

## **HUMAN RIGHTS FOR PRECARIOUS WORKERS: THE LEGISLATIVE PRECARIOUSNESS OF DOMESTIC LABOR**

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### I. INTRODUCTION

What is the role of human rights for the protection of precarious workers? In order to address the question this Article, first, looks at definitions of precarious work. According to the literature, precariousness at work may be due to political, social, legal, economic, or other factors. All jobs can become precarious in different circumstances, and every job may be characterized by different degrees of precariousness. This Article focuses on a specific normative problem, a special type of precariousness caused by legislation, “legislative precariousness.” This is defined as the special vulnerability created by the explicit exclusion or lower degree of protection of certain categories of workers from protective laws. A group that is frequently made precarious by law in many jurisdictions are domestic workers, the situation of whom the second part of the article explores by using examples from national (United Kingdom mainly) and supranational legal orders. The intersection of numerous expressions of legislative precariousness of this category of workers disadvantages them in comparison to other workers, and also makes enforcement difficult. The legislative precariousness of domestic workers, therefore, places them in a uniquely vulnerable position.

Human rights as moral principles incorporate strong entitlements. They are based on important human interests. The legal protection of the human rights of precarious workers must be strong too. Is it sufficiently strong? Looking at the European human rights system, which is an

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influential and effective mechanism of protection, Part III first examines the legal protection of the rights of domestic workers. It emerges that human rights law has potential to assist this group, but what also becomes evident is that aspects of the law on social rights create further precariousness. The most precarious workers, as it turns out, are undocumented migrants in Europe (and elsewhere). This explains why they have also been described as “precarious residents.”<sup>1</sup> The exclusion of undocumented migrants is very troubling, but may be corrected to a degree, as the European example shows.

What lessons can be learned from the above? Part IV considers how human rights practice in Europe sheds light on the interplay between human rights and labor rights in the context of migrant domestic work. It emerges that human rights law challenges the traditional public/private divide, and plays an important role in addressing the legislative precariousness of domestic workers. It is, therefore, valuable instrumentally to them. In addition, importantly, some further conclusions can be drawn as to the normative foundation of the two bodies of rules (human rights and labor rights). These involve their shared theoretical justifications: dignity as noncommodification, liberty, and distributive justice. At a normative level, then, this Part V finds that the human rights and labor rights of precarious workers have much in common. The employment relationship is commonly described as one of submission and subordination,<sup>2</sup> and labor law is meant to address this situation. In the case of domestic workers, the problem is that legislation reinforces (rather than addressing) the relation of submission and subordination. Human rights law incorporates principles that our legal orders rank highly. Properly applied, it can contribute to the improvement of the condition of precarious domestic workers.

## II. DOMESTIC WORK AS PRECARIOUS WORK

Traditionally, “precarious work” was defined as work that is not standard. Standard work is “a continuous, full-time employment relationship where the worker has one employer and normally works in the employer’s premises or under the employer’s supervision.”<sup>3</sup> As early as 1961, Sylos Labini was writing that those who are precariously employed

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1. Matthew J. Gibney, *Precarious Residents: Migration Control, Membership and the Rights of Non-Citizens* (Hum. Dev. Res., UN Development Programme, Apr. 2009).

2. OTTO KAHN-FREUND, PAUL LYNDON DAVIES & MARK ROBERT FREEDLAND, *KAHN-FREUND’S LABOUR AND THE LAW* 18 (3d ed. 1983).

3. Judy Fudge & Rosemary Owens, *Precarious Work, Women and the New Economy: The Challenge to Legal Norms*, in *PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 3, 10 (Judy Fudge & Rosemary Owens, eds., 2006) [hereinafter *PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY*].

“have no definite prospects of improvement: that not only their economic, but also their social, position is unstable and insecure.”<sup>4</sup> Later Rodgers explained that “precarious work goes beyond the form of employment to look at the range of factors that contribute to whether a particular form of employment exposes the worker to employment instability, a lack of legal and union protection and economic vulnerability.”<sup>5</sup> Dimensions that serve to show whether a job is precarious, on this analysis, include the element of certainty of employment continuity, control over working conditions exercised through union representation, degree of legal protection, and level of income.

Several legal arrangements create precariousness, according to the literature.<sup>6</sup> These have mainly emerged in the context of the effort to make the labor market flexible, as Fredman has argued, showing how “numerical flexibility,” which is “characterised by low pay, low status, and little by way of job security, training, or promotion prospects,” produces precarious workers.<sup>7</sup> Part-time workers, casual workers, agency workers, home workers, and temporary workers, are all nonstandard workers, as she explains, who are in a precarious position for this reason.

There are broader definitions of precariousness. On Vosko’s definition:

[P]recarious employment encompasses forms of work involving limited social benefits and statutory entitlements, job insecurity, low wages and high risks of ill-health. It is shaped by employment status (*i.e.* self-employment or wage work), form of employment (*i.e.* temporary or permanent, part-time or full-time), and dimensions of labour market insecurity as well as social context (such as occupation industry and geography) and social location (the interaction between social relations, such as ‘gender’ and ‘race’ and political and economic conditions).<sup>8</sup>

It is primarily not the legal arrangements that make work precarious: there are further social and economic factors that contribute to the creation of precariousness. Some of these involve the nature of the job. Others involve the worker himself or herself. A job like mining can be viewed as precarious because of hazardous working conditions. A permanent full-

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4. Paolo Sylos-Labini, *Precarious Employment in Sicily*, 89 INT’L LAB. REV. 268, 271 (1964).

5. Gerry Rodgers, *Precarious Work in Western Europe: The State of the Debate*, in PRECARIOUS JOBS IN LABOUR MARKET REGULATION: THE GROWTH OF ATYPICAL EMPLOYMENT IN WESTERN EUROPE 1 (Gerry Rodgers & Janine Rodgers, eds. 1989).

6. See Sandra Fredman, *Precarious Jobs for Precarious Workers*, in PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY, *supra* note 3, at 177; Rosemary Hunter, *The Legal Production of Precarious Work*, in PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY, *supra* note 3, at 283; Nicola Kountouris, *The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective*, 34 COMP. LAB. L. & POL’Y J. 21 (2012).

7. See Fredman, *supra* note 6, at 177.

8. PRECARIOUS EMPLOYMENT: UNDERSTANDING LABOUR MARKET INSECURITY IN CANADA 3–4 (Leah F. Vosko ed., 2006).

time job of a factory worker, which would not be characterized as precarious using the criterion of working conditions, may become precarious because of the circumstances of the worker (social or immigration status, race, or gender). When many of these factors affect one worker, it can be said that she is in a particularly precarious position.

Degrees of precariousness affecting a job or a worker may vary over time. In a free market economy, work that is categorized at first instance as standard employment by a worker who does not have a precarious status – a white, male professor in a permanent, full-time academic position in a philosophy department of a university, for example – may become precarious because of economic circumstances (financial crisis) or because of factors that involve the worker (illness). At a time of increased sentiments of xenophobia, nonnationals' jobs become precarious. At a time of financial crisis, most jobs are precarious.

Several factors contribute to precariousness, and human rights are not necessarily relevant to all these factors. Not all nonstandard legal arrangements, for instance, are incompatible with human rights. It is unlikely that a part-time job will breach human rights law, simply because it is part-time, but there may be a breach of human rights law if the part-time job does not provide equal working entitlements to a full-time job. This is because human rights are basic standards of decency. Human rights morality does not exhaust the whole field of moral standards.<sup>9</sup> Hence human rights law, which encapsulates human rights as moral standards, does not capture all nonstandard employment.

In order to address the human rights aspects of precariousness, this Article focuses on a specific expression of precariousness, which is created by legislation. I call this type of precariousness “legislative precariousness.” The term “legislative precariousness” refers to the explicit exclusion or lower protection of workers from protective legislation. It is relevant to any category of workers whose job is viewed as one that merits different treatment to other jobs. This term ought to be distinguished from the more general employment status precariousness, which excludes those that are not employees or workers from labor law more generally.<sup>10</sup> Legislative precariousness is specific to the particularities of the domestic labor relation, and is due to the fact that the law in many jurisdictions treats domestic labor as “work like no other,”<sup>11</sup> which gives rise to several problems, such as the question who falls in the category of a domestic

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9. See discussion in John Tasioulas, *The Moral Reality of Human Rights*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR?* 75 (Thomas Pogge ed., 2007).

10. See Kountouris, *supra* note 6.

11. INT'L LAB. ORG., *DECENT WORK FOR DOMESTIC WORKERS*, REPORT IV(1) 12 (Int'l Lab. Conf., 99th Sess., 2010) [hereinafter *DECENT WORK FOR DOMESTIC WORKERS*].

worker (and should therefore be excluded or specifically regulated).<sup>12</sup> Legislative precariousness leads to special vulnerability. It places domestic workers at disadvantage if compared to other groups of workers, and reinforces the relationship of submission and subordination that typically characterizes the employment relation. This Article examines the position of domestic workers that are made precarious by law in many jurisdictions through numerous provisions. Some of the observations and conclusions are applicable to migrant workers more generally, and to all workers who are found in a precarious position because of the law.

#### A. *Precariousness of Domestic Work*

Domestic workers typically work in private homes, performing various household tasks, such as cleaning, cooking, gardening, and caring for children or elderly people (the latter are also known as “care workers”).<sup>13</sup> This type of work is gendered, and most of the times done by women.<sup>14</sup> Domestic workers may be live-in or live-out (full-time or part-time), employees or independent contractors. Domestic work was delineated as a separate area of work when productive and reproductive work got separated. During Victorian times this type of work was performed by “menial or domestic servants” for middle and high-class families, and with the decline in domestic servant employment the weekly cash in hand cleaner has become important for professional couples. At the post-war period a shift occurred from the model of the ideal family with a single wage earning male head of household, to the ideal family being comprised of dual wage earners. This new model of family life required accommodations of new patterns of work and family lives, which resulted, among other things, in an increasing need for domestic labor.

