisdiction in relation to working time.

Finally, the enforcement of regulatory protections for fishers – in particular, its fragmentation among a variety of state bodies – has been frequently criticised in the past (e.g., MRCI, 2017). As an example of this problem, the AWS provides that 'Where the contract is breached by the licence holder (employer), no further Atypical Worker Permission will be made available for the purposes of employment to the licence holder (employer)'. The Department of Justice has not once been made aware of any confirmed breaches of contract requiring the barring of a vessel owner from employing future individuals under the AWS (PQ, 14 July 2021). This is at odds with the fact that hundreds of employment contraventions have been detected on vessels by the WRC inspectorate (PQ, 16 June 2021), and suggests that the enforcement mechanisms are not sufficiently co-ordinated.

Barriers to Pursuing Employment Claims for Undocumented Migrant Fishers

The general difficulties encountered by migrants in making employment rights claims are well-documented and relate to their deportability as well as to the structure of employment law (Mantouvalou, 2014). In common law countries, including the UK and Ireland, undocumented employees may be barred from enforcing employment rights where the underlying contract of employment is deemed void for illegality (*Okedina v Chikale* [2019]; *Allen v Houna* [2014]; *Patel v Mirza* [2016]; Navid, 2020; Bales

et al., 2018; Zou, 2015; Bogg and Green, 2018; Dewhurst, 2012; Murphy, 2015). The current legal position in Ireland is strict: undocumented workers cannot generally enforce employment rights due to the illegality of the contract of employment (*TA Hotels Limited t/a Lynam's Hotel v Vireshwarsingh Khoosye and TA Hotels Limited t/a Lynam's Hotel v Preeti Khoosye*). The Employment Permits (Amendment) Act 2014 amended the primary legislation to provide that the foreign national worker (or the Minister for Justice on their behalf) may take a civil claim for compensation against the employer, notwithstanding the illegality of the contract, where it can be proved that they took all reasonable steps to comply with the requirement to have an employment permit (Employment Permits (Amendment) Act 2014, s. 4). This remedy is extremely limited: it seems that 'civil proceedings' may only be brought before the ordinary courts (i.e., not the WRC or the Labour Court) (*TA Hotels Limited t/a Lynam's Hotel v Vireshwarsingh Khoosye and TA Hotels Limited t/a Lynam's Hotel v Preeti Khoosye*), and it does not appear that this provision has ever been successfully utilised.

More broadly, the lack of separation between employment and immigration enforcement functions in Ireland has long been criticised as problematic in terms of the protection of migrant workers (MRCI 2012, 2017, 2020; Murphy et al., 2020). The labour inspectorate (Workplace Relations Commission, 'WRC') has enforcement functions under the Employment Permits Acts 2003–2014 and as such is an extension of the immigration authorities (WRC, 2017: 11). WRC policy is to bring prosecution proceedings in all cases where non-EEA employees (in any sector) are employed without a valid permission to work. From the WRC's perspective, 'the prosecution of fishing vessel owners indicates the seriousness of the offence of employing a non-EEA national without permission which, together with effective enforcement, has the objective of disincentivising exploitation and non-compliance with employment law and the Atypical Scheme' (WRC Responses, 2021). However, it also means that some undocumented migrant fishers may risk losing their job as a result of WRC inspections.

Workers' Experiences of the Legal Framework

The previous section set out the key elements of the legal and policy framework and highlighted the legal construction of hyper-dependence and hyper-precarity of migrant fishers in Ireland. In this section, we build on this analysis by exploring how this state-constructed vulnerability is experienced in practice, drawing on the findings of the interviews. We present the workers' perspectives on three central themes: immigration rules; working conditions; and racism and discrimination.

Perspectives on and Experiences of Immigration Law

The workers interviewed for this study emphasised the role of immigration rules as both the key to understanding vulnerability to exploitation and the potential route out of poor working conditions. The AWS was described by one interviewee as 'like your visa into slavery'. In contrast, a secure and flexible immigration status was perceived to represent freedom: 'if I have my documents, my stamp 4... I can go wherever I go, I can work for land, I can work for fishing boats'. Immigration status was the key concern of most

participants. Many of the fishers interviewed had been in Ireland for a long period of time: half the participants had been in Ireland for 10 years or more. Despite this, just two of the interviewees were living in Ireland under a long-term, secure immigration status (Stamp 4). The other interviewees still have a precarious one-year renewable status under the AWS (10) or are undocumented (8). A number of participants reported that they had received temporary residence permissions at Garda stations without having an AWS contract or permission in place, and therefore were partly-documented (4). In practice, the undocumented workers were in a variety of situations: the majority had previously been working with an AWS permission which was not renewed for various reasons, including dismissal and injury.