The positive effect of paid domestic work for contemporary society cannot be underestimated. With changes happening in the labor market, including the growth of the service economy, higher participation of women in the market, the sharing of household tasks by men, and globalization, it has become clear that having domestic workers is beneficial for family members, the employers and the market as a whole. In today’s economic

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12. Guy Mundlak & Hila Shamir, *Bringing Together or Drifting Apart? Targeting Care Work As “Work Like No Other,”* 23 CAN. J. WOMEN & L. 289 (2011). For an argument in favor of treating domestic labor as “work like no other,” based on the historical evolution of the regulation of domestic labor in the United Kingdom, see Einat Albin, *From Domestic Servant to Domestic Worker, in CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION* 231 (Judy Fudge, Shae McCrystal & Kamala Sankaran eds., 2012).

13. This Section draws on Einat Albin & Virginia Mantouvalou, *The ILO Convention on Domestic Workers: From the Shadows to the Light*, 41 INDUS. L.J. 67 (2012).

14. This aspect of domestic labor is analyzed in depth in BRIDGET ANDERSON, *DOING THE DIRTY WORK? THE GLOBAL POLITICS OF DOMESTIC LABOUR* (2000).

setting, domestic work is vital for the sustainability and function of the economy outside the household. Domestic labor can also be a desirable job for workers who are not highly skilled and might not easily be employable in other occupations. Domestic workers, however, are not always low skilled; they are sometimes educated, and migrate to work in the domestic labor sector in order to send income back to their home countries.<sup>15</sup> Like other jobs, domestic work can be fulfilling—the worker can develop a personal relationship of trust with the employer, sometimes to a degree higher than other jobs, and may feel highly valued for the services provided.

Yet the particularities of domestic work set challenges too. Much of the domestic labor workforce is composed of migrants who are often preferred by the employers to the country's nationals, particularly if they are live-in domestic workers. The intimacy that often characterizes the relationship between the employer and the domestic worker makes her seem like a family member—not a worker. This sense of intimacy can be false, though, because the relationship between the domestic worker and the employer, who is a woman most of the times, is characterized by a difference of status that the latter is often keen to maintain.<sup>16</sup> At the same time domestic work is hard to regulate, being invisible because it is performed away from the public eye, in the privacy of the employer's household. The location of domestic labor is an additional factor of precariousness, as it makes the workers more vulnerable to abuse by the employers while being hidden from the authorities and the public. Domestic labor also has a stigma attached to it, because it is the poorest and neediest who are occupied in it, and due to the tasks required from the workers, which are gendered and undervalued.<sup>17</sup> Domestic work is precarious for social (gender, race, migration, and social class), psychological (intimacy and stigma), and also economic reasons (low pay).

Sadly examples of abuse of domestic workers are widespread, and there is important literature that documents and analyzes them.<sup>18</sup> A recent report by Kalayaan, an NGO working on migrant domestic workers in the United Kingdom, said that in 2010, 60% of those who registered with it were not allowed out unaccompanied, 65% had their passport withheld, 54% suffered psychological abuse, 18% suffered physical abuse or assault, 3% were sexually abused, 26% did not receive adequate meals, and 49%

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15. Helma Lutz, *Domestic Labour*, 14 EUR. J. WOMEN'S STUD. 187, 189 (2007).

16. See Bridget Anderson, *Just Another Job? The Commodification of Domestic Labor*, in GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY 104B (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2004); Bridget Anderson, *A Very Private Business: Exploring the Demand for Migrant Domestic Workers*, 14 EUR. J. WOMEN'S STUD. 247 (2007).

17. MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 282 (1999).

18. See, e.g., ANDERSON, *supra* note 14.

did not have their own room. Their working conditions were exploitative: 67% worked seven days a week without time off, 58% had to be available “on call” twenty-four hours, 48% worked at least sixteen hours a day, and 56% received a weekly salary of £50 or less.<sup>19</sup>

The regulation of domestic labor sets challenges because of its invisibility and the stigma attached to it. The exploitation suffered by domestic workers highlights the urgency of the need for state intervention. But what is particularly worrying and is the focus of this Article is that domestic labor suffers from a strong element of legislative precariousness. The sections that follow present several examples of the legislative precariousness of domestic workers.

### B. Working Conditions and Union Representation

In many jurisdictions, labor legislation on working conditions and union representation differentiates the treatment of domestic workers from other workers, a point that has frequently been highlighted.<sup>20</sup> In the United Kingdom, for instance, domestic workers are exempted from legislation on working time, minimum wage, and health and safety. Regulation 19 of the Working Time Regulations excludes domestic workers in private homes from the majority of Regulations 4-8 on maximum weekly working time, maximum working time for young workers, length of night work, night work by young workers, and restrictions on the patterns of work that can be set by employers when there is risk to the health and safety of a worker. In Greece, to give another example, domestic workers are excluded from legislation on maximum working time and pay for overtime.<sup>21</sup> Jurisprudence of courts tends to extend the exclusions.<sup>22</sup> These examples are by no means exceptional. Working time exclusions are found in almost half of the countries surveyed in a Report of the ILO,<sup>23</sup> while at the same time the majority of the countries examined (83%) do not impose a limit on night work of domestic workers.<sup>24</sup>

19. MUMTAZ LALANI, KALAYAAN: JUSTICE FOR MIGRANT DOMESTIC WORKERS, ENDING THE ABUSE 10 (2011), <http://www.kalayaan.org.uk/documents/Kalayaan%20Report%20final.pdf>.

20. See, e.g., EUR. TRADE UNION CONFED’N, OUT OF THE SHADOWS: ORGANISING AND PROTECTING DOMESTIC WORKERS IN EUROPE—THE ROLE OF TRADE (Celia Mather ed., 2005); José Maria Ramirez-Machado, *Domestic Work, Conditions of Work and Employment: A Legal Perspective* (Conditions of Work and Employment Series No. 7, ILO, 2003).

21. See I Ληξουριώτης [I Lixouriotis], *Ατομικές Συμβάσεις Εργασίας [Individual Employment Contracts]*, Νομική Βιβλιοθήκη, 204–06 (2005); ΙΔ Κουκιάδης [ID Koukiades], *Εργατικό Δίκαιο—Ατομικές Εργασιακές Σχέσεις [Employment Law—Individual Employment Relations]*, Εκδόσεις Σάκκουλα, n.251 (1995).

22. See *supra* note 21.

23. See DECENT WORK FOR DOMESTIC WORKERS, *supra* note 11, at 49.

24. *Id.* at 50.

On minimum wage, the U.K. Minimum Wage Regulations 1999 exempt family members and those living within the family household who are not family, but work in the household or for the family business, from the scope of protection. The provisions are interpreted as applying to domestic workers.<sup>25</sup> Canada, Finland, Japan, and Switzerland offer further examples of such exclusion from minimum wage legislation.<sup>26</sup> In Greece, even though there are general national collective agreements covering all workers in all sectors, domestic workers are excluded from the national collective agreement on minimum wage. Greek law also excludes domestic workers from industrial accidents' legislation.<sup>27</sup> Similar exclusions are to be found in other countries too.<sup>28</sup>

Legislative precariousness is created not only through the exclusion of domestic workers from labor standards, but also through their exemption from, or special regulation of, monitoring through labor inspections. For this reason, the phenomenon described here can also be called "regulatory precariousness," in order to capture the fact that it is not only the norms, but also their implementation that may be at issue.<sup>29</sup> Section 51 of the U.K. Health and Safety at Work Act 1974, which regulates working conditions, inspection, and sanctions, excludes domestic workers from its scope altogether. In France, inspectors can monitor the working conditions of domestic workers, but only after a court order. In other legal orders, the law sets special conditions for inspectors to be able to visit the household, such as a request by one of the parties.<sup>30</sup> In many jurisdictions, it is clear that in the conflict between employers' privacy and domestic workers' decent working conditions, the former often prevails.

Further precariousness is created through the exemption of domestic workers from legislation on trade union representation. Various countries like Ethiopia and Jordan, exclude them from protection.<sup>31</sup> A particularly

25. See *Julio & Others v. Jose & Others*, [2011] UKEAT/0553/10/DM, UKEAT/0596/10/DM, UKEAT/0597/10/DM, UKEAT/0070/11/DM, UKEAT/0071/11/DM (E.A.T.) 8–10 (Eng.). The Low Pay Commission highlighted the problems in the interpretation and enforcement in its NATIONAL MINIMUM WAGE: LOW PAY COMMISSION REPORT, at 94 (Apr. 2011), <http://www.official-documents.gov.uk/document/cm80/8023/8023.pdf>.

26. See DECENT WORK FOR DOMESTIC WORKERS, *supra* note 11, at 40.

27. There is critical academic literature on this point. See, e.g., M. Τσολάκη [M. Tsolaki], "Συλλογικές Συμβάσεις Εργασίας—Διαιτητικές Αποφάσεις" ["Collective Labor Agreements—Arbitration Decisions"], *Ι Ληξουριώτης (επ), Εφαρμογές Εργατικού Δικαίου [Applications of Labor Law]*, Νομική Βιβλιοθήκη, σελ. 778–79 (2008); Δ Ζερδέλης [D. Zerdelis], *Εργατικό Δίκαιο—Ατομικές Εργασιακές Σχέσεις [Employment Law—Individual Employment Relations]*, 2006, τόμος [vol.] 1, σελ. 55.

28. For an overview of the exclusion of domestic workers from labor legislation see, e.g., DECENT WORK FOR DOMESTIC WORKERS, *supra* note 11.

29. I am grateful to Bernard Ryan for this suggestion.

30. Ramirez-Machado, *supra* note 20, at 63.

31. Asha D'Souza, *Moving Towards Decent Work for Domestic Workers: An Overview of the ILO's Work*, 49 (Int'l Lab. Office, Working Paper 2/2010, 2010).



interesting example that reflects the complexities of domestic workers' unionization is the legislation of Ontario, Canada. Domestic workers' trade union rights were at some point recognized in legislation, only to be repealed a few years later by a conservative government.<sup>32</sup> This provides another example of the legislative precariousness of domestic workers, which is very worrying, given that collective organization could have crucial effects for workers who are migrant and work in a household, such as a feeling of membership and inclusion in society.<sup>33</sup>

### C. Immigration Law

Apart from labor legislation that excludes domestic workers from its scope, immigration legislation creates further precariousness by treating migrant domestic workers differently to other migrant workers. In the United Kingdom in the past, when migrant domestic workers arrived lawfully in the country accompanying an employer, their visa status tied them to this employer. Their residency status was lawful for as long as the employer with whom they entered employed them, gaining in this way important means to control them.<sup>34</sup> This situation changed, with immigration rules allowing domestic workers to change employers (but not work sector). In 2012, the U.K. Government decided to reintroduce a very restrictive visa regime,<sup>35</sup> which does not permit domestic workers to change employer, despite strong opposition voiced by domestic workers, and organizations, such as Kalayaan and Anti-Slavery International. Similar programs exist in other jurisdictions, like Canada.<sup>36</sup>

Domestic workers are sometimes irregular residents in a country.<sup>37</sup> They may have entered with no visa, or on a tourist visa or temporary work

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32. Labour Relations Act, S.O. 1995, s. 3(a) (Can.). See the discussion in Judy Fudge, *Little Victories and Big Defeats: The Rise and Fall of Collective Bargaining Rights for Domestic Workers in Ontario*, in NOT ONE OF THE FAMILY: MIGRANT DOMESTIC WORKERS IN CANADA 119 (Abigail B. Bakan & Daiva Stasiulis eds., 1997). In Quebec domestic workers are covered by the relevant legislation. See DECENT WORK FOR DOMESTIC WORKERS, *supra* note 11, at 81.

33. See the case study presented in Bridget Anderson, *Mobilizing Migrants, Making Citizens: Migrant Domestic Workers As Political Agents*, 33 ETHNIC & RACIAL STUD. 60 (2010).

34. Bridget Anderson, *Migration, Immigration Controls and the Fashioning of Precarious Workers*, 24 WORK, EMP. & SOC'Y 300, 310 (2010); see also ANDERSON, *supra* note 18, at 88. More generally on the role of immigration law in the creation of precariousness, see Judy Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, 34 COMP. LAB. L. & POL'Y J. 95 (2012).

35. See U.K. BORDER AGENCY, *Persons Seeking to Enter or Remain in the United Kingdom for Employment*, 159A–59H (last visited Sept. 11, 2012), <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part5/>.

36. See the analysis in Joseph H. Carens, *Live-In Domestic, Seasonal Workers, and Others Hard to Locate on the Map of Democracy*, 16 J. POL. PHIL. 419, 433 (2008).

37. See EUR. UNION AGENCY FOR FUNDAMENTAL RTS., *MIGRANTS IN AN IRREGULAR SITUATION EMPLOYED IN DOMESTIC WORK: FUNDAMENTAL RIGHTS CHALLENGES FOR THE EUROPEAN UNION AND ITS MEMBER STATES* (2011) [hereinafter FRA REPORT].

permit, which they overstay. Immigration law permits their deportation, since their status in the country is unlawful. Due to the fear of deportation, domestic workers often wish to remain invisible to the authorities. Their desire to remain invisible makes them vulnerable to abuse. But the anxiety of deportation is not the only implication of the irregular status of a migrant worker. This status has implications for employment rights too, with rules of employment law creating further precariousness. In the United Kingdom, for example, the employment contract of an unlawful resident is considered to be illegal. Workers whose contract is illegal have very limited rights. The problem was illustrated in a case of the Employment Appeal Tribunal (EAT),<sup>38</sup> where a migrant domestic worker, Ms. Houna, who overstayed her tourist visa and kept working as a domestic worker, was seriously ill-treated and eventually dismissed. Because of her irregular status in the United Kingdom, the tribunal ruled that the employment contract was illegal, so her claims for unfair dismissal, breach of contract, unpaid wages, and holiday pay could not be enforced. The EAT repeated a statement from past rulings, according to which “the courts exist to enforce the law, not to enforce illegality.”<sup>39</sup> On the view of the tribunal, Ms. Houna never had the right to work, so she could not claim loss of earnings because of her discriminatory dismissal. Only her discrimination claim was allowed, as it did not depend on a valid contract of employment. Yet the Court of Appeal was not willing to accept that the discrimination claim should be allowed for the reason that she was fully aware of the illegality.<sup>40</sup>

In addition, the law on migrant domestic workers who accompany foreign diplomats creates a most dramatic expression of legislative precariousness. Even though this may appear secondary from an immigration law perspective, the abuse by their employers is grave and well-documented in the media,<sup>41</sup> so it is worth emphasizing that the law recognizes wide immunity from civil and criminal jurisdiction in the receiving state. Article 31 of the Vienna Convention on Diplomatic Relations (1961) states that diplomats enjoy immunity from criminal and many cases of civil jurisdiction. In the United Kingdom, the relevant legislation is the State Immunity Act 1978 that incorporates these immunities and makes special mention of employment disputes.<sup>42</sup>

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38. Allen (Nee Aboyade-Cole) v. Houna, [2011] UKEAT/0326/10/3103 (Eng.).

39. *Id.* at para. 37.

40. Houna v. Allen, [2012] EWCA, Civ. 609 (Eng.).

41. See, e.g., *Domestic Servitude*, BBC Radio 4 (Jun. 27, 2010), available at <http://www.bbc.co.uk/programmes/b00srp6v>. See also the campaign on this issue by KALAYAAN: JUSTICE FOR MIGRANT DOMESTIC WORKERS, <http://www.kalayaan.org.uk/> (last visited Sept. 11, 2012).

42. See State Immunity Act, 1978, §§ 4, 16 (Eng.). For a critique of the immunity of diplomats for their relationships with their employees, see Richard Garnett, *The Precarious Position of Embassy and Consular Employees in the United Kingdom*, 54 INT'L & COMP. L.Q. 705 (2005).

Immunity often leads to complete impunity for grave crimes, which brings to the forefront another example of legislative precariousness. This explains why the Parliamentary Assembly of the Council of Europe in its Recommendation 1523 (2001) requested the amendment of the Vienna Convention to exclude all offences committed in private life.<sup>43</sup> A resolution of the European Parliament, in turn, invited member states to connect the visas of domestic workers who work for diplomats to a minimum level of working conditions.<sup>44</sup>

Martin Saler MP emphasized the gravity of this problem of diplomatic immunity in U.K. parliamentary debates:

The title of this debate refers to visa rights for migrant domestic workers, but it will become apparent that what we are actually discussing is a secret slavery taking place a stone's throw away from this building. For the most abused groups of vulnerable workers, the dark ages are still happening, just around the corner from this mother of Parliaments. It is a scar on this country that such things occur within our borders; it is certainly a scar on the conscience of the diplomatic missions that use diplomatic immunity and their privileged position to treat fellow human beings in the most appalling, disgusting, dehumanising and disgraceful manner. It must stop.<sup>45</sup>

A 2012 U.K. case held that while diplomats may have immunity even when they move to a new post, this immunity “does not apply to actions that pertain to [a diplomat’s] household or personal life.”<sup>46</sup> Similar developments in the United States may reflect a change in the approach of the courts to the diplomatic immunity defense in cases of abuse of domestic workers.<sup>47</sup>

#### D. European Union

Evidence of legislative precariousness of domestic workers is found not only in national legislation, but also in supranational orders. In the context of the EU, the Framework Directive 89/391/EEC provides that a worker is “any person employed by an employer, including trainees and apprentices but excluding domestic servants.”<sup>48</sup> As a result, all health and

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43. Eur. Parl. Ass’n, *Recommendation 1523 on Domestic Slavery*, Doc. No. 9722, at para 10(iv) (Mar. 5, 2003).

44. Eur. Parl. Ass’n, *Regulating Domestic Work*, A5-0301/2000 (Nov. 30, 2000) [hereinafter *Regulating Domestic Work*].

45. Martin Salter MP, Hansard, Column 251WH (Mar. 17, 2010).

46. *Wokuri v. Kassam*, [2012] EWHC 105 (Ch.), para 25 (Eng.).

47. See Swarna v. Al Awadi, 622 F.3d 123, 144 (2d Cir.2010). For analysis, see Emily F. Siedell, Swarna and Baoanan: *Unraveling the Diplomatic Immunity Defense to Domestic Worker Abuse*, 26 MD. J. INT’L L. 173 (2011).

48. Council Directive 89/391/EEC, Art. 3(a) (June 12, 1989). For further discussion, see Deirdre McCann, *New Frontiers of Regulation: Domestic Work, Working Conditions, and the Holistic Assessment of Nonstandard Work Norms*, 34 COMP. LAB. L. & POL’Y J. 167 (2012).

safety directives that followed the Framework Directive, as well as the Working Time Directive, exclude domestic workers. Domestic workers are not specifically mentioned in other directives, such as the part-time or fixed-term directives, but this does not mean that they cannot be excluded from protection in EU countries, which will depend on whether they will be categorized as “workers.” The European Parliament has specifically addressed domestic labor in the nonbinding Resolution “Regulating Domestic Work” of November 30, 2000, highlighting the problems associated with migrant domestic labor.<sup>49</sup> This resolution recommends, among other issues, the creation of specialized reception centers for migrant domestic workers, which will be providing psychological, psychiatric, and legal help for abuse, as well as several changes that involve work permits and diplomatic visas. In a positive development, in 2011 the EU adopted a directive on human trafficking, which covers trafficking for domestic labor,<sup>50</sup> and in 2012 the European Commission published a strategy for 2012–2016 to eradicate trafficking in human beings.

#### *E. International Labor Organization*

Several ILO instruments, finally, permit the exclusion of domestic workers from their scope through the so-called “flexibility clauses.”<sup>51</sup> These include the Protection of Wages Convention No. 95 (1949), the Night Work Convention No. 171 (1990), the Private Employment Agencies Convention No. 181 (1997), and the Maternity Protection Convention No. 183 (2000). The flexibility clauses can be used after consultation with organizations of workers and employers. States have a duty to make a declaration at the time of ratification of a Convention, explaining why they exclude categories of workers as well as what measures they take to protect them in the context of their reporting obligations.<sup>52</sup>

Crucially, in the 100th session of the International Labour Conference, in June 2011, the ILO adopted Convention No. 189 and supplementing Recommendation No. 201 regulating the terms and conditions of work for domestic workers.<sup>53</sup> This was a landmark moment for domestic workers whose participation in the paid labor market and specific working conditions were recognized for the first time in a holistic manner within a legal document. The Convention contains detailed provisions on the rights

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49. *Regulating Domestic Work*, *supra* note 44.