When asked what they would change to make conditions better for workers, the vast majority of interviewees focussed on immigration issues. A number of interviewees suggested that a flexible immigration status, easily renewable and decoupled from the perceived control of the employer, would allow them to negotiate better conditions and move employer more easily (T5, T14, T15).

‘workers should be free, not controlled by the working permit and stamp 1, because this permit controls them’ (T22).

Undocumented workers wished to regularise their position to allow them to enjoy better pay and conditions, and to allow them to travel to their country of origin (T19). Workers felt that ‘the long process of these documents’ (T19) put employers off, while another felt: ‘they don’t want to give him the stamp so he would be able to not speak up more’ (T2).

The Atypical Working Scheme as a Structure of Exploitation. While State bodies emphasise that the objective of the AWS is to reduce and disincentivise exploitation and undocumented work (WRC Responses, 2021), participants reported very few positive aspects of the AWS. One participant stated: ‘the only benefit of it is that they can go home and see their families, but other than that no it’s not good’ (T8), while another observed that ‘this system now it’s not for the people just made for owners only, for owners, it’s good for them, it’s not for us’ (T11). The interviews suggest that the legal framework of the AWS creates fertile conditions for coercive and exploitative work relations. One participant summed up the effect of the AWS as follows:

‘the money wasn’t enough for working on this boat and the only reason I stayed with them is because they kept on telling me they would sort the contract for me and I wanted the contract as soon as possible so I could go and see my family. I stayed for ... months not getting paid’ (T8).

AWS permit-holders expressed the view that they had endured the conditions of the AWS in the hope that they could obtain a long-term residence status after 5 years. Stamp 4 status was perceived to offer the employee more power, including over working hours and to change employer, and would allow working on a ‘share’ basis which would result in better pay (T19, T14, T11). Existing scholarship points to the

tying of migrant workers to a specific employer as a central issue as it permits the 'state-sanctioned subordination of migrant workers to employers and creates a situation ripe for abuse' (Fudge, 2012: 101). Although the AWS allows for a change of employer if a new contract of employment is entered into, this possibility often seems unavailable to workers in practice. The prevailing understanding among those interviewed was illustrated by one interviewee's comment that they felt that they could not change employer, 'because the boss tied me in that job with the contract and with the stamps and the GNIB card and all that stuff' (T7). Throughout the interviews, there was reference to the fact that if you left an employer, others would think that you are a troublemaker and would not employ you (T8, T18).

Coercion as a Means of Control Resulting from Immigration Status. A number of boat owners exerted substantial control through the workers' dependence on them for their livelihood and/or their immigration permission, and this 'served to discipline workers not to challenge seriously exploitative labour relations' (Lewis et al., 2014: 100). The overt nature of such threats was reflected in the comments of interviewees who recalled that 'he said always like threatening me about if you don't work I will cancel your permit' (T4; see also T11) and that 'no one else would want to employ me if they know I caused trouble' (T4). Similarly, this practice was highlighted by another fisher who observed that he performed extra work tasks 'because I am threatened I can't not work or my permit will get cancelled' (T3). Other forms of coercion deployed included threats of repatriation (T11) or withholding payment (T18). The level of control was captured by other fishermen who pointed out that 'if you have contract you feel like you are slaves' (T16) and that migrant fishermen 'don't want all of our lives to be controlled by employers' (T14). Conversely, one worker stated that 'nobody controls him' and 'he can do what he wants' (T17), but at least one quarter of the participants in this study, akin to workers in other sectors and jurisdictions, 'fear losing the job in which they are exploited' (Ollus, 2016: 36). Potter and Hamilton's findings in relation to migrant work in the mushroom sector in Northern Ireland (Potter and Hamilton, 2014) resonated with the experiences of the interviewees. Potter and Hamilton note that the situation of the mushroom workers encompassed a wide precarity and isolation in social and economic terms which 'maintains individuals in a situation of exploitation that occasionally, but not constantly, takes on the characteristics of forced labour' (Potter and Hamilton, 2014: 402). This point is illustrated by one interviewee's answer to the question, 'Were you ever forced to work?'