50. See Eur. Par. Comm'n, Directive 2011/36/EU (Apr. 5, 2011) on preventing and combating trafficking in human beings and protecting its victims, and replacing Eur. Par. Comm'n, Council Framework Decision 2002/629/JHA (July 19, 2002).

51. See DECENT WORK FOR DOMESTIC WORKERS, *supra* note 11, at 20.

52. INT'L LAB. ORG., ILO CONSTITUTION, Art. 22, [http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO) (last visited Sept. 11, 2012).

53. For analysis of the Convention, see Albin & Mantouvalou, *supra* note 13.

of domestic workers. It defines “domestic work” as work performed in or for a household, and a “domestic worker” as any person performing domestic work in an employment relationship.<sup>54</sup> This results in the exclusion of those who come on a casual basis (something which is specifically mentioned in subsection 3 of that Article). The Convention protects the Fundamental Principles and Rights at Work of the ILO.<sup>55</sup> It recognizes that domestic work is undervalued and invisible and is mainly carried out by women and girls.<sup>56</sup> Thus it states clearly that Member States shall take measures to ensure that domestic workers, like workers generally, enjoy fair terms of employment as well as decent working conditions,<sup>57</sup> enjoy minimum wage coverage,<sup>58</sup> and be paid directly in cash.<sup>59</sup> Requirement is made that Members set a minimum age for domestic workers,<sup>60</sup> ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence,<sup>61</sup> has the right to a safe and healthy work environment,<sup>62</sup> and of social security protection, especially in respect to maternity.<sup>63</sup>

Does the Convention address the legislative precariousness of domestic workers? Article 2 of the Convention states that it “applies to all domestic workers.”<sup>64</sup> Yet it also permits exclusions. First, it provides for a possibility to exclude categories of workers who are otherwise covered with at least equal protection. This does not seem problematic. However, the provision that follows states that further exclusions may apply to “limited categories of workers in respect of which special problems of a substantial nature arise.”<sup>65</sup> It can fairly be assumed that one reason that led to the adoption of Convention 189 was the fact that many jurisdictions exclude domestic workers from protective laws. That this Convention, which has been specifically drafted to protect domestic workers and address their precariousness, permits the exclusion of some of them from its scope is, therefore, troubling.

The intersection of different aspects of legislative precariousness suffered by domestic workers, to conclude, places them in a uniquely vulnerable position. It can be said with certainty that the various exclusions

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54. ILO CONVENTION ON DOMESTIC WORKERS Art. 1 (2011).

55. *Id.* at Art. 3.

56. *Id.* at Preamble.

57. *Id.* at Art. 6.

58. *Id.* at Art. 11.

59. *Id.* at Art. 12.

60. *Id.* at Art. 4.

61. *Id.* at Art. 5.

62. *Id.* at Art. 13.

63. *Id.* at Art. 14.

64. *Id.* at Art. 2.

65. *Id.* at Art. 2, para. 2(b).

have different rationales. They attempt to maintain low costs for employers, for example, and avoid complexities in monitoring domestic labor by the state, which could also be costly. The exclusions may be explained, but can they be justified under human rights law?

### III. EUROPEAN HUMAN RIGHTS AND PRECARIOUS WORK

This Part addresses the question whether the legislative precariousness of domestic workers is compatible with human rights through the lens of European human rights law. Its main focus is on the Council of Europe, which is a key regional human rights organization with forty-seven member states that serves as a paradigm for other national and supranational orders.<sup>66</sup> The EU has also addressed aspects of the problem presented here, and will be discussed later on.<sup>67</sup> This Part describes how each aspect of legislative precariousness has been viewed in the European legal order.

For readers that are not familiar with European human rights, there are two supranational organizations in the region: the Council of Europe and the EU. In the Council of Europe there are two main human rights documents, each of which will be discussed in turn. Following the model of most post-World War II treaties,<sup>68</sup> this organization separated civil, political, economic and social rights in two documents: the European Convention on Human Rights (ECHR or Convention) that was adopted in 1950, and primarily concerns civil and political rights, and the European Social Charter (ESC or Charter), adopted in 1961, that guarantees social and economic rights. The ECHR provides for a right to individual petition to the European Court of Human Rights (ECtHR or Court) for alleged violations. The ESC is monitored by the European Committee of Social Rights (ECSR or Committee)<sup>69</sup> that issues periodic reports and also hears collective complaints. Both documents have dealt with the rights of workers,<sup>70</sup> and as it emerges below, the legislative precariousness of domestic workers.

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66. For discussion of domestic work in the context of the Inter-American human rights system, see Margaret L. Satterthwaite, *Beyond Namysgate: Using the Inter-American Human Rights System to Advance the Rights of Migrant Domestic Workers*, in *NEW PERSPECTIVES ON GENDER AND MIGRATION: EMPOWERMENT RIGHTS AND ENTITLEMENTS* 275 (Nicola Piper ed., 2009).

67. The EU has twenty-seven Member States. Each of these is also a Member of the Council of Europe.

68. See, e.g., the division between the U.N. International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights, which were both adopted in 1961 and entered into force in 1966.

69. Formerly known as Committee of Independent Experts.

70. See K.D. Ewing & John Hendy, *The Dramatic Implications of Demir and Baykara*, 39 *INDUS. L.J.* 2 (2009); Judy Fudge, *The Constitutionalisation of Labour Rights in Europe*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SKEPTICAL ESSAYS* 244 (Tom Campbell, K.D. Ewing & Adam Tomkins eds., 2011); Virginia Mantouvalou, *Work and the European Convention on Human Rights: A Dynamic Relationship in Need of Justification*, in *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A*

The EU adopted the EU Charter of Fundamental Rights (EUCFR) only in 2000 as a nonbinding document. In 2009 it incorporated it in the Treaty of Lisbon, giving it a legally binding status.<sup>71</sup> The EUCFR contains both civil and political and economic and social rights. It addresses institutions and Member States of the EU only when they implement EU law. The European Court of Justice has not considered any complaints involving migrant domestic workers this far. However, the EU Agency for Fundamental Rights, which is an advisory agency, established in 2007,<sup>72</sup> addressed the legislative precariousness of domestic workers in a Report that will be discussed later on.

#### A. *European Social Charter*

The ESC protects rights such as the right to work,<sup>73</sup> the right to just conditions of work,<sup>74</sup> the right to organize,<sup>75</sup> the right to benefit from social welfare services,<sup>76</sup> the right of migrant workers to protection and assistance.<sup>77</sup> The revised version of the Charter, which entered into force in 1999 and is gradually replacing the 1961 document, contains a number of new social rights and keeps labor rights as its centerpiece. The original version of the Charter contained no complaints procedure, but only reporting obligations. The ECSR did not enjoy the status of a court adopting binding decisions, but only assessed compliance with the ESC in its Conclusions. The Collective Complaints Protocol (CCP), which entered into force in 1998, does not provide for a right of individual petition, but recognizes a right to submit complaints for noncompliance against a contracting state to some international organizations of employers and employees, national representative organizations of employers and employees and some international nongovernmental organizations.

The ECSR has in several circumstances examined the compatibility of legislation that excludes domestic labor from its scope with the provisions of the Charter.<sup>78</sup> It has ruled, for instance, that the complete exclusion of

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LIVING AND DYNAMIC INSTRUMENT 377 (Dean Spiamann et al. eds., 2012); Rory O'Connell, *The Right to Work in the European Convention on Human Rights*, 2 EUR. HUM. RTS. L. REV. 176 (2012).

71. For an introductory account on human rights in the EU, see, PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS*, ch. 11 (5th ed. 2011).

72. See Eur. Council Reg. 168/2007 (Feb. 15, 2007) establishing the Fundamental Rights Agency.

73. COUNCIL OF EUROPE, *EUROPEAN SOCIAL CHARTER* (1996), <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>.

74. *Id.* at Art. 2.

75. *Id.* at Art. 5.

76. *Id.* at Art. 14.

77. *Id.* at Art. 19.

78. An overview of the case law of the ESC is to be found in LENIA SAMUEL, *FUNDAMENTAL SOCIAL RIGHTS: CASE LAW OF THE EUROPEAN SOCIAL CHARTER* (2d ed. 2002). It is also significant to note that the Committee is dealing specifically with questions of domestic labor in its next cycle of supervision.

domestic workers from health and safety legislation is contrary to Article 3 of the Charter that protects health and safety at work.<sup>79</sup> The Committee has examined the problem of the exclusion of private homes from labor inspections, and said that “for the purposes of Article 3 § 2, inspectors must be authorized to check all workplaces. It takes workplaces to equally include residential premises. This requirement has a particular bearing on the health and safety rights of domestic staff and home workers, as well as those of self-employed workers working at home.”<sup>80</sup> On the view of the ECSR, in other words, interests of privacy of the employer do not necessarily outweigh domestic workers’ rights.

Similarly the pay of domestic workers has frequently been examined in the context of Article 4, the right to fair remuneration.<sup>81</sup> Article 7 paragraph 1 provides that “the minimum age of admission to employment shall be fifteen years, subject to exceptions for children employed in prescribed light work without harm to their health, morals and education.” The ECSR has said that this is applicable to domestic work, which is not by definition “light work.” Allowing children under the age of fifteen to be employed in domestic work breaches the Charter.<sup>82</sup>

Domestic work is gendered and usually done by women, as was said earlier. Article 8 of the ESC provides for a right of employed women to protection. It covers all workers, and special attention has been paid to domestic workers’ maternity leave.<sup>83</sup> In its Conclusions on the Netherlands, the Committee examined the fact that domestic workers that are employed part-time, working for less than three days a week, are not considered to be “workers” and are, therefore, not insured and not entitled to social benefits. It held that this is incompatible with the ESC.<sup>84</sup> Italian legislation that excluded from protection domestic workers who were dismissed during pregnancy, which meant that they were not entitled to maternity benefits in cash unlike other women workers, violated the Charter.<sup>85</sup> Article 8 also provides for post-natal time off, and the

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79. See I EUR. SOC. CHARTER, *Conclusions 2009, Cyprus*, at 188, available at <http://hudoc.esc.coe.int/esc2008/query.asp?action=page&page=2&view=searchform&timestamp=67961.51>.