'I say ... yes, because one time I was in Dublin I was working with some man and we work like over hours and we were very tired and we landing in Howth and we like to get coffee before we land the fish and he said no you have to work you have to get the prawns out first, so that is forcing me' (T23).

Working Conditions

Fishing is an industry that relies on migrant workers 'to fill its hazardous, low-paying jobs' (Chantavanich et al., 2016: 1) and the systemic exploitation of migrant fishermen

in Ireland has been well-documented in recent years (Murphy, 2017). The experiences reported by the workers interviewed for this study echo the earlier findings of both the *Guardian* newspaper and the Migrant Rights Centre Ireland with respect to working conditions (MRCI, 2017). Extremely long working hours with few breaks, very low wages (often below minimum wage given hours worked), racist insults and verbal abuse were the common experiences of the overwhelming majority of those interviewed. In the words of one participant:

‘what is happening is many, many people are ... absolutely living and working in miserable conditions and getting very, very low paid’ (T12).

The majority of the participants in this study were skilled fishers, with many years of experience in the fishing industry. In the words of one fisher, ‘from the day like he is born he started fishing, fishing is his life’ (T18). The workers reported a variety of employment-related issues which would constitute violations of the relevant legislation in terms of employment; working time; minimum wage; paid annual leave; and dismissal. Undocumented workers appear to experience the biggest power imbalance with their employer, reporting that they had to settle for whatever conditions the employer was willing to offer: ‘whatever he gives I take, and sometimes whatever I get is not equivalent of my work’ (T9, also T2). Nevertheless, it is important to note that some participants (5 in total) reported being satisfied overall with their working situation. Two interviewees described their skippers as ‘a gentleman’ (T17) and ‘a friend’ (T10), respectively. Rather than particularly exploitative working conditions, the key concern for these individuals was uncertainty around their immigration status and a lack of freedom to change employer or sector (e.g., T16, T17, T19). Overall, from a legal perspective, the participants’ situations reflected a continuum of exploitation, from relatively minor employment violations in some cases, to severe violations such as withheld wages (T18) and work performed under threat of deportation and dismissal (T1, T3, T4, T5, T11, T14, T18, T20).

Pay-Related and Working Time Issues. Pay-related problems were frequently referred to by the workers throughout the interviews, with rates of pay varying widely between the participants. The Low Pay Commission has consistently emphasised in its annual reports that non-compliance with national minimum wage legislation ‘is of particular concern as it relates to migrant workers’ (Low Pay Commission, 2016) and this was borne out by certain interviewees in this study. While some workers reported that their employer ‘never didn’t pay me’ (T13) and that ‘always I have got what I worked for’ (T14), others received substantially less remuneration than they were initially promised (T18). One fisher noted that ‘sometimes for example he tells you that he’s going to give me one thousand euro and at the end he gives me two hundred euro’ (T18), while another participant observed that ‘I never actually knew what I was making’ (T1; see also T9). This lack of certainty as to how much was to be paid, and how net pay was calculated, permeated many of the interviews in this study, which is particularly concerning given that wages have been recognised as playing ‘an important role in preventing workers’ vulnerability to exploitation, as well as in deepening and accelerating it’ (LeBaron, 2021).

This uncertainty was further compounded by other pay-related issues including delays in receiving payment (T7; T11), and not receiving pay that was agreed upon (T7). Workers on the AWS appeared to generally receive the agreed payment under the contract (usually receiving €1500–€2000 per month) but the participants in this study reported frequently working many more hours per week or month than agreed. In fact, over two thirds of the participants revealed that they could work between 15 and 20 h a day – meaning that they, taking into account the reported number of hours worked, earn much less than they are legally entitled to under their contract and minimum wage legislation (T22). More broadly, many workers with employment contracts and AWS permissions observed that there is a significant gap between the terms of the AWS contract and the real conditions of the job (T12, T20). The following quote illustrates the perceived lack of integrity of the contract:

‘... most of the time it was very bad treatment ... Long hours, long hours, sometimes one week no sleep just working’ (T19; see also T1 and T20).

The contract was often seen as ‘for show’ (T11), particularly in terms of working hours (T18). Other workers also recalled the ‘long hours, sometimes one week no sleep just working’ (T13) and ‘working in miserable conditions’ (T12). These recollections mirror the experiences of fishermen in other jurisdictions, such as Thailand, where workers are also subjected to long hours, frequently without adequate breaks, for seven days a week (Beatty, 2016: 1114). One fisher stated that he thought he was ‘going to be working limited hours’, but on arrival in Ireland he found out that he had to ‘work for long hours maybe all day and night and not that much income’ (T22).