80. EUR. SOC. CHARTER, *Conclusions XVI-2, Czech Republic*, at 137, *supra* note 79.

81. See, e.g., EUR. SOC. CHARTER, *Conclusions XIV-2, Finland*, at 227, 772, *supra* note 79.

82. See EUR. SOC. CHARTER, *Conclusions XV-2, Italy*, at 291–92, *supra* note 79.

83. See EUR. SOC. CHARTER, *Conclusions XIII-4, Austria*, at 83, 93–94, 96–97 and *Conclusions XV-2, Netherlands*, at 345, *supra* note 79.

84. EUR. SOC. CHARTER, *Conclusions XIII-4*, at 86–87 and *Conclusions XV-2*, at 346–47, *supra* note 79.

85. EUR. SOC. CHARTER, *Conclusions XIII-2*, at 213, and *Conclusions XIII-4*, at 83, *supra* note 79. The same was said with respect to Spanish and Austrian legislation permitting dismissal of domestic workers during pregnancy. EUR. SOC. CHARTER, *Conclusions XV-2, Spain*, at 253, and *Conclusions III, Austria*, at 49, and *Conclusions XIII-4, Austria*, at 93–94, *supra* note 79.



Committee has examined state compliance with respect to domestic workers.<sup>86</sup>

Immigration legislation has a key role in the creation of legislative precariousness for domestic workers, but the ESC contains a provision that protects migrant workers, which could address the problem of legislative precariousness. From as early as its first set of Conclusions, the Committee said that:

[I]t goes beyond merely guaranteeing equality of treatment as between foreign and national workers in the sense that, recognising that migrants are in fact handicapped, it provides for the institution by the Contracting States of measures which are more favourable and more positive in regard to this category of persons than in regard to the states' own nationals.<sup>87</sup>

There is a duty to actively promote the rights of migrant workers, and this is particularly evident in the sixth paragraph of the provision, which states that they have to “facilitate as far as possible the reunion of the family of a foreign worker.”<sup>88</sup> The United Kingdom has repeatedly been criticized for the treatment of domestic workers on the basis of this provision.<sup>89</sup>

The ECSR has questioned and criticized the legislative precariousness of domestic workers. The approach of the Committee shows that domestic work cannot simply be excluded from the scope of legislation and monitoring, for this is contrary to the Charter. In fact, the Conclusions of the Committee suggest that the special vulnerability of this category of workers may require special positive measures. Sadly, though, the scope of the Charter is not sufficiently broad, as the section that follows shows, but creates further legislative precariousness of domestic workers.

### B. “Precarious Residents”: The Most Precarious Workers

The personal scope of the ESC is strikingly narrow, so the Charter itself creates legislative precariousness. The Appendix to the Charter under the title “Scope of the Social Charter in Terms of Persons Protected” states as follows:

[P]ersons covered by Articles 1 to 17 include foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party

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86. EUR. SOC. CHARTER, *Conclusions XIII-4, France and Netherlands*, at 101, 103, and *Conclusions XV-2, Italy*, at 299–300, *supra* note 79. On this issue, Italy responded that, in practice, domestic workers are able to take breaks for breast-feeding because of the circumstances of their job, and the ESCR accepted this, provided that the time-off be remunerated.

87. EUR. SOC. CHARTER, *Conclusions I*, at 81, *supra* note 79.

88. *Id.*

89. EUR. SOC. CHARTER, *Conclusions III*, at 97, *supra* note 79; *see also* EUR. SOC. CHARTER, *Conclusions IX-1*, at 110 and *Conclusions X-1*, at 152, *supra* note 79.

concerned, subject to the understanding that these Articles are to be interpreted in the light of the provisions of Articles 18 and 19.

This means that people who reside lawfully in a country, but do not come from one of the Contracting States, are not protected under the ESC, with the exception of Article 19 that protects migrant workers. Work-related rights depend on the status of immigrants as lawful residents, which means that persons residing and working illegally in the territory of Contracting States do not enjoy any protection of their social rights. This has important implications for domestic workers, who are sometimes irregular migrants, and is also particularly troubling because of the restrictive immigration rules that tie them to a particular employer. It should not come as a surprise, at this point, that non-nationals who do not have a lawful residence status have also been described as “precarious residents” in the literature, that defines them as “people living in a state that possess few social, political or economic rights, are highly vulnerable to deportation, and have little or no option for making secure their immigration status.”<sup>90</sup>

The ECSR has attempted to address the shortcoming of the personal scope of the ESC in the collective complaint *International Federation of Human Rights Leagues (FIDH) v. France*.<sup>91</sup> Here the lack of access to healthcare of children of undocumented migrants was held to be in breach of the protection of children and young persons, contrary to the clear wording of the Charter that excludes non-nationals. The decision to interpret the Charter in a manner opposite to its wording was not uncontroversial, but was confirmed in a more recent ruling.<sup>92</sup>

Even though the Committee has taken some steps to address the problem of the exclusion of irregular migrants from the scope of the ESC, the gap in the document itself is problematic both for its symbolism and for its possible implications. It is not clear if the Committee would be prepared to extend the coverage of the ESC to irregular migrants in other alleged violations of social rights, and more to the point, to the protection of domestic workers when they are undocumented migrants. That migrant domestic workers are both essential in modern-day societies, and excluded from membership through social rights because of immigration status, is most troubling. Does the ECHR fare any better here?

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90. Gibney, *supra* note 1, at 2.

91. Int'l Fed'n Hum. Rts. Leagues (FIDH) v. France, Complaint No. 14/2003, Eur. Comm. on Soc. Rts., Decision of Sept. 8, 2004.

92. Defense for Children Int'l (DCI) v. Netherlands, Complaint No 47/2008, Eur. Comm. on Rts., Decision of Oct. 20, 2009.

### C. ECHR

The ECHR protects civil and political rights, such as the right to privacy,<sup>93</sup> and two labor rights: the right to form and join a trade union<sup>94</sup> and the prohibition of slavery, servitude, forced and compulsory labor.<sup>95</sup> Is it relevant to precarious domestic workers and (the most precarious among them) precarious residents? Unlike the ESC, the rights of the Convention are recognized to everyone within Contracting States' jurisdiction,<sup>96</sup> so the status of someone as a lawful or unlawful resident does not affect the applicability of the guarantees.

#### 1. "Modern Slavery"

In a landmark development the Court examined the appalling working and living conditions of a migrant domestic worker, in a judgment that for the first time in the history of the Convention gave rise to a violation of Article 4 (the prohibition of slavery, servitude, forced and compulsory labor), *Siliadin v. France*.<sup>97</sup> The applicant was a Togolese national who was brought to France to work and be educated, but was instead kept at home as a domestic worker, living and working in appalling conditions.

In dealing with this situation, the Court took two steps. First, it explained that this situation is not "slavery," because the employer did not exercise a right of legal ownership over the worker. Yet it classified it as "servitude," which is still in the scope of Article 4. On servitude, it said that "what is prohibited is a 'particularly serious form of denial of freedom' . . . It includes, 'in addition to the obligation to perform certain services for others . . . the obligation for the serf to live on another person's property and the impossibility of altering his condition.'"<sup>98</sup> Being a minor at the time, the applicant, migrant domestic worker, had to work almost fifteen hours a day, seven days per week. She had not chosen to work for her employers, she had no resources, was isolated, had no money to move elsewhere, and "was entirely at [the employers'] mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred."<sup>99</sup> She was almost never free to leave the house, nor did she have any free time. Even though she

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93. Council of Europe, European Convention on Human Rights, Nov. 4, 1950, Art. 8.

94. *Id.* at Art. 11.

95. *Id.* at Art. 4.

96. *Id.* at Art. 1.

97. *Siliadin v. France*, App. No. 73316/01, Judgment of July 26, 2005. For analysis see Holly Cullen, *Siliadin v. France: Positive Obligations Under Article 4 of the European Convention on Human Rights*, 6 HUMAN RIGHTS L. REV. 585 (2006); Virginia Mantouvalou, *Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers*, 35 INDUS. L.J. 395 (2006).

98. *Siliadin*, App. No. 73316/01 at para. 123.

99. *Id.* at para. 126.

had been promised that she would be sent to school, this never happened, so she had no hope that her life would improve. Second, the Court found that Article 4 imposes positive obligations on state authorities. It does not only require that they refrain from employing individuals in exploitative conditions. It imposes a state duty to criminalize private conduct that is classified as falling in the scope of Article 4. Lack of criminal legislation penalizing grave labor exploitation of a migrant domestic worker, in other words, is incompatible with the ECHR.

The *Siliadin* judgment has attracted attention and raised awareness on the vulnerability of domestic workers. For example, it was heavily relied upon in NGO submissions and parliamentary debates, leading to the enactment of legislation in the United Kingdom criminalizing “modern slavery.”<sup>100</sup> It was also discussed in the context of the drafting of the ILO Convention on Domestic Workers,<sup>101</sup> and in other documents too.<sup>102</sup>

*Siliadin* is not the only case that dealt with the legislative precariousness of domestic workers. The question of immigration legislation that creates legislative precariousness was addressed in another landmark judgment on human trafficking for sexual exploitation this time: *Rantsev v. Cyprus and Russia*.<sup>103</sup> Even though *Rantsev* was not about domestic work, it developed principles that are applicable to migrant domestic workers. The case involved a young woman from Russia who was trafficked to Cyprus under an artist visa regime. An artiste was defined in the legislation as “any alien who wishes to enter Cyprus in order to work in a cabaret, musical-dancing place or other night entertainment place and has attained the age of 18 years.”<sup>104</sup> Rantseva received a temporary work and residence permit, and worked at a cabaret for three days. She then escaped, but was captured a few days later, and taken to the police that returned her to her employer. Another employee of the same employer took her to a flat, and less than an hour later she was found dead on the street below the apartment. The case was taken to the ECtHR by her father, who claimed that Russia and Cyprus breached Article 4 (among other provisions).