Inspection, Enforcement and Systemic and Practical Barriers to Reporting. From the perspective of the participants in this study, inspection and enforcement of employment law are weak and ineffective. Less than half of the interviewees recalled boats being inspected by the WRC or anyone else asking about work-related issues. One participant noted:

‘I didn’t get to see any of them, any inspectors, it could possibly be that he would send us off or get us busy with something while they come on-board, so we wouldn’t know that they are here (T1).

Crew members appear to be interviewed, where possible, in private away from the vessel (WRC 2016: 24), but those who had experienced inspections highlighted the challenges to directly engaging with inspectors or being frank about their conditions of work. Two workers, for instance, were simply asked to hide during an inspection to avoid detection (T8, T3). In other cases, the inspectors ‘just talked to the captain’ (T21), or the migrant workers perceived that the inspectors’ primary focus was employment permits. The process was described by one participant as follows:

‘they come now for you to ask, ‘you eating good and you sleeping good?’ and you have to sign ... everyone sign it, but this one is not happy and it’s not true, but just sign it because you not like to lose the job (T11).

Many interviewees appeared to be aware that their employment rights were being infringed. Of those currently working under the AWS, the majority had received contracts translated into their native language, in accordance with the Scheme's rules. However, over half the participants stated that they would not take a legal complaint against their employer, citing fears of losing their job (and therefore, their permit) or because of their precarious position as the holder of a one-year contract. One interviewee pointed out: 'I had an idea about my rights, but we couldn't do anything about them because we were scared that they would cancel our contract' (T1, T22, T5). It thus appears that regulatory initiatives to promote better working conditions are likely to fail in the absence of immigration reform, due to workers' 'hyper-dependence' on the employer for legal status and/or paid work.

Interviewees also reported a significant language barrier which affected their capacity to engage with inspectors and lawyers, as well as their employer. One worker stated:

'if I want to apply for something or to do my documents legally or to do any work or work, so I don't have solicitor or I don't know any lawyer. Yeah, so my English is not good enough to communicate and explain what, what I can do. So what should I do in this case?' (T15)

One of the interviewees pointed out that it is difficult to convey your point through an informal translator (T3). In this context, the interpretation practices used by official bodies take on a heightened importance. The WRC has noted that as most WRC inspections are unannounced and at short notice outside working hours, 'it is neither practical nor cost effective to engage interpreters to accompany inspectors' on such inspections (WRC Queries, 2021). Inspectors do have access to interactive translation technologies and telephone translation services, but the WRC notes that inspectors do not, in general, encounter any significant difficulties from a language perspective.

Racism and Discrimination

Recent research on the treatment of migrant fishers in North-East Scotland concluded that 'more needs to be done to address the potential for micro-disciplinary, psychological, and verbal abuse of non-European Economic Area (non-EEA) crew', which is 'difficult to evidence' (Djohari and White, 2022: 19). The study suggested that non-EEA migrant fishers are rendered vulnerable by the intersection of the socio-cultural practices of fishing (including coarse language and 'alpha-male' behaviours) with a restrictive visa system. These findings are reflected in the experiences of the fishers interviewed for our study. In addition to the economic threats, 'very bad conditions and very bad money' (T11), many of the participants were subjected to racial and verbal abuse on fishing vessels. The 'connection between exploitation and racism is complex' (MRCI, 2012: 19), but certain boat owners and captains were reported to be 'very racist' (T22; see also T7 and T20). One interviewee recalled that boat owner declared that he didn't care about 'Muslims or anything that belongs to them' (T22), while another participant revealed that the 'the head of the ship was very racist he wouldn't let us pray or fast or anything like that and this was always causing problems' (T1). An employee's religious observances are usually none of an employer's business (Dwyer, 1998: 111), but

the latter participant noted that this particular captain ‘doesn’t allow Halal food on-board of the ship’ (T1). However, it appears that this type of racist abuse was not the preserve of the boat owners or the captains. One worker, for instance, noted that the crew are ‘very racist’ (T20), while similarly another observed that there was ‘racism from other members of the crew’ but that this tended to be only aimed at ‘the Egyptians’ (T3). The level of racism reported by the interviewees ranged from ‘people were a bit racist ... sometimes’ (T2) to ‘a lot of racist comments in work’ (T13; see also T4 and T21).

Wage disparities between migrant and non-migrant fishers have long been a feature of the industry in many jurisdictions (Lozano et al., 2022: 5). Similar findings emerged from this study with almost half of the participants revealing that they were paid less than others – particularly Irish and European Union (EU) citizens – on the boat performing the same work. One participant stated that those Irish fishermen made ‘more money’ than him (T16), while another interviewee reported that he was ‘getting a lot less money than the other European workers’ (T5). For those on the AWS, the reason put forward for this was the contract: those who were working for a ‘share’ of the catch (Irish and EU citizen colleagues, and even those with a Stamp 4 permission) earned much more than those on the AWS, who were paid a monthly rate and working extremely long hours (T3, T4, T8, T9). One fisher recalled that ‘I was getting paid well before the work permit but after the work permit everything changed’ (T13), while another observed that ‘when you have a work permit you become the slave of that person’ (T18). This form of discrimination, based on immigration status, is created by the legal framework itself and likely to reinforce other deeply-embedded forms of racial discrimination.

Some of the workers pointed to precarious legal status as part of the reason for the differential treatment of non-EEA workers compared to others on the vessel. One worker noted:

‘He is bad in general, he treats all nationalities bad, but when it is someone who is European for example, we had Romanian crew with us as well sometimes and he would treat them a bit better than the way he treats us, but still he was bad to everyone in general ... Because with them they are part of the EU, so technically they are allowed to be working there, they don’t fear him the way we fear him because if he tries to cause any problems to them they can try and sue him, but with us he could simply cancel our contract and we would be left with no work.’ (T1)

The complexity of discrimination and its overlapping causes was highlighted by many interviewees, one of whom referred to *both* structural and individual sources of vulnerability to exploitation:

‘where we used to get bad treatment it used to be only to [a certain nationality], while the other members who were part of the EU they would get treated better than us because they know their rights.’ ... Any other person who is EU or even if they are from Russia, they would get their exact pay that was agreed on, but me no ... It’s because I was from a different religion to them and I wouldn’t eat the food that they are eating, to be honest with you I just only eat cheese sandwiches when we were there, that is what I was living off.’ (T3)

As was the case for working conditions generally, it appears that undocumented workers were particularly vulnerable to unequal pay and treatment (T8). As one participant put it: 'it is obvious because we don't have papers very easy to fool us and give us a lot less than the others' (T9). This was also captured by another worker who observed that 'most of them are illegal and they [boat owners] are using them ... they give them very little money or none unlike the other European fishermen' (T7). Equally, it should be noted that not all fishers were treated differently to others working on vessels (T13, T15, T21), but it does seem that the experiences of migrant fishers in Ireland mirrors the experience of migrant workers in the construction and agriculture sectors in other jurisdictions where they receive the 'lowest salaries' and the 'worst work conditions' (Pajnik, 2016: 166).

Conclusions

This article has examined the role of law in creating vulnerability to exploitation for migrant workers and has sought to deepen our understanding of this process by combining detailed doctrinal analysis with workers' perspectives gathered through interviews. We suggest that the concepts of hyper-dependence and hyper-precarity are the building blocks of the concept of 'state-constructed vulnerability to exploitation' and provide a useful means to analyse the legal position of non-EEA migrant fishers in Ireland. Through doctrinal analysis and qualitative data, we show that the hyper-precarity and hyper-dependence of migrant fishers is enshrined in both immigration and employment law. For fishers with an AWS permission, their hyper-dependence is rooted in the need to renew the permission on an annual basis, and the practical difficulties involved in changing employer. The hyper-precarity of AWS permission-holders stems from deficiencies in working time rules, and supposed non-eligibility for a secure, long-term and flexible residence status. Likewise, fishers working on an undocumented basis may be 'hyper-dependent' on the employer for work and remaining under the authorities' radar. This 'hyper-dependency' is heightened because fishers working on an undocumented basis are generally excluded from enforceable employment rights – as well as social protection entitlements – which renders their position 'hyper-precarious', and this is borne out in the findings of our study. Immigration issues are identified by the participants as being at the heart of the matter: while not all the interviewees were dissatisfied with their working situation, all (bar those who had long-term residence) were frustrated with the restrictions of their immigration status. The current regulatory and enforcement framework does not appear to effectively address the impact on workers of their hyper-precarious and hyper-dependent position. Rather, the combination of restrictive migration policies, combined with the State's tolerance of this 'legal black hole' (Mann, 2018), have created a situation of state-constructed vulnerability, in which the precariousness of legal status and work intersect (Goldring and Landolt, 2011).