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100. Coroners and Justice Act, 2009, c. 3, § 71 (Eng.) noted in Virginia Mantouvalou, *Modern Slavery: The UK Response*, 39 INDUS. L.J. 431 (2010).

101. DECENT WORK FOR DOMESTIC WORKERS *supra* note 11, at paras. 22, 226.

102. For evidence of the impact of the judgment in documents of international organizations, see FORCED LABOUR AND HUMAN TRAFFICKING: CASEBOOK OF COURT (2009). See also María Fernanda Perrez Solla, *Slavery and Human Trafficking: International Law and the Role of the World Bank 52* (Social Protection and Labour Discussion Paper No. 0904, Apr. 2009). For discussion of the judgment by NGOs, see HUM. RTS. WATCH, “AS IF I AM NOT HUMAN”: ABUSES AGAINST ASIAN DOMESTIC WORKERS IN SAUDI ARABIA, c. V (July 7, 2008). For references to the case in parliamentary documents and debates, see U.K.H.L. Debs, Nov. 5, 2009, Col 400. See also VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES 8 (2008); FRA REPORT, *supra* note 37.

103. *Rantsev v. Cyprus & Russia*, Eur. Ct. H.R., App. No. 25965/04, Judgment of Jan. 10, 2010.

104. *Id.* at para. 113.

The Court examined whether human trafficking for sexual exploitation is covered by the Convention. On this issue, it ruled that:

[T]rafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere . . . It implies close surveillance of the activities of victims, whose movements are often circumscribed . . . It involves the use of violence and threats against victims, who live and work under poor conditions . . .<sup>105</sup>

The Court was satisfied that the ban on labor exploitation, which constitutes the principle underlying Article 4, covers human trafficking too, even though such behavior could not have been envisaged by the drafters of the provision in the late 1940s.<sup>106</sup>

Having reaffirmed that the Convention imposes positive obligations, the Court ruled that in the case of trafficking, these obligations include: first, an obligation to legislate to protect individuals from abusive conduct; second, a duty to take positive operational measures in order to protect victims or potential victims; third, a duty to investigate situations of potential trafficking; and fourth, because trafficking is a cross-border crime, a duty to cooperate with authorities of other states concerned in the investigation of acts that took place in their territories.<sup>107</sup>

Looking specifically at the Cypriot immigration policy framework, the Court found it problematic. Of particular concern was the fact that cabaret managers made an application for an entry permit for the artiste, in a way that made the migrant dependent on her employer or agent. This artist visa scheme rendered the individuals vulnerable to traffickers, as both the Council of Europe Human Rights Commissioner and the Cypriot Ombudsman had stressed.<sup>108</sup> In addition, the Court found that the obligation of the employers to inform the authorities if an artiste leaves her employment is a legitimate means to the end of monitoring compliance with immigration law. However, it is only the authorities (and not the manager) that should take steps in case of non-compliance. This is also why the Court was particularly troubled by the requirement on cabaret owners and managers to lodge a bank guarantee that will be used to cover artistes that they employed.

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105. *Id.* at para. 281.

106. On the interpretation of the Convention as a living instrument, see George Letsas, *The ECHR As a Living Instrument: Its Meaning and Its Legitimacy*, in *THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT* (Geir Ulfstein, Andreas Follesdal & Birgit Schlütter eds., 2010).

107. *Rantsev*, App. No. 25965/04, at paras. 283–89.

108. *Id.* at paras. 89, 91, 94, 100.

The *Siliadin* and *Rantsev* cases raised awareness on the grave exploitation of migrant workers in Europe. Immigration rules that lead to precariousness by creating strong ties between a particular employer and a migrant worker, have been scrutinized by the Court, which sought to ensure that migrant workers are not victims of exploitation because of their immigration status. It was earlier said there are different degrees of precariousness. Domestic work is characterized by a dual deficit, which is due to the fact that, first, it is viewed as 'work like no other' (legislative precariousness), and second because of workers' social location (immigration status precariousness). Article 4 of the Convention becomes relevant in the worst cases of precariousness created by the law and their status.

The potential of Article 4 has not as of yet been fully explored, but pending cases are expected to shed light on further aspects and effects of the provision for precarious domestic workers.<sup>109</sup> It is important to stress that the fact that the trafficking of human beings is classified as "slavery" in the case law of the ECtHR may have significant implications for one particular aspect of legislative precariousness highlighted earlier on: diplomatic immunity and domestic labor. The prohibition of slavery in international law is a rule of *jus cogens*,<sup>110</sup> which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."<sup>111</sup> Immunity of states and their agents is a controversial area. The International Court of Justice, for instance, examined the question of immunity for heinous crimes, and was criticized for holding that activities performed in an official capacity by a former Minister are covered.<sup>112</sup> The ECtHR has examined issues of breach of *jus cogens* in *Al-Adsani*,<sup>113</sup> where the majority upheld state immunity, but several Judges dissented strongly and convincingly, arguing that breach of *jus cogens* rules cannot be covered by immunity.<sup>114</sup> The argument that diplomats who ill-treat domestic workers cannot enjoy immunity, because

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109. Pending cases on trafficking and forced labor are the following: Elisabeth Kawogo v. United Kingdom, Eur. Ct. H.R., App. No. 56921/09, Nov. 20, 2010; CN v. United Kingdom, App. No. 4239/08. Pending cases on trafficking and prostitution are the following: LR v. United Kingdom, App. No. 49113/09; Lilyana Sashkova Milanova and Others v. Italy and Bulgaria, App. No. 40020/03.

110. See, e.g., INTER-AM. COM. HUM. RTS., *Michael Domingues* (United States), Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L/V/ II.117, doc.1, rev.1 para 49 (2003). See also the analysis in Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006).

111. Vienna Convention on the Law of Treaties, Art. 53 (May 23, 1969).

112. Democratic Republic of the Congo v. Belgium, Int'l Ct. Just. (Feb. 14, 2002). For a critical analysis, see Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? A Comment on the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 853 (2002); Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 877 (2002).

113. *Al-Adsani v. United Kingdom*, Eur. Ct. H.R., App. No. 35763, Grand Chamber Judgment of Nov. 21, 2001.

114. See the Joint Dissenting Opinion issued by Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic. *Id.*

the situation is akin to slavery, will no doubt be made in courts, and it remains to be seen what they will decide in these situations.

## 2. Beyond Slavery?

Is the ECHR relevant to the human rights of precarious workers beyond situations of grave abuse? What further principles can we find in the Convention that can be relevant to the human rights of precarious domestic workers? It was earlier said that in a recent case of a domestic worker, Ms. Houna, who was abused and dismissed, U.K. courts ruled that she was not entitled to arrears salaries and compensation, because she did not have a right to work. The ECtHR has not as of yet examined such complaints on labor rights of irregular migrants. Yet it has ruled that Article 8 of the Convention that protects the right to private life can incorporate a right to work,<sup>115</sup> and has also recognized that irregular migrants have rights under the ECHR.<sup>116</sup> The suggestion that irregular migrants do not have a right to work might, therefore, be questioned under Article 8. Similarly, the facts of the *Allen v. Houna* case could raise issues under the right to property (Article 1 of Additional Protocol 1 of the Convention) alone, and also taken together with the prohibition of discrimination (Article 14). Wages that have not been paid for work that has been done would be classified as property, and withholding these wages as a violation of the right to property.<sup>117</sup> The landmark Advisory Opinion of the Inter-American Court of Human Rights “Juridical Condition and Rights of the Undocumented Migrants”<sup>118</sup> could be of use on this matter, as well as the FRA Report that is discussed in the following section. The IACtHR ruled that the exclusion of undocumented migrants from labor rights breached international principles of equality before the law and nondiscrimination, which it recognized as norms of *jus cogens*. The Court emphasized that it would not be lawful to deny labor rights once someone is already employed. In its words:

Labor rights necessarily arise from the circumstance of being a worker, understood in the broadest sense. A person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights

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115. *Sidabras and Dziautas v. Lithuania*, Eur. Ct. H.R., App. Nos. 55480/00 and 59330/00, Judgment of July 27, 2004.

116. *Hirsi Jamaa v. Italy*, Eur. Ct. H.R., App. No. 27765/09, Judgment of Feb. 23, 2012.

117. *See Ewaldsson and Others v. Sweden*, Eur. Ct. H.R., App. No. 75252/01, Judgment of May 13, 2007.

118. *Juridical Condition and Rights of the Undocumented Migrants*, E.C.H.R., Advisory Opinion OC-18/03, Sept. 17, 2003, Inter-AmCtHR (Ser. A) No. 18 (2003). For a note on the opinion, see Sarah H. Cleveland, *Legal Status and Rights of Undocumented Workers: Advisory Opinion OC-18/03*, 99 AM. J. INT'L L. 460 (2005).

inherent in that condition . . . [T]he migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment.<sup>119</sup>

A final remark before concluding this section involves the interplay between the ESC and ECHR, which is crucial when it comes to the protection of irregular migrant workers. It has been observed in recent years that the ECtHR pays increasing attention to materials of the ECSR, by adopting an interpretive technique that has come to be known as an “integrated approach to interpretation.”<sup>120</sup> By using this interpretive method, which can also be understood in the context of discussions on cross-fertilization and dialogue,<sup>121</sup> monitoring bodies of civil, political, economic, and social rights documents integrate them, and refer to each other’s materials (decisions, conclusions etc.). The integrated approach rests on the idea that both groups of rights have shared foundations, and cannot be separated if their content is to be made “practical and effective.”<sup>122</sup>

The ECtHR has been employing this interpretive technique increasingly in recent years, taking note of materials of the ECSR and the ILO in the interpretation of the scope of the Convention. In *Siliadin*, for example, it referred to several ILO materials, making them indirectly justiciable. This integration does not only take place in ECHR case law. It also occurs in ESCR jurisprudence. Crucially, the *Siliadin* judgment was specifically mentioned by the ECSR that stressed that the ban of forced labor under Article 2 of the ESC also covers domestic slavery.<sup>123</sup> This judgment was also mentioned in the Committee’s Conclusions on the United Kingdom that examined the compatibility with the Charter of the exclusion of domestic workers from health and safety inspections.<sup>124</sup> The importance of the *Siliadin* judgment was accepted despite the fact that, in reality, someone like *Siliadin*, found in a condition of modern slavery, would be excluded from the protection of the ESC because of her immigration status.