The interview data demonstrates that the AWS is a classic legal structure of exploitation: it 'places groups of workers in a special position of vulnerability which state or non-state agents systematically exploit' (Mantouvalou, 2018: 190). This special position of vulnerability stems from two simple factors consistently referred to by the participants: the necessity to renew the immigration permission on an annual basis, and the practical

difficulties with changing employer. Workers describe being systematically disadvantaged compared to others performing similar work due to the terms of the Scheme and identify the AWS as a key driver of unequal pay and a barrier to employment redress. The allocation of power between the employer and employee is highly imbalanced and the formal terms of the contract of employment are worth little in practice as a result. The consequences of this 'legal construction of identities' (Fineman and Fineman, 2018: 2) in the context of the AWS work relationship are potentially far-reaching: it remains to be seen in Ireland whether, as in other jurisdictions, 'the shift to low paid, low status, contractual employment with limited rights has transformed working relationships in the fishing industry' (Djohari and White, 2022: 20).

State strategies to address the perceived vulnerabilities of migrant workers usually fail to acknowledge the complicity of immigration controls in producing 'relations of domination and subordination' (Anderson, 2010: 303). At the time of writing, an inter-departmental group is conducting a review of the AWS, while it also appears that some of the fully undocumented fishers interviewed for this study will be able to avail of the Regularisation Scheme for Long Term Undocumented Migrants which opened in January 2022. This, of course, is very positive news for eligible undocumented fishers, but regrettably there still appears to be a considerable gap between what the fishers enrolled on the AWS want in the short term (access to a flexible immigration status, easily renewable and decoupled from the perceived control of the employer) and the degree to which the State is willing to accede to applications for Stamp 4, and to consider the abolition of the AWS and the incorporation of these fishers within standard employment permit schemes.

From the State perspective, there have been numerous important reforms put in place since 2016 that seek to address the specific vulnerabilities experienced by migrant fishers. The immigration status provided by the AWS, the programme of employment inspections of relevant vessels by the WRC, police investigations of serious abuses, and the 2019 reforms of the Scheme, all lead to the view that 'changes to the atypical work permit scheme have led to a very significant reduction in abuses reported in the off-shore fisheries industry as compared with previous years' (Department of Justice, 2020). However, this understanding is at odds with the reports of the participants in this study, most of whom expressed the view that conditions in the sector had actually worsened overall since that time. This disconnect suggests that the perspectives of workers have not been sufficiently taken into account in these reform processes, leading to serious gaps in the understanding of the lived experience of the legal and policy framework. As Judy Fudge has argued, a critical dimension of any strategy to combat labour exploitation is to cultivate effective worker voice and power (Fudge, 2020). The findings of this research suggest that the views of workers, as well as organisations advocating on their behalf, must be built into any reform process in order for such a process to be practically effective and truly transformative.

More fundamentally, this case study highlights that the solutions to the structural problems of labour exploitation involve broad questions of state regulation and responsibility. Legal and policy reform must go beyond the inclusion of marginalised groups in existing employment protections or specifically tailored regulation directed at each group (Fineman and Fineman, 2018: 5), and the regulation of atypical work requires a

much more holistic approach than the adoption of ‘flexicurity’ instruments designed to balance flexibility and security (Countouris, 2016). In Ireland, specific labour regulation of the unusual work relationship in fishing and a targeted campaign of inspection by the labour inspectorate have failed to address exploitation in the sector. In this context, structural oppression through immigration rules renders employment regulation meaningless in practice. Indeed, the solution offered by the workers themselves is structural in nature: they identify the need for a long-term, secure and flexible residence status, which would go some way to addressing their identified priorities – to provide for family, to visit their country of origin, and to have decent working conditions. True, the proliferation of precarious employment—work that is unstable and insecure, offers limited rights, protections, and benefits, and allows workers limited autonomy, recourse, or control—is symptomatic of a global shift in the very nature of work (Lowe et al., 1999; Kalleberg, 2009; Magugliani, 2021), but the Irish state – celebrating a century of independence – should not be in any way complicit in the creation or maintenance of structures and situations conducive to labour exploitation.


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