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119. *Advisory Opinion OC-18/03*, at Paras 133–34.

120. See Virginia Mantouvalou, *Work and Private Life: Sidabras and Dziautas v. Lithuania*, 30 EUR. L. REV. 575 (2005).

121. Laurence R. Helfer & Anhne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 323(1997).

122. See the landmark case *Airey v. Ireland*, Eur. Ct. H.R., App. No. 6289/73, Judgment of Oct. 9, 1979.

123. EUR. SOC. CHARTER, *Conclusions, 2008, France*, at 314, *supra* note 79.

124. EUR. SOC. CHARTER, *Conclusions XIX-2, 2009, United Kingdom*, at 79, *supra* note 79.



### 3. EUCFR

The above Subsection showed that irregular migrant domestic workers form the most precarious category of domestic workers. It is therefore significant to note that the EU Fundamental Rights Agency (FRA), which is an advisory agency, recognized this point, and drafted a report in 2011, entitled “Migrants in an Irregular Situation Employed in Domestic Work: Fundamental Rights Challenges for the European Union and its Member States.” The Report opened by discussing the *Siliadin* judgment, which “highlighted the extent to which a person in an irregular situation can be deprived of her most fundamental rights.”<sup>125</sup> The Report put emphasis on the grave risk for abuse suffered by irregular migrant domestic workers, and drafted opinions that address their legislative precariousness. It examined the working conditions of irregular migrant domestic workers, including issues such as fair pay, health and sick leave, compensation for work accidents, right to rest periods, and lodging. Its conclusion on this matter was that there is a need for a clear legal framework addressing fair working conditions, which should also provide for labor inspections.<sup>126</sup> The Report made similar findings regarding unjustified dismissal under Article 30 of the EUCFR. It stated that “[i]n the case of dismissal, effective steps should be taken to remove any practical obstacles that prevent migrants in an irregular situation from claiming compensation or severance pay from their employer, when these are foreseen for migrants on an irregular situation.”<sup>127</sup> The Report also examined the right to participate in a trade union (article 12 of the EUCFR), and emphasized that unions should raise awareness about the rights of irregular migrant domestic workers, who should have a right to organize like all workers.<sup>128</sup>

The Report of the FRA is not legally binding, but is valuable both symbolically, for raising awareness on the working conditions and rights of irregular migrants, and for challenging key aspects of their legislative precariousness. For these reasons, it is a very important document, which is likely to be influential in future developments on the human rights of irregular migrant workers more generally.

The legislative precariousness of domestic workers is incompatible with provisions of the ESC, the ECHR and the EUCFR. Human rights law imposes both negative and, crucially for domestic workers, positive obligations. These positive duties challenge the traditional public/private divide that has haunted human rights law until recent years, and lead to

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125. FRA Report, *supra* note 37, at 3.

126. *Id.* at 30.

127. *Id.* at 33.

128. *Id.* at 35–36.

several further conclusions as to the interplay between human rights and labor rights.

#### IV. HUMAN RIGHTS AND LABOR RIGHTS

In the early Sections of this Article it was argued that domestic workers suffer from legislative precariousness. It was then shown that European human rights law has served an important role in addressing their legislative precariousness. What lessons can be learned from the above? This Subsection explores these, and draws some more general conclusions on the human rights of precarious domestic workers.

##### A. *Collapse of the Public/Private Divide*

A first set of observations stemming from the discussion of European human rights law involves the collapse of the public/private divide. Human rights law has traditionally regulated the public sphere, namely the manner in which the state treats individuals, and not the private sphere, namely how individuals treat each other. Private relations are generally regulated by private law. The right to privacy, in turn, traditionally covered activities performed at home, shielding them from state intervention. Labor law mainly involves the relationship between the employer and the worker who are most of the time private actors. Domestic workers are employed by a private, non-state actor, while also being employed in the private sphere, in the private household that is a person's fortress and place of privacy. This creates serious challenges.<sup>129</sup> Domestic workers can be invisible to the authorities and beyond the reach of human rights law. Yet human rights law has over recent years been found to give rise to positive state obligations to regulate private conduct in several jurisdictions, both at international and at national level, as the case law of the previous section showed.<sup>130</sup> State authorities have an obligation to legislate without disadvantaging groups of workers, as was seen in the context of the ESC and the EUCFR, to criminalize private conduct, as was seen in *Siliadin*, to investigate allegations of abuse by private actors and take positive operational measures in order to give effect to human rights obligations in the private sphere, as was seen in *Rantsev*. The example of the human rights of domestic workers provides excellent illustration of how human

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129. See ANDERSON, *supra* note 14, at 4–5.

130. See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); Mattias Kumm, *Who Is Afraid of the Total Constitution? Constitutional Rights As Principles and the Constitutionalization of Private Law*, 7 GER. L.J. 341(2006); Hugh Collins, *Utility and Rights in Common Law Reasoning: Rebalancing Private Law through Constitutionalization*, 30 DALHOUSIE L.J. 1 (2007).

rights law can, in fact, bring to the light workers that have historically been kept in the shadows of the labor market, in the privacy of the employers' homes.

*B. A Positivist, an Instrumental, and a Normative Approach*

In addition to the collapse of the public/private divide, the example of precarious domestic workers leads to some more general conclusions about the interplay between human rights and labor rights. It is sometimes said that the two bodies of rules have little in common. Labor rights reflect collective values, while human rights involve individual interests. Human rights law, which is inherently individualistic, on this view, cannot capture the solidaristic values underlying labor rights. It cannot, therefore, be used to advance their interests.<sup>131</sup> I have argued in detail elsewhere that the answer to the question whether labor rights are human rights, which we find in academic scholarship, reflects in fact three different approaches.<sup>132</sup> First, there is a positivistic approach, according to which a group of rights are human rights insofar as certain treaties or Constitutions recognize them as such. The question whether labor rights are human rights is uncomplicated on this approach, which we mainly find in international law literature.<sup>133</sup> A response to it comes through a survey of human rights law. If labor rights are incorporated in human rights documents, they are human rights. If they do not figure therein, they are not human rights. Looking at the example of domestic workers, for instance, someone taking this approach will accept without much hesitation that (at least some) labor rights of domestic workers are human rights, exactly because they appear in human rights documents, like the ECHR, the ESC and the EUCFR.

Second, there is an instrumental approach that looks at the consequences of using strategies, such as litigation or civil society action, which promote labor rights as human rights. This is the most common way in which labor law scholars analyze the problem in question. If strategies are, as a matter of social fact, successful, the question is answered in the affirmative; if not, skepticism is expressed. The roots of the instrumental

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131. See, e.g., Jay Youngdahl, *Solidarity First – Labour Rights Are Not the Same As Human Rights*, 18 NEW LAB. F. 31 (2009). The response by Lance Compa, *Solidarity and Human Rights – A Response to Youngdahl*, 38 NEW LAB. F. 38 (2009). See also Harry Arthurs, *The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems*, 19 SOC. & LEGAL STUD. 403 (2010); Kevin Kolben, *Labor Rights As Human Rights?*, 50 VA. J. INT'L L. 449 (2010).

132. Virginia Mantouvalou, *Are Labour Rights Human Rights?*, 3 EUR. LAB. L.J. 151 (2012).

133. See, e.g., Manisuli Ssenyonjo, *Economic, Social and Cultural Rights: An Examination of State Obligations*, in RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW 36 (Sarah Joseph & Adam McBeth eds., 2010).

approach lie in the Marxist tradition.<sup>134</sup> On this analysis, “[t]he imperative to present [workers’] claims as human rights comes from the desire to utilise the potentially powerful legal methods of securing advantage to pursue their claims, and also from the perceived need to respond to employers’ willingness to use these arguments and tools themselves.”<sup>135</sup> Scholars adopting this approach examine which labor rights are human rights according to the relevant documents, and assess how institutions and civil society organizations fare in protecting them, so as to find “whether labour rights really are promoted under the rubric, or within the framework, of human rights.”<sup>136</sup> Following this analysis, the character of labor rights as human rights is endorsed if either state and international institutions, like courts,<sup>137</sup> or civil society organizations, like trade unions and NGOs,<sup>138</sup> are successful in promoting them as such. In the case of domestic workers, again, it can be said with confidence that, judging from the example of European human rights, there have been important victories in the protection of domestic workers, who have successfully defended their labor rights as human rights through monitoring bodies and with the support of groups of civil society. The *Siliadin* and *Rantsev* judgments, for example, have been celebrated both by lawyers and activists promoting workers’ rights as human rights, because they showed that the protection of labor rights as human rights produces positive outcomes for domestic workers.

Finally, the third approach to the question whether labor rights are human rights is a normative one. It examines what a human right is, and assesses, given this definition, whether certain labor rights are human rights. This path is the one that has been least taken in the literature, but is an important one and has implications for the previous two approaches.<sup>139</sup> This Subsection makes some remarks that involve the normative analysis in relation to domestic work. It argues that the example of domestic workers shows that human rights and labor rights have common justifications. They rest on values such as dignity, liberty, and distributive justice, which are particularly seriously affected in the example of abuse of domestic workers.

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134. See, e.g., Karl Marx, *On the Jewish Question*, in EARLY WRITINGS 211 (2000). On the Marxist approach towards legal rights, see HUGH COLLINS, *MARXISM AND THE LAW* 142 (1982).

135. Colin Fenwick & Tonia Novitz, *Conclusion: Regulating to Protect Workers’ Human Rights*, in HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION 587–88 (Colin Fenwick & Tonia Novitz eds., 2010).

136. Philip Alston, *Labour Rights As Human Rights: The Not So Happy State of Art*, in LABOUR RIGHTS AS HUMAN RIGHTS 3 (Philip Alston ed., 2005) [hereinafter LABOUR RIGHTS AS HUMAN RIGHTS]; see Patrick Macklem, *The Right to Bargain Collectively in International Law: Workers’ Right, Human Right, International Right?*, in LABOUR RIGHTS AS HUMAN RIGHTS, *supra*, at 61.

137. See Bob Hepple, *Introduction*, in SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT 1 (Bob Hepple ed., 2002).

138. Virginia A. Leary, *The Paradox of Workers’ Rights As Human Rights*, in HUMAN RIGHTS, LABOUR RIGHTS AND INTERNATIONAL TRADE 22 (Lance A. Compa & Stephen F. Diamond eds., 2003).

139. For further analysis, see Mantouvalou, *supra* note 134.

For this reason, the example discussed in this Article shows that it is a mistake to say that the two categories of rights are incompatible at a normative level.

### 1. Dignity As Noncommodification

It is commonly stated that dignity is the most appropriate and least controversial basis for human rights, because it is something people possess simply by virtue of being human.<sup>140</sup> For this reason, it is also pronounced in several constitutions and other human rights documents as a basis of all human rights, and is also used widely in judicial interpretation.<sup>141</sup> Dignity is not a subjective value. It is not about what each person feels that she should have. It is an objective value that refers to peoples' justified feelings. Someone might feel that it is undignified to fly by plane in economy class, and that it is inconsistent with her dignity not to fly "business." Yet this simply reflects the views of a person with a particular background and from a particular social class. It is not a justified feeling shared by everyone.

The statement that "labour is not a commodity"<sup>142</sup> is similarly founded on the value of dignity that underlies human rights treaties.<sup>143</sup> The worker sells her labor to the employer, and the idea underlying labor law is that labor cannot be objectified like other commodities that people can buy and sell. A person's work is distinctly tied to her personality, unlike other economic transactions, and should be regulated in a way that mirrors this.<sup>144</sup> The danger of commodification of labor, namely treating labor as any other commodity, may be pertinent to any job and may have an effect on dignity. With domestic workers, particularly when they live in the employer's household, dignity as noncommodification is under distinct threat, because the domestic worker does not only sell her labor power, but her existence as a whole, for the employer of the domestic worker "is buying the power to command . . . the entire person," as Anderson has noted.<sup>145</sup>

The problem with migrant domestic workers that are tied to an employer is particularly grave, as immigration law treats them as objects that belong to the employer, rather than workers. This was captured in United Kingdom parliamentary debates in discussions involving domestic

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140. See the discussion in John Tasioulas, *Human Rights*, in ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW 348, 353–59 (Andrei Marmor ed., 2012).

141. For analysis, see Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008).

142. INT'L LAB. ORG., DECLARATION OF PHILADELPHIA, Art. I(a) (May 10, 1944).

143. See the analysis in HUGH COLLINS, EMPLOYMENT LAW, c. 1 (2d ed. 2010). See also Paul O'Higgins, *Labour Is Not a Commodity*, 26 IND. L.J. 225, 230 (1997).

144. COLLINS, *supra* note 145, at 3.

145. ANDERSON, *supra* note 14, at 11; see generally the discussion *id.* at 112.

workers of diplomats. Martin Salter MP drew an analogy between domestic workers, on the one hand, and objects brought by diplomats in diplomatic bags, on the other: “What diplomats bring in their diplomatic bags may be a matter for them, but how they treat fellow human beings and how they bring fellow human beings as workers into our country is a matter for us and for our legislative process.”<sup>146</sup>

It was earlier said that because of the intimacy of the domestic labor relationship, domestic workers are sometimes presented as members of the family where they are employed.<sup>147</sup> Their labor is, therefore, not viewed as a commodity in the sense that other jobs are. From this perspective, it may be said that domestic labor *must* be commodified, so as to recognize these workers' important contribution to the labor market. Like other workers, though, the labor of domestic workers primarily has to be treated with the dignity that is tied to the status of being human. This fundamental consideration underlies the European human rights developments, and particularly the ECHR cases and the FRA Report, which did not tie labor rights to the status of a regular migrant, but tied them instead to that of a human being.

## 2. Liberty and Choice

Liberty is another foundational value of human rights law. For some libertarian thinkers, liberty requires state abstention from interference, and not positive action. The fewer constraints the state poses on individual action, the freer people are.<sup>148</sup> Yet there are better accounts of freedom, which recognize that people are not free, if the options open to them are very limited and unappealing.<sup>149</sup> Human rights are founded on a rich account of freedom that values choice, and the case law of courts often recognizes positive state duties that increase choice. Labor rights are similarly based on a rich account of freedom. The employment contract is offered to workers on a “take it or leave it” basis, and most people are unable to consider alternative options other than the one that is offered to them by a particular employer at a given time. Labor legislation recognizes the limited freedom of workers in this situation (freedom to either take or leave the job offer as it stands, without the possibility to compare it to other

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146. Martin Salter MP, Hansard, Column 258WH (Mar. 17, 2010).

147. See the analysis in ANDERSON, *supra* note 14, at c. 9.

148. See FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY*, c. 1 (1978).

149. Gerald A. Cohen, *Capitalism, Freedom and the Proletariat*, in *THE IDEA OF FREEDOM: ESSAYS IN HONOUR OF ISAAH BERLIN* 9 (Alan Ryan ed., 1979); MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011); Jeremy Waldron, *Homelessness and the Issue of Freedom*, in JEREMY WALDRON, *LIBERAL RIGHTS* 309 (1993).

offers and negotiate more favorable terms), and has as its aim to set rules to improve choice.<sup>150</sup>

The freedom of migrant domestic workers is even more limited than the freedom of other workers, particularly when they are under restrictive visa regimes, which tie them to their employer. This is due to the knowledge that they are free to remain in a country, only if they retain their job with this particular employer. Should they decide to leave their job, they will be deported. This alternative that for many will be extremely unappealing, because of great poverty in their country of origin, limits their freedom to the extent that their situation has been classified as “modern slavery.” The ECtHR has shown willingness to recognize that situations of modern slavery may be due to immigration status, and to rule that this unfreedom is contrary to one of the most fundamental provisions of the ECHR, the prohibition of slavery, servitude, forced and compulsory labor.

### 3. Distributive Justice

A final observation that should be made involves the distributive character of the law. Human rights law is sometimes concerned with questions of distributive justice. Typically, it is the area of social and economic rights of the ESC that involves distribution of income (rights such as housing, healthcare, and education). Social rights encapsulate a right against poverty, a right to have one’s basic needs met. These rights are based on important individual interests. Their legal recognition signifies that their fulfillment ought to be given priority when the state allocates resources.<sup>151</sup> The distributive effect of human rights is also apparent in civil and political rights of the ECHR, such as the prohibition of torture or the right to vote. These can have resource implications too, and may lead to redistributive outcomes. But in this area redistribution is most of the times a side-effect; it is not the primary purpose of the body of rules. Labor law is another important institution for the distribution of income, as Collins has highlighted, which is a function that is not left to the individual contract between the employer and the worker alone, because of their unequal bargaining power.<sup>152</sup> This is evident, for example, in legislation on minimum wage.<sup>153</sup>

The legislative precariousness of migrant domestic workers, who are often excluded from labor protective legislation, has significant distributive

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150. See COLLINS, *supra* note 145, at 6.

151. See Virginia Mantouvalou, *In Support of Legalisation*, in DEBATING SOCIAL RIGHTS 85 (Conor Gearty & Virginia Mantouvalou eds., 2011).

152. COLLINS, *supra* note 145, at 12.

153. Guy Davidov, *A Purposive Interpretation of the National Minimum Wage Act*, 72 MOD. L. REV. 581 (2009).

effects. By employing domestic workers, men and women can participate in the market outside home, but by creating what Shamir has called “negative exceptionalism,” which excludes domestic workers from protection, labor laws lead to unfair distribution.<sup>154</sup> Shamir uses Doeringer’s and Piore’s dual labor market theory, which talks about a primary labor market that has “several of the following characteristics: high wages, good working conditions, employment stability, chances of advancement, equity, and due process in the administration of work rules,” and a secondary labor market “that is characterized by ‘low wages and fringe benefits, poor working conditions, high labor turnover, little chance of advancement, and often arbitrary, capricious supervision.’”<sup>155</sup> The exclusion of domestic workers from protective rules creates unfair advantage for the employers, as she argues. Domestic labor is made affordable, in order to enable employers to participate in the primary labor market, at the expense of the domestic workers who earn little and remain excluded from labor rights, being in this way part of the secondary labor market. Recent developments in European human rights law, which protects not only civil and political, but also economic and social rights, and which has also paid attention to the vulnerability of irregular migrant workers, demand that the unfair advantage of the employer is addressed. The example of European human rights law serves as evidence that unfair distribution that affects the secondary labor market does not remain unquestioned. It is challenged and can be found incompatible with fundamental human rights principles.

## V. CONCLUSION

Aspects of labor and human rights law are about the distribution of wealth and, more indirectly, the distribution of power.<sup>156</sup> Unsurprisingly, the legislation does not always lead to fair distribution, with certain categories of workers suffering more than others. This Article argued that domestic workers are at a particular disadvantage, and that their legislative precariousness goes against the grain of human rights that are universalist by definition.

Human rights have a unique moral force, and when workers’ rights are violated, human rights law can empower them.<sup>157</sup> Monitoring bodies of

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154. Hila Shamir, *Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care*, 30 BERKELEY J. EMP. & LAB. L. 404, 446 (2009).

155. PETER B. DOERINGER & MICHAEL M. E. PIORE, INTERNAL LABOR MARKET AND MANPOWER ANALYSIS 165 (1971).

156. See COLLINS, *supra* note 145, at 14, and earlier analysis of the shared justifications of human rights and labor law.

157. See the argument in Mantouvalou, *supra* note 153, at 85.



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human rights treaties in Europe have shown perceptiveness to the problem of the legislative precariousness of domestic workers, proving that this moral force can deliver tangible outcomes. At a normative level, this example also shows that human rights and labor rights have common justifications (dignity, liberty, and distributive justice). This Article concluded that the reform of the laws that create legislative precariousness is urgent, and the shared underlying values of the two bodies of labor rights and human rights should guide national and supranational legislative bodies in this process.